IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JS 736/06

In the matter between:

IVOR JOHN DOUGLAS **First Applicant**

JOHANNA SUSANNA BEKKER Second Applicant

SUSARAH FRANCINA CATHARINA KRUGER Third Applicant

and

THE GAUTENG MEC FOR HEALTH Respondent.

JUDGMENT

VAN NIEKERK A, AJ

1 The Applicants were all employed as hospital managers by the Gauteng Anti-Tuberculosis Association (GATBA), a section 21 company that managed three hospitals in Gauteng, all of them established to treat patients with tuberculosis. The Applicants contend that their contracts of employment were transferred from GATBA to the Respondent (the GDOH) by operation of law, in terms of section 197 of the Labour Relations Act, 66 of 1995 (the LRA), and that with effect from the date of the transfer, the GDOH was substituted as their employer. They also contend that after they

refused an offer by the GDOH of continued employment on significantly less favourable terms, they were dismissed by the GDOH, and that the reason for their dismissal is one that the LRA categorises as automatically unfair.

2 The facts underlying the dispute are largely common cause. In 2004, the GDOH decided to take over the management of the Gauteng centres operated by GATBA. To this end, the GDOH initiated discussions with GATBA, which culminated in an agreement concluded between them on 24 March 2006.

3 The agreement regulates the transfer, *inter alia*, on the following basis:

> *"**5. Date of transfer***
> The services of GATBA will be transferred to the Department on 01 April 2006.
>
> ***6. Specific conditions of the agreement***
> *6.1 Human resources*
>
> *6.1.1 The Department will make offers of employment to current employees of GATBA in terms of this agreement and the prescripts of the public service.*
>
> *6.1.2 The appointment of employees from GATBA to the* Department will not be automatic and therefore will be subject to terms and conditions of this agreement and other prescripts governing the Public Service.
>
> *6.1.4 The current salary structures and notched (sic) of GATBA will upon verification, be matched with the nearest salary band and range in the Public Service.*
>
> *6.1.5 The date of appointment with the Department shall be 01 April 2006.*
>
> *6.1.6 In the event of restructuring based on operational* requirements as per PSCBC resolutions, which shall lead to job losses or retrenchments, the Department shall consider the date of

appointment with the GATBA to be the date of appointment with the Department, This recognition shall be limited to service and not severance payment (sic).

6.1.7 The job title as defined by the code of remuneration an employment applicable in the Public Service shall be adopted (sic)…

6.1.12 GATBA employees may be redeployed after full consultation in the Department where there is a need."

4 The Applicants' evidence is that their understanding of the terms of the transfer agreement was that their terms and conditions of employment would largely be unaffected after the transfer, pending the restructuring process that the transfer agreement foreshadowed. They also say that prior to signature of the agreement, they received assurances from GDOH officials to this effect.

5 This is not what transpired. On 31 March 2006, the day before the effective date of the transfer, the Applicants received offers of employment from the GDOH. The terms of the offer included the following:

"4. Brief particulars of your appointment are as follows:

4.1 Rank : Middle Manager
4.2 Salary Level : 9
4.3 Salary Package : R135 302.00 per annum excluding other service benefits
4.4 Employment Status : Fixed term contract for three months (01 April to 30 June 2006)
4.5 Centre : TS Centre"

6 It is common cause that the terms of this offer contemplate a rate of remuneration of approximately one-third of what the Applicants were

earning immediately prior to the transfer, and that their security of employment was reduced to a three-month fixed term contract. In addition, their status was varied from that of CEO (the Applicants' titles prior to the transfer) to that of middle management. The Applicants were given five working days to accept the offer.

7 On 7 April 2007 the First Applicant directed a letter to Dr Joe Khoali of the GDOH in which he recorded in his view, the offer did not comply with the transfer agreement. In this regard, the First Applicant made specific reference to the provision in the agreement that required the Applicants' current salary structure to be matched with the nearest salary band in the public service. The First Applicant also recorded that "*We were recently assured by senior officials of the department that the status quo would be maintained with regard to our salaries, but we have received no written confirmation in this regard*." The letter notes further that in all other provinces the hospital managers had been retained on their previous terms and conditions of employment, and that all other GATBA employees in Gauteng had been offered similar remuneration and positions, but for the three-month fixed term contract which also applied in their case. The letter concluded with an expression of a willingness to resolve the matter, and a recordal that after taking advice, the Applicants had been informed that given the provisions of section 197 of the LRA, the drastic change to their terms and conditions "*in any event appears to be legally questionable*."

