IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 10802/2014

In the matter between:

TERTIARY EDUCATION NATIONAL UNION OF SOUTH AFRICA (TENUSA) **FIRST PLAINTIFF**

NATIONAL HEALTH AND ALLIED WORKERS UNION (NEHAWU) **SECOND PLAINTIFF**

and

DURBAN UNIVERSITY OF TECHNOLOGY **DEFENDANT**

J U D G M E N T
Delivered on: FRIDAY, 11 MAY 2018

OLSEN J

[1] The defendant in this action, the Durban University of Technology, was created by the merger with effect from 1 April 2002 of two technikons, Technikon Natal and the ML Sultan Technikon. (The former of these two institutions was generally called the "Natal Technikon" and is referred to in the papers by the letters "NT", which I will use to denote it. I will use the letters "MLS" when I refer to the second technikon.) When created by the merger the defendant was named the "Durban Institute of Technology". Its name subsequently changed to the present one.

[2] The merger occurred at the instance of the Minister of Education, who was given powers in terms of s 23 of the Higher Education Act 101 of 1997, to effect such mergers by notice in the Gazette. The notice provided for the two merging institutions to be taken over as "going concerns", and for all their

assets to be vested in the new entity. Existing agreements of employment between NT and MLS and their respective employees would be deemed to be agreements entered into between those employees and the defendant and would continue to subsist. Employees would be deemed to have served continuously under the same employer without interruption.

[3] The plaintiffs in this action are two trade Unions, TENUSA and NEHAWU, who represent employees of the defendant. They litigate in defence of what they contend to be the rights of certain employees and retired employees of the defendant who were employees of MLS prior to the merger. The employment benefits of the employees of the two merging institutions were not identical at the time of merger. Certain of the employees of NT were entitled to a post-retirement medical aid subsidy in terms of their contracts of employment, whereas none of the employees of MLS were entitled to such a subsidy. Prior to the merger the post-retirement benefit had been restricted by NT to persons who commenced employment with NT prior to 1 January 2000. (Other qualifications governing the right to the benefit are not material to this case at present.) It is the plaintiffs' contention that it has come about that employees of the defendant who were former MLS employees, and who had been in the employ of MLS prior to 1 January 2000, are entitled to the same post-retirement medical aid benefits as their similarly situated colleagues in the former employ of NT, a proposition which the defendant rejects. The plaintiffs seek an order declaring that those former employees of MLS are indeed entitled to such post-retirement medical aid benefits.

[4] Being burdened with two categories of employees employed under different conditions of service, the defendant embarked upon a process aimed at establishing new conditions of service applicable to all employees of the defendant. This became known as the "harmonisation process". Lengthy negotiations between the Unions (three of them were involved) and the defendant ensued. As pleaded, the plaintiffs' claim to a declaratory order rests on the enforcement of what it calls a written agreement concluded on 4 November 2005 entitled "Conditions of Service of the Durban Institute of Technology". The document in question (which comprises 69 pages) has

been referred to by the plaintiffs and the defendant alike as an “agreement”, despite the fact that it was and remains the defendant’s case that not everything set out in the document was in fact agreed to by the defendant. For the sake of convenience I will call it an agreement as well.

[5] The agreement was signed by a Professor Goba ‘for the Durban Institute of Technology (DIT)’ and by three Union representatives, one of whom was a Mr Shakeel Ori who was called to give evidence for the plaintiff. It is not disputed that Professor Goba had no authority to bind the defendant when he signed the document. The evidence reveals that, when he signed it, he was in fact acting in his capacity as the head of university management. He was the vice-chancellor. From the date of merger the defendant was governed by the Standard Institutional Statute published in terms of s 33(3) of the Higher Education Act. In terms of that standard statute the council of the university ‘determines conditions of service, the disciplinary provisions and the privileges and functions of its employees, …’. In terms of the Standard Institutional Statute the council could not delegate the power to determine such conditions of service. The first institutional statute adopted by the council of the defendant was published on 25 November 2005, and it too provided that the council’s powers to determine conditions of service could not be delegated.

