



THE FINANCIAL SERVICES TRIBUNAL

CASE NO. PFA14/2025

In a matter between:

JD AUTOMOTIVE ENGINEERING (PTY) LTD

APPLICANT

and

SUZETTE DO CARMO DOS SANTOS MARQUES

FIRST RESPONDENT

THE PENSION FUNDS ADJUDICATOR

SECOND RESPONDENT

AUTO WORKERS PROVIDENT FUND

THIRD RESPONDENT

TRIBUNAL PANEL: Judge LTC Harms, Judge DM Davis; Adv KD Magano

Appearance for Applicant: Anne Marie Brender-A-Brandis

Appearance for Respondent(s): None

Date of hearing: 20 August 2025

Date of Decision: 27 August 2025

Summary: Application for Reconsideration in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 against determination of the Pension Funds Adjudicator regarding the failure to remit all provident fund contributions. Significance of section 197 of the Labour Relations Act 66 of 1995.

DECISION

1. This is an application for the reconsideration of a decision of the second respondent of 14 February 2005 which has been brought in terms of s 230 of the Financial Sector Regulation Act 9 of 2017 ('the FSR Act').
2. The decision concerned a complaint of the first respondent in response to the applicant's failure to remit all provident fund contributions due on behalf of Mr AMR Marques, the deceased husband of first applicant. In terms of the decision of the second respondent, the applicant was ordered to pay to the third respondent the deceased's insured risk portion of R782 885.10 within two weeks of the determination as well as the deceased's outstanding death benefit to his beneficiaries in terms of s 37C of the Pension Fund Act 24 of 1956 ('the Act') within two weeks of receipt of payment from the applicant.

The factual background

3. The deceased was employed from 1 January 2000 by D & S Diesels t/a Isipingo Engineering (Pty) Ltd ('D&S Diesel'). It appears that D&S Diesel was liquidated in February 2022 from which date it ceased to exist. Following this liquidation, it appears that the deceased entered into an employment contract with applicant on 1 March 2022. D&S Diesel had paid contributions due on behalf of the deceased to the third respondent from November 2012 to March 2015, September 2017 to

November 2017, January 2019 to April 2019 to March 2020, October 2020 to May 2021 and July 2021 to July 2022.

4. The third respondent had taken the view, as a result of the failure of the deceased's employer, which was the applicant as from March 2022 to pay all contributions due on behalf of the deceased, that the first respondent was only entitled to the deceased's credit together with an investment return. As a result, she was paid an amount of R164 681.39 on 31 December 2022.

The benefits to which a member is entitled

5. Rule 8.9 of the Rules of the third respondent provide for death benefits as follows:

'8.9.1 The following benefits will be payable on the death of a Member while in Service:

8.9.1.1 His Fund Credit; plus

8.9.1.2 Subject to the provisions of Rule 8.9.4 a Risk Benefit equal to three (3) times the Member's last determined Remuneration.

8.9.4 If the contributions payable in terms of Rules 5.1.1 and 5.2.1 have not been paid up to date the benefit referred to in Rule 8.9.1.2 will not be paid.'

6. This Rule needs to be read with Rule 5(1) of the Fund's Rules which deals with the payment of contributions as follows:

'Member Contributions

5.1.1 Subject to Rule 5.1.2 below, each Member in the Service shall contribute to the Fund monthly to an amount equal to seven and half percent (7.5%) in his monthly Remuneration provided where a

Member receive or is entitled to receive wages for less than twenty three hour in any week, no contribution shall be payable to him in respect of such week.

Rule 5(2) provides as follows:

Employer Contributions

5.2.1 Subject to rule 5.2.2 below the Employer shall contribute to the Fund monthly in respect of each Member in Service an amount equal to eight percent (8%) of the Member's monthly Remuneration.'

7. As a result of the arrear contributions, the insured portion, which was equal to three times the deceased's remuneration which stood in the amount of R782 885.10, was not paid by third respondent to the applicant.
8. The first respondent lodged a complaint on 12 January 2024 concerning the failure of the applicant to remit all contributions due on behalf of the deceased to third respondent with the consequent non-payment of the death benefit which otherwise would have been due to the first respondent. This complaint gave rise to the decision of the second respondent.

The decision of second respondent

9. The second respondent noted that the applicant had paid R12 721.38 in contributions made on behalf of the deceased to the third respondent, albeit that these payments had been made late, that is on 9 October 2023.
10. The second respondent found thus: 'the appropriate relief is that which has the effect of placing the deceased's beneficiaries in the position they would have been had the employer timeously paid all the contributions due.' The employer had paid

contributions after the due date which affected the deceased's fund credit and the insured portion. For these reasons, the applicant was ordered to pay to the third respondent the deceased's insured portion of R782 885.10.

The applicant's case

11. The applicant raised a number of criticisms against this decision of the second respondent which she contended justified a reconsideration of the decision. Fundamental to her submissions was that the deceased had not completed his probationary period in terms of the contract which he had entered into with the applicant. Furthermore, the submission was made that the deceased had only worked 15 days in March 2022, 10 days in April 2022, 16 days in May 2022, 8 days in June 2022 and 5 days in July 2022. It was contended that, if the number of days which the deceased worked through the duration of his contract with the applicant from March 2022 was taken into account, he had worked some 54 days. This meant that he had not concluded his three-month probation period, for according to the applicant he was required to work 64.98 days for his probationary period to be completed.