8 Dr Khoali acknowledged receipt of the letter on 12 April 2006, and on 20 April 2006 a Dr Moloi addressed a reply to the Applicants. The letter recorded that the offer of employment was an interim offer, open for acceptance or rejection. The letter further records that "*The*

agreement between the Department and GATBA is not in terms of section 197 of the Labour Relations Act. Therefore the provisions of the agreement between it and GATBA and the prescripts applicable to the Publlc Service (sic)." The letter concluded by noting:

> "In view of the fact that GATBA employees may not accept the offers made to then after the above explanations, then the DEPARTMENT will request those GATBA employees to cease work with effect from 1st *May 2006."*

9 On 25 April 2006 the First Applicant directed a reply to Dr Moloi in which he recorded that the transfer agreement made no provision for an interim job offer, nor did it refer to fixed term employment or to any requirement that the Applicants would be required to apply for their own jobs. The First Applicant also noted that the conduct of the Department was contrary to assurances given by departmental officials that the Applicants' existing remuneration would remain unchanged, at least until "*issues between ourselves an the Department have been resolved*." The letter again referred to the provisions of section 197 and recorded that section 197(6) contemplates only an agreement between the affected employers and employees if the statutory effects of the section was to be varied. The First Applicant noted that he could not accept the offer of interim employment, since it was contrary to the transfer agreement and section 197 and amounted to a *"severe demotion"* and termination of his position as a permanent employee. The GDOH was put on notice that that the Applicants regarded Dr Moloi's letter as a dismissal (should they not accept the offer of interim employment) for a reason that the Act regards as automatically unfair.

10 Dr Moloi did not reply to the letter, and no explanation for that failure was forthcoming from either of the GDOH's witnesses.

11 The Applicants left the GDOH's employ on 30 April 2006. Despite the fact that they rendered services for that month, they were not paid.

12 On 10 May 2006, the Applicants referred a dispute concerning their dismissal to the Bargaining Council for the Public Health and Welfare Sector. A meeting was convened by a council panellist, a Mr Shongwe, who on the same day issued what he termed a "ruling" to the effect that the parties should hold a "settlement discussion" and thereafter report to him. The GDOH failed to attend the meeting that was convened on 22 August 2006. Neither of the Department's witnesses was able to explain this failure. Mr Shongwe then issued a certificate to the effect that the dispute remained unresolved. In the certificate, he categorised the dispute between the parties as one concerning a unilateral change to terms and conditions of employment, and the application and interpretation of an agreement.

13 In these proceedings, the GDOH raised two points *in limine* that require consideration prior to reflection on the merits of the Applicants' claim. The first is that the Applicants were never employed by the GDOH, and that they were therefore never dismissed by the Department. The second point is that GATBA was not joined to these proceedings. Both points *in limine* beg the question of the application of section 197 to the transaction underlying the transfer of the hospitals managed by GATBA to the GDOH. If section 197 applies, and in the absence of a valid variation of the statutory consequences of the section in terms of section 197(6), then on 1 April 2006, the GDOH became the Applicants' employer. In these circumstances, any dismissal that

occurred on 30 April 2006 (the date on which the Applicants aver that they were dismissed) was effected by the GDOH, and GATBA has no interest in these proceedings. Since the GDOH's primary defence to the Applicants claim is that the transfer agreement concluded between GATBA and the GDOH constituted an agreement for the purposes of section 197(6), the points *in limine* remain to be determined by the legal issues considered below.