[6] At the outset of the trial it was made clear that the parties accepted that the real issue to be determined was whether or not the council of the defendant had adopted the agreement in full as its conditions of service. It is the plaintiffs’ case that this was indeed done at a meeting of council held on 23 November 2005. The basis upon which that proposition is disputed by the defendant emerges from an account of the facts.

THE PRINCIPAL DOCUMENTARY EVIDENCE

[7] The evidence put before the court is largely documentary. The plaintiffs called only one witness, as did the defendant. The defendant’s

witness was Mr RU Kumar, who is employed as the defendant's Director, Finance Operations and Accounting.

[8] Amongst the documents put up by the parties in a joint bundle is one which was apparently prepared by the institutional forum of the defendant. I will call it the "forum record". It constitutes a history of deliberations on the subject of post-retirement medical aid subsidies. Some portions of the document were referred to in evidence and in argument. It appears from the forum record that a Human Resources Task Team had been formed to consider uniform conditions of service in advance of the date of merger. It apparently made very little progress. As already mentioned the harmonisation process continued after the merger. The forum record suggests that by about September 2004 a seventh version of the conditions of service put together by the negotiating parties had been produced. Whilst an eighth version also emerged, it is the seventh version which was ultimately put before the council for its consideration. Neither the earlier versions nor Version 8 were produced in evidence. However it appears from the minutes of the council meeting of 31 May 2005 that at an earlier meeting on 17 March 2005 the council had agreed that the Human Resources Committee convene within a month to deliberate further on the conditions of service document. It appears that the document in question may have been Version 8.

[9] Be that as it may, at the council meeting of 31 May 2005 it was made clear that 'the Unions were adamant that Version 7 which was a signed document and which had been agreed to between Executive Management and the Unions should have been submitted to Council.' It was also recorded that Version 7 had been submitted to the council's Human Resources Committee which raised issues concerning the provisions of Version 7 relating to group life insurance, medical aid, accumulative leave and a housing allowance. The minutes of the meeting of 31 May 2005 then record various views being expressed by members of council whereafter the following resolution appears.

> '(a) <u>APPROVED</u> Version 7 of the Conditions of Service document except for medical aid, group life, leave and voluntary

> severance package which are to serve before the next Council meeting on 15 September 2005, after further consultation with the Unions.
>
> It was noted that the grievance procedure was removed from the Conditions of Service document.'

[10] The subject of medical aid appears in the section of the document which deals with remuneration packages and benefits. It reads as follows.

> '**MEDICAL AID**
>
> 3.7.1 All permanent and contract (more than one year) employees have the option to become members of the medical aid schemes approved and subsidised by DIT.
>
> 3.7.2 Current DIT employees who were employees of the former Natal Technikon or ML Sultan Technikon would enjoy similar medical aid benefits as agreed in the harmonisation process.
>
> 3.7.3 In respect of post-retirement medical aid subsidy this would be applicable (as part of the harmonisation process) to staff who are current employees of DIT, provided they were employed by either institution prior to 31 December 1999. And further, post-retirement medical aid subsidy, are subject to prevailing rules.'

The lack of clarity in these provisions, certainly in so far as they relate to post-retirement medical aid benefits, is not a matter which appeared to cause concern for the parties during the trial. In its particulars of claim the plaintiffs have sought not only the declaratory order already mentioned, but also an order directing the defendant to enter into *bona fide* negotiations with the plaintiffs for the purpose of reaching agreement 'on the form and manner pursuant to which the subsidy is to be provided to the former MLS employees who are eligible therefor'. It is the plaintiffs' case that the approval of clause 3.7 of the Conditions of Service Agreement would have required further *bona fide* negotiations on the form and manner in which the subsidy would actually be provided. As the parties presented their cases, the real issue is whether

there was any extension at all of the post-retirement benefits to former MLS employees.

[11] According to the minutes of the council meeting of 15 September 2005 the vice-chancellor reported to council that the outstanding issues, namely medical aid, group life, leave and voluntary severance package would be discussed between Executive Management and the Unions via the Labour Consultative Forum. He reported that the time frame for resolution of these matters would be the end of the year. At the meeting the council agreed to rescind its previous decision approving (in part) Version 7 of the conditions of service because it had not been signed correctly. Apparently the document then (in May 2005) available had only been signed on the signature page. The council requested Executive Management and the Unions to sign the entire document and directed that there should be no further negotiations except concerning the '4 issues still to be agreed upon namely medical aid, group life, leave and voluntary severance package'. According to the minutes of 15 September the council agreed that the properly signed version would 'serve before the next council meeting for approval'. The same minutes record that the next meeting of the council would take place on 23 November 2005. What one is to make of this is not clear, given that the vice-chancellor had reported to the meeting that the time frame for resolution of the outstanding issues was the end of the year.