12. The relevant clause of the contract between the deceased and the applicant insofar as probation is concerned reads thus:

'The Employee is appointed for a probation period of three months. The Employer shall be entitled to terminate the contract before the expiring of probation period due to the Employees' misconduct, incapacity or due to operational reasons.'

13. It is common cause that no letter of termination appears in the record nor is there any evidence that, notwithstanding the argument about the deceased being absent from work, the applicant terminated the contract of employment which it had entered into with the deceased.
14. The rights of an employee in terms of a period of probation are dealt with in terms of paragraph 8 of the Code of Good Practice – Dismissal in Schedule 8 of the Labour Relations Act 66 of 1995 ('the LRA').
15. The status of an employee under probation is only altered from that of a permanent employee when the issue concerns work performance or competence. It not applicable to other rights enjoyed by a permanent employee; that is an employee under probation must be treated in exactly the same way as a permanent employee.
16. As is evident from the payment records, the applicant paid the deceased from May 2021. That short payments had been made from March to July 2022 leads to a conclusion that the employer had failed to comply with its payment obligations, but this does not in any way justify a conclusion that the applicant was not liable to pay over contributions to third respondent on the basis that the deceased was subject to a probation clause.
17. Notwithstanding disputes raised without any evidential basis by the representative of applicant in relation to the payment of amounts due to the deceased, there is no gainsaying the conclusion that the probationary clause did not, without more, justify an argument to the effect that the applicant was not liable to ensure that the

applicant was obliged to make the required contributions to the third respondent on behalf of the deceased. For that reason alone, there is no basis by which to reconsider the order which was made by the second respondent.

The significance of s 197 of the LRA

18. By contrast, an objection can be taken with the reasoning of the second respondent with regard to the conclusion that, as the deceased's employment with the previous employer (D&S Diesel) was terminated before he commenced employment with the applicant, the applicant was not liable for any of the liabilities of the previous employer concerning the claims of first respondent.
19. Section 197 of the LRA makes it clear that, upon the transfer of a business as a going concern, the acquiring employer assumes the rights and obligations of the previous employer. Accordingly, there is a continuity of employment between employees of the erstwhile employer where its business concern has been sold and consequently acquired by the new employer. Section 197(2) provides that the rights and obligations between the new employer and the employees will remain the same as they were between the old employer and the employees, unless the latter agree otherwise.
20. There is evidence that there was a transfer of a going concern from D&S Diesels and the applicant. In an inter-office memorandum generated by the Motor Industry Bargaining Council it was observed that 'all employees were taken over by the JD Automotive from 01/03/2022 and the employer provided lists of employees to be registered and their contracts of employment. I have registered all employees

supplied by the employer and the JD Automotive Engineering accordingly. During the takeover by JD Automotive the employee in question was sick and in hospital and died in July 2022.’ A similar description of events is evident from a letter by Mr Al Esat, the principal officer of the third respondent generated on 28 March 2024.

21. The Constitutional Court in *National Education, Health and Allied Workers Union v University of Cape Town and others* (2003) (24) ILJ 95 (CC) held that s 197 of the LRA serves ‘a dual’ purpose. It facilitates a transaction while at the same time protects the workers against unfair job losses. In other words, the Court recognised that s 197 protects employees by preventing an employer from relying upon a transfer of any part of the business, whether by outsourcing or any other commercial arrangement to another employer, as a basis for retrenching these employees.
22. In *National Education Health and Allied Workers Union v University of Cape Town and others* 2003 (3) SA 1 (CC) at para 62, the Constitutional Court found that the proper approach to the construction of s 197 is to construe the section as a whole and in the light of its purpose and the context in which it appears in the LRA. In addition, regard must be had to the declared purpose of the LRA to promote economic development, social justice and labour peace. In short, ‘the purpose of protecting workers against loss of employment must be met in substance as well as in form.’

23. One of the important requirements for an application of s 197 is whether a transfer of a business has occurred. As the Court said in *Aviation Union of South Africa and another v SAA (Pty) Ltd and others* 2012 (1) SA 321 (CC) at para 48:

'For a transfer to be established there must be components of the original business which are passed on to the third party. These may be in the form of assets or the taking over of workers who are assigned to provide the service. The taking over of workers may be occasioned by the fact that the transferred workers possess particular skills and expertise necessary for providing the service or the new owner may require the workers simply because it does not have a workforce to do the work. Without the protection afforded by section 197 the new owner with no workers may be exposed to catastrophic consequences in the event of the workers declining its offer of employment.'

24. In summary, the test to determine whether there has been a transfer of business is to enquire into the substance as opposed to the form of the transaction. In this particular case there was evidence to suggest that D&S Diesel and the applicant were significantly linked to one Dean Naidoo at the same physical address, employing the same email and telephone number. The employees continued with the same tasks for which they had been employed by D&S Diesel. In summary, the takeover of the employees and the continuation of the business fell directly within the scope of s 197 as set out in the case law cited above. In finding that s 197 of the LRA did not apply to this dispute and hence that the applicant was not liable to assume the obligations of D&S Diesel towards its employees including the deceased, the second respondent erred. However, the finding that a deceased status as being on probation was no defence to the applicant's obligations to the deceased cannot be assailed.

25. For all of these reasons, the application for reconsideration is dismissed.

sgd Judge DM Davis

JUDGE DM DAVIS

For and on behalf of the Panel