14 During the hearing of this matter, Mr Mokhare, who appeared for the Respondent, raised what amounted to a third point *in limine*. He contended that to the extent that the Applicants case was one of unfair dismissal, this was not a dispute contemplated by the terms of the certificate of outcome signed by the council's panellist, Mr Shongwe. (Mr Shongwe had reflected the dispute as one that concerned the unilateral variation of conditions of employment, and as a dispute concerning the application and interpretation of a collective agreement.) On this basis, Mr Mokhare submitted that the Applicants were precluded from pursuing an unfair dismissal claim.

15 There is no merit in this contention. First, the dispute that the Applicants referred to the bargaining council was clearly one that was categorised as one concerning their unfair dismissal. Secondly, a conciliator's classification of a dispute does not bind the parties to the dispute, nor does it bind this Court. In *NUMSA v Driveline Technologies (Pty) Ltd & Another [2000] 1 BLLR 20 (LAC),* Zondo AJP (as he then was) stated:

"*[53] We were also urged by the respondent's counsel to hold that parties to a dismissal dispute which has been to conciliation are bound by the conciliating commissioner's description of the dispute in the certificate of outcome contemplated in section 191(5). For the reasons that follow, I am of the opinion*

that there is also no merit in this submission.

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[54] A commissioner who conciliates a dispute is not called upon to adjudicate or arbitrate such dispute. He might take one or other view on certain aspects of the dispute but, for his purposes, whether the dismissal is due to operational requirements or to misconduct or incapacity, does not affect his jurisdiction. It is also not, for example, the conciliating commissioner whom the Act gives the power to refer a dismissal dispute to the Labour Court. That right is given to the dismissed employee (see section 191(5)(b)). If the employee, and not the conciliating commissioner, has the right to refer the dispute to the Labour Court, why then should the employee be bound by commissioner's description of the dispute?" (at 34).

Thirdly, the panellist, Mr Shongwe, in describing the dispute between the parties, clearly did not appreciate the nature of the dispute that the Applicants had referred to the bargaining council. From the terms of his so-called advisory ruling, in which he advised the parties to engage in a further meeting, he clearly regarded the transfer agreement as a collective agreement, which no doubt informed his categorisation of the dispute as one concerning the "application and interpretation of an agreement". The transfer agreement is not a collective agreement - it does not meet the requirements of the definition of that term in section 213 of the LRA since it is not an agreement between an employer or employers' organisation and a trade union. Rather, the transfer agreement is an agreement between two employer parties, recording the terms on which the GDOH would acquire GATBA's business. There is no reason why this Court should hold disputing parties bound to an obviously erroneous description of their dispute, or why this Court should require a certificate of outcome issued in these circumstances to be reviewed and set aside prior to the referral of the dispute to this Court for adjudication.

16 The Applicants' claim raises a number of legal issues. First, this Court is required to determine whether the transaction between GDOH and GATBA is one contemplated by section 197. In other words, was there a transfer of a business, as a going concern, from GATBA to the GDOH? If so, the GDOH was substituted for GATBA as the Applicants' employer on the effective date of the transfer. The question that then arises is whether the transfer agreement concluded between GATBA and the GDOH varies all or any of the consequences of the application of section 197 to the transaction. Finally, this Court is required to determine the reason for the Applicants' dismissal, whether that reason is an automatically unfair reason contemplated by section 187(1) of the LRA and if so, the relief to which the Appplicants are entitled.

Did the transaction between the GDOH and GATBA trigger the application of s197?

17 Section 197(2) of the LRA provides:

'If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)-

(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;

(b) all of the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee……..

18 A 'business' is defined to include the whole or any part of any business, trade undertaking or service' and a 'transfer' is defined to mean *"the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern."* Section 197 is triggered therefore if all three of the following conditions are met:

- a *transfer* by one employer to another;
- the transferred *entity* must be the whole or part of a business (here, the test is whether is there an economic entity capable of being transferred); and
- the business must be transferred as a *going concern* (here, the test is whether the economic entity that is transferred retained its identity after the transfer).

19 did not understand Mr Mokhare to contend that these conditions had not been fulfilled. This was a concession properly made. The terms of the agreement clearly contemplate a transfer of the services rendered by GATBA to the GDOH. The preamble to the agreement records that with effect from 1 April 2006 the GDOH would resume its constitutional mandate to render hospital care services to patients suffering from tuberculosis, and that its primary purpose is to set out the terms on which that transfer will take place. The essence of the agreement was that the services of GATBA would be transferred to the GDOH on 1 April 2006. "Services" are defined in the transfer agreement to mean *"the care and ancillary support required to manage tuberculosis patients in accordance with National Tuberculosis Control Programme (NTCP) and Departmental policies, norms, standards guidelines and procedures."* The definition of "business", referring as it does to the *"whole or any part of any business, trade, undertaking or service"* is

sufficiently broad to include every possible form of activity in which employees engage, whether for profit or otherwise and whether in the private or the public sector.

20 The terms of the transfer agreement are equally clear that the business that was the subject of the transfer was to be transferred as a going concern. This was confirmed by the evidence of the First Applicant, who testified that in so far the operations of the hospitals previously managed by GATBA were concerned, "nothing changed" after the transfer except that the facilities were, from 1 April 2006, managed by the GDOH.

21 I have no hesitation in concluding that the terms of the transfer agreement contemplated the transfer of GATBA's business to the GDOH, and that section 197 accordingly applied to the transaction.

Was the transfer agreement between the GDOH and GATBA an agreement contemplated by section 197(6)?

21 The answer to this question is fundamental to the GDOH's case, since it contends, in essence, that the agreement had the effect of varying the statutory consequence of an automatic and obligatory transfer of employment contracts on the same terms. Section 197 (6) provides:

> "(a) An agreement contemplated in subsection (2) must be in writing and concluded between:
>
> *i) either the old employer, the new employer, or the old employer and new employer acting jointly, on the one hand; and*
> *II) the appropriate person or body referred to in section 189(1), on the other.*

(b) In any negotiations to conclude an agreement contemplated by paragraph(a), the employer or employers contemplated in subparagraph(II), all relevant information that will allow it to engage effectively in the negotiations.

(c) Section 16(4) to (14) applies, read with the changes required by the context, to the disclosure of information in terms of paragraph (b)."

22 Mr Mokhare acknowledged that on the face of it, the Applicants were not parties to the transfer agreement, and that only the signature of one of them, the First Applicant, appeared on the last page of the agreement where it is indicated that he signed as a witness. Clause 2.2.6 of the agreement defines "Parties" to mean "*the Gauteng Department of Health and GATBA*", and makes no mention of the Applicants, a fact that is affirmed by the title page of the agreement where only GATBA and the GDOH are reflected as parties.

23 Despite these indications that the Applicants were not parties to the transfer agreement, Mr Mokhare contended that since the Applicants had been party to the negotiation of the agreement (in the sense that they were aware of both its contents and its consequences for their continued employment) it was not open to them now to contend that the agreement should in effect be disregarded, at least in so far as its employment-related provisions are concerned. In other words, as I understood the argument, the fact that the Applicants had actively participated in the negotiations that led to the agreement precluded them from now attacking its validity or legal force and effect.

24 Mr Mokhare made much of the fact that the Applicants had not pleaded a case nor sought any relief in respect of validity of the

transfer agreement, and in particular, that they had failed to approach the Court to have the agreement rectified or declared null and void. In this sense, Mr Mokhare submitted, the Applicants' claims were mutually destructive. On the one hand, their claims that section 197 applied envisaged that the agreement be treated as having no force or effect; on the other hand, their claims that they should have been appointed by the GDOH on the terms on which they understood the agreement to regulate their continued employment, amounted to an enforcement of the agreement.

25 These submissions overlook the nature of the Applicants' claim as defined by the pleadings and the terms of the pre-trial minute. The Applicants contention, quite simply, is that since the transfer agreement does not meet the requirements of section 197(6), the transfer of GATBA's business to the GDOH remained regulated by section 197 in its unvaried form. The Applicants do not rely on the transfer agreement to enforce their rights - they rely squarely on the application of section 197(2). It was never open to the Applicants, not being parties to the transfer agreement, to seek its rectification or to challenge its legal force and effect. The only relevance of the transfer agreement in these proceedings is its status under section 197(6).

26 To meet the requirements of section 197(6), an agreement must comply with the terms of that section in relation both to the identity of the parties, as well as the process that is prescribed by which any variation to the consequences section 197 should be sought. First, the agreement must be concluded between the old employer, the new employer (or the two employers acting jointly) on the one hand, and on the other hand, the appropriate person or consulting party

identified after reference to section 189(1). In brief, that section contemplates a hierarchy of representative parties who are entitled to conclude agreements that 'contract out' of section 197. That hierarchy ordinarily applies to the consultation process required before a dismissal is effected in terms of section 189 or 189A.

27 Section 197(6) is carefully formulated, no doubt with an eye to protecting the rights of employees affected by a pending transfer. It should be recalled that the primary purpose of section 197 is to balance employer and employee interests when the transfer of a business takes place, and that it contains important protections for employees affected by a transfer by ensuring continuity of employment on the same terms. (See *NEHAWU v University of Cape Town (2003) 24 ILJ 95 (CC)).* Section 197(6) introduces a flexibility measure that parties may wish to invoke to vary all or some of the consequences of the application of section 197 to a business transaction, but the plain meaning of the section must be respected, so that the primary purposes of the section are preserved. I am unable to read into the section, as Mr Mokhare urged me to do, limitation to the effect that an employee who in a representative capacity participates in the negotiation of an agreement regulating the terms on which a business is to be transferred is for that reason deprived of any right that might otherwise be available to that employee under section 197.

28 The fact that the transfer agreement in this instance was concluded only between the old and the new employers means that it is not an agreement contemplated by section 197(6). Had the old and new employers wished to vary the consequences of section 197(2) by

reaching agreement on the terms of any variation with the affected employees and their representatives, they ought to have ensured that the transfer agreement constituted a proper "contracting out " as envisaged by the formal requirement of section 197(6).

29 In so far as the GDOH alleges that the Applicants' participation in the negotiation of the transfer agreement, in their capacity as representatives of GATBA rather than as employees, brings the agreement within the ambit of section 197(6), this is not a reason to deny the Applicants the protection of section 197. When they participated in the negotiation of the transfer agreement, the Applicants no doubt reflected on its consequences for them not only as the CEO's of the centres operated by GATBA, but also as employees who would be affected by the transfer. The Applicants were content, given the wording of the agreement, the experience of their colleagues in other provinces and the assurances that they were given by GDOH officials, that they would be by and large no worse off after the transfer. The offer of employment, when it was made by the GDOH on 31 March 2006, came as a profound shock. The GDOH's witnesses both conceded that the terms of the transfer agreement did not contemplate an offer of interim employment such as that which was made to the Applicants. They sought to justify the offer on the basis of the provision that offers of employment would be made in terms of the agreement and *"other prescripts governing the Public Service"*. These *"prescripts"*, it was contended, justified the terms of the offer of interim employment, and the Applicants should have been aware of them. The nature and extent of the Public Service's prescripts is neither here nor there. The Applicants had reasonably assumed that the terms of the agreement were such that their employment-related interests were protected. These

assumptions had been fortified by the experience of colleagues elsewhere (which was not disputed by the GDOH) and the assurances they had been given that in an interim period, pending the resolution of all transfer related issues, their terms and conditions of employment would remain unchanged. (The fact of these assurances and their terms were conceded by the GDOH at paragraph 2.6 of the pre-trial minute). In these circumstances, even if Mr Mokhare is correct in contending that an employee who participates in a negotiation on the terms of a transfer is bound both in a representative capacity and as employee to the terms of the agreement, this is not a case in which the agreement should prevail. The Applicants have been grossly unfairly treated. They were blissfully unaware of how the GDOH intended to implement the agreement, and there was no indication given prior to 31 March 2006 that might reasonably have altered them to the fact that their interests were about to be seriously compromised. The GDOH was unable to explain or justify its conduct other than to refer to *"prescripts"* and to a faceless committee *"at district level"* that took the decision to make the offer of interim employment in the terms on which it was made.

30 Finally, the fact that the transfer agreement does not meet the requirements of section 197(6) does not, as Mr Mokhare appeared to contend, render the agreement voidable at the instance of the Applicants, nor is the agreement necessarily invalid for that reason. If an agreement that purports to amount to a contracting out of section 197 fails to meet the threshold set by that section, it means no more than that the terms of the agreement fail to trump the affected employees' statutory rights to work security in the form that these are cast by section 197(2). In other words, section 197 governs the terms

of the transfer without variation, and any affected employees are entitled to rely on all of the rights conferred by that section as against both the old and the new employers.

31 For the above reasons, I conclude that the transfer agreement entered into by the GDOH and GATBA is not an agreement contemplated by section 197(6), and that the GDOH cannot avoid the consequence of section 197(2) i.e. an automatic and obligatory substitution of the GDOH as the Applicants' employer, with effect from 1 April 2006, on the same terms and conditions that had applied as between the Applicants and GATBA. It follows from this conclusion that neither of the points *in limine* raised by the GDOH in its papers have any merit.

Was there a dismissal, and was the reason for the Applicants' dismissal automatically unfair?

32 The offer of interim employment made to the Applicants stated that in the absence of acceptance of the offer, the Applicants would be requested to cease work from 1 May 2006. This can only mean that if the Applicants refused to accept the offer, they would be dismissed with effect from 1 May. The wording of the letter clearly acknowledges that the Applicants were working, and directs them to stop doing so. This was confirmed in the correspondence addressed to the GDOH by the First Applicant, and was never disputed or contradicted.

33 Mr Malan submitted that the reason for the Applicants dismissal was to compel them to accept a demand in relation to a matter of mutual interest, and that the reason was also the transfer of the business or

a reason related to it. All of these reasons are automatically unfair. In *Van der Velde v Business Design Systems (2006) 27 ILJ 1738 (LC),* this Court expressed the view that section 187 imposes an evidentiary burden upon the employee to produce evidence that is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstances envisaged in section 187(1) as constituting an automatically unfair dismissal. This Court also expressed the view that when an applicant alleges that the reason for dismissal is a transfer or is related to a transfer in terms of section 197, it is incumbent on an applicant to establish at least the following:

33.1 the existence of a dismissal (see section 192(1));

33.2 that the transaction concerned is one that falls within the ambit of section 197 (i.e. the transfer of the whole or a part of a business as a going concern);

33.3 that there is some credible evidence to support the proposition that the dismissal and the transfer might be causally linked.

34 This Court suggested the following test:

> *"In summary, and in an attempt to crystallise these views and to formulate a test that properly balances employer and worker interests, the legal position when an applicant claims that a dismissal is automatically unfair because the reason for dismissal was a transfer in terms of section 197 or a reason related to it, is this:*

- *the applicant must prove the existence of a dismissal and establish that the underlying transaction is one that falls within the ambit of section 197;*

- *the applicant must adduce some credible evidence that shows that the dismissal is causally connected to the transfer. This is an objective enquiry, to be conducted by reference to all of the relevant facts and circumstances. The proximity of the dismissal to the date of the transfer is a relevant but not determinative factor in this preliminary enquiry;*

- *if the applicant succeeds in discharging these evidentiary burdens, the employer must establish the true reason for dismissal, being a reason that is not automatically unfair;*

- *when the employer relies on a fair reason related to its operational requirements (or indeed any other potentially fair reason) as the true reason for dismissal, the Court must apply the two-stage test of factual and legal causation to determine whether the true reason for dismissal was the transfer itself, or a reason related to the employer's operational requirements;*

- *the test for factual causation is a 'but for' test- would the dismissal have taken place but for the transfer?*

- *if the test for factual causation is satisfied, the test for legal causation must be applied. Here, the Court must determine whether the transfer is the main, dominant, proximate or most likely cause of the dismissal. This is an objective enquiry. The employer's motive for the dismissal, and how long before or after the transfer the employee was dismissed, are relevant but not determinative factors.*

- *if the reason for dismissal was not the transfer itself (because, for example, it was a dismissal effected in anticipation of a transfer and in response to the requirements of a potential purchaser of the business) the true reason may nonetheless be a reason related to the transfer;*

- *to answer this question (whether the reason was related to the transfer) the Court must determine whether the dismissal*

was used by the employer as a means to avoid its obligations under section 197. (This is an objective test, which requires the Court to evaluate any evidence adduced by the employer that the true reason for dismissal is one related to its operational requirements, and where the employer's motive for the dismissal is only one of the factors that must be considered).

- *if in this sense the employer used the dismissal to avoid it section 197 obligations, then the dismissal was related to the transfer; and*

- *if not, the reason for dismissal relates to the employer's operational requirements, and Court must apply section 188 read with section 189 to determine the fairness of the dismissal."*

35 The Applicants have presented clear and incontrovertible evidence that their dismissals were casually connected to the transfer, in that they were dismissed for refusing to accede to an ultimatum to accept significantly less favourable terms and conditions of employment in the immediate context of the transfer of GATBA's business to the GDOH. It is therefore for the GDOH to establish that the Applicants' dismissal was substantively and procedurally fair, and effected for a reason that is not automatically unfair. On a conspectus of all the evidence, this is an onus that the GDOH has patently failed to discharge. It has not sought to defend the legitimacy of the Applicants' dismissals rather than deny the existence of any employment relationship with them. The only cogent defence proffered by the GDOH is that related to the status of the transfer agreement and its submissions to the effect that the employment-related components of that agreement remained in force since the agreement was one contemplated by section 197(6). For the reasons advanced above, there is no merit in this defence. Dr Khoali, who testified for the GDOH, appeared to suggest that the reason that the

Applicants were offered interim employment on less favourable terms was to *"keep them in the system"* until new posts could be evaluated, advertised and filled. It was also suggested that the Applicants were overpaid relative to similar positions in the public service. Even if that is correct (I have my doubts since the First Applicant was replaced more than a year later by an incumbent paid a package not dissimilar to that earned by the First Applicant while he was employed by GATBA) the GDOH was always entitled to restructure its business after the transfer and align remuneration packages with the public sector, provided it did so in compliance with the LRA. What it could not do was to present employees with an ultimatum to accept the less favourable terms on offer or face dismissal. I accordingly find that GDOH has failed to discharge the onus of proving a substantively and procedurally fair dismissal.

Remedy

36 The Applicants seek compensation. None of them has been able to obtain any meaningful employment since the date of their dismissals. Only the Second Applicant was able to find contract work, on a month-to-month basis, during the latter half of 2007. In considering an appropriate amount of compensation, Mr Mokhare submitted that I should have regard to what he termed the Applicants disingenuous conduct, in that they participated in a negotiation that determined the terms of their employment after the transfer of the business in which they were engaged which they now seek to avoid in favour of an automatic transfer on the same terms. There is no merit in this submission. The Applicants were plainly of the view that the terms of the agreement were such that in the interim at least, their existing terms and conditions of employment would be largely retained. There

is nothing in the agreement to gainsay this. After receiving the GDOH's offer and taking advice, the Applicants raised the prospects of the application of section 197 and their automatic transfer on the same terms from GATBA to the GDOH. There is nothing disingenuous in their conduct. But living as it does in a glass house, the GDOH is hardly in a position to throw stones. The conduct of the GDOH and its officials has been less than exemplary. There is nothing in the transfer agreement that could have given the Applicants the slightest sense that when the transfer took effect, they would be made offers of employment for a limited period of three months at a salary of a third of what they had earned prior to the transfer, and that they would have to apply for their existing positions. In their minds, quite reasonably, the Applicants considered that the process of 'matching up' to public service scales would not materially affect them. The GDOH's witnesses both fairly conceded that the Department's conduct in this regard was unfair. I also take into account the GDOH's attitude when the Applicants first raised their concerns about the offer they received on the day prior to the transfer. The response to the Applicants' correspondence was dismissive, and even after they had raised questions about the legality of the Department's actions, they were in effect told to *"take it or leave it."* The GDOH's conduct during the conciliation process was equally deplorable. After a meeting had been arranged in terms of Mr Shongwe's directive, the GDOH simply failed to attend. Neither of the GDOH's witnesses could provide an explanation for this failure. In these circumstances, the Applicants are entitled to the maximum amount of compensation that the Court is entitled to award.

The claim for remuneration for the month of April 2006

37 Mr Malan submitted that in terms of section 74 of the Basic Conditions of Employment Act, 1997, the Court was entitled to award the Applicants their remuneration for the month of April 2006, the month during which they rendered services but were not paid. Section 74(2) of the Act reads as follows:

> "*(2) If an employee institutes proceedings for unfair dismissal, the*
> Labour Court or the arbitrator hearing the matter may also determine any claim for an amount that is owing to that employee in terms of this Act if –
> (a) the claim is referred in compliance with section 191 of the Labour Relations Act, 1995;
> *(b) the amount had not been owing by the employer to the employee for longer than one year prior to the dismissal; and*
> *(c) no compliance order has been made and no other legal proceedings have been instituted to recover the amount."*

38 Section 191 contemplates two forms of referral. The first is the referral of a dispute to the appropriate statutory dispute resolution agency (see section 191(1)), the second contemplates the referral of a dispute to this Court or to an arbitrator for adjudication (section 191(5)). Which form of *"referral"* does section 74(2) of the Basic Conditions of Employment Act contemplate? In my view, it can only be the former. The Labour Courts have consistently held that a dispute as framed in the initial referral to the CCMA or bargaining council is definitive, and that it is not competent for a party to change the nature of the dispute at the second stage of referral to arbitration or adjudication (See *NUMSA v Driveline Technologies (Pty) Ltd & Another [2000] 1 BLLR 20 (LAC)).* In the present instance, the referral form in terms of which the Applicants referred their dispute to the Bargaining Council makes no mention of a claim for remuneration

for the month of April 2006. The claim for remuneration appears for the first time in the Applicants' statement of claim filed in these proceedings. In these circumstances, the Applicants have not met the condition established by section 74(2)(a) and this Court is accordingly precluded from making any order in this regard.

Costs

39 Mr Malan submitted that the Applicants ought to be awarded costs on the attorney-client scale. He noted that the GDOH's response to the Applicants' attempts to resolve the issue of the terms of their continued employment had been met with contempt, and that this attitude was reinforced by the GDOH's failure to attend the dispute resolution meeting that the parties were directed by Mr Shongwe to attend. Had the GDOH taken seriously the Applicants' representations and had it participated in the statutory dispute resolution process, this matter may never had reached the stage of trial. The LRA places an important emphasis on conciliation as a means to avoid litigation. When a party, without any cogent explanation for its conduct simply fails to attend conciliation meeting when directed to do so by a panellist whose function it is to attempt to broker a settlement of the dispute, it would ordinarily be appropriate for this Court to convey its disapproval by making an appropriate punitive order as to costs. Tempted as I am to make such an order, I am unable to find, on the evidence before me that the GDOH acted maliciously in its treatment of the Applicants or that its failure to attend the conciliation meetings was for any reason other than the sheer incompetence of its officials. It seems to me that the Applicants were the victims of bureaucratic bungling and ineptitude on the part of the GDOH and its officials. In these circumstances, and

in view of the award of the maximum compensation to which they are entitled, I intend to make an order of costs on the ordinary scale.

40 I accordingly make the following order:

1. The dismissal of each of the Applicants was automatically unfair.

2. The Respondent is ordered, within 14 days from the date of this order, to pay each of the Applicants an amount equivalent to 24 months' remuneration, calculated at the rate of remuneration paid to them by GATBA as at 31 March 2006.

3. The Respondent is to pay the costs of these proceedings.

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ANDRÉ VAN NIEKERK

Acting Judge of the Labour Court

Date of Hearing: 4 and 5 February 2008

Date of Judgment: 12 February 2008

APPEARANCES

For the Applicants: Mr G F Malan from Edward Nathan Sonnebergs

For the Respondent: Adv W R Mokhare

Instructed by The State Attorney