[12] The next council meeting was held on 23 November 2005. The minutes record what had been agreed at the council meeting of 15 September, and that at a Human Resources Committee meeting held on 13 October 2005 it was agreed that the four outstanding issues would be dealt with by the vice-chancellor and that if there was a need for mediation the vice-chancellor should attend to it; and:

> 'that the issues that are agreed upon should be signed off by both parties and there should be a declaration of issues in respect of which there is no agreement'.

The Human Resources Committee agreed that the vice-chancellor would report on the matter at the next council meeting.

[13] In advance of the council meeting of 23 November the now signed Version 7 of the agreement was distributed to members of council as well as a letter dated 19 October 2005 addressed to members of council by Professor Goba.

[14] The letter from Professor Goba has the following opening paragraph.

> 'Council, at its last meeting on 15 September 2005 requested that the Conditions of Service be fully signed by Executive Management and the Unions, except for the 4 issues (medical aid, group life, accumulative leave and voluntary severance package) which are still subject to further negotiations.'

The letter went on to report that the document had indeed been signed. (According to the signature page it was only signed on 4 November 2005 – ie after the date of Professor Goba's letter.) We know that the signed document included the provisions previously contained in it dealing with the four issues which were still subject to negotiation. The opening paragraph of Professor Goba's letter is not easily understood.

[15] The letter went on to state the following.

> 'While we are mindful that council raised 4 issues for further negotiations, these will form the basis of further discussion together with issues that either parties may raise. When these discussions are completed the Conditions of Service will be duly amended to reflect such agreement between management and the Unions.
>
> Therefore in order to ensure that we have a working conditions of service document in place council is requested to approve the document circulated to all council members.'

The one thing which appears to be clear from Professor Goba's letter is that, despite the fact that the original provisions of the agreement relating to the four issues had not been removed from the document prior to signature, the differences between the parties over those issues had not been resolved.

[16] The minute of what transpired regarding the conditions of service at the meeting of the council on 23 November 2005 is somewhat terse. After recording what had been agreed at the council meeting of 15 September, and at the meeting of the Human Resources Committee meeting of 13 October, the following appears under the heading "Conditions of Service for DIT".

> 'COUNCIL APPROVED the final agreed Conditions of Service document as signed by Executive Management and the Unions on 2005-11-04, copies of which had been circulated previously with the agenda and noted.
>
> Council noted that there are 4 outstanding issues (therefore not contained in the aforesaid Conditions of Service document) still to be dealt with by the Vice-Chancellor.'

When considering the meaning of the second paragraph of this quotation from the minutes it will be necessary to take account of the following earlier passage from the minutes which records what the vice-chancellor highlighted from his report circulated with the agenda for the meeting.

> 'The Vice-Chancellor reported that Executive Management and the Unions have signed the conditions of service document with the exception of four outstanding issues.'

[17] It is the plaintiffs' case that the approval of conditions of service incorporating post-retirement medical aid benefits for former MLS employees was given at the meeting of 23 November 2005. The plaintiffs' argument is that taking into account all that had gone before the meeting of 23 November 2005, and the defendant's need for a comprehensive and all embracing harmonised set of conditions of service, the council must be taken to have approved the entire document before it on the basis that if negotiations on the outstanding issues should generate agreement on conditions at variance with the approved document, the conditions of service would be amended to reflect the required changes.

[18] As a matter of fact, if council intended on 23 November 2005 in particular to approve the provision of post-retirement medical aid benefits to

former MLS employees, that aspect of its resolution was never implemented. The issue became a thorn in the side of labour relations.

[19] One sees, for instance, from the forum record that at a meeting of the Labour Consultative Forum attended by Professor Goba on 20 September 2006 there was a difference of opinion as to the meaning of the note in the minute that the four outstanding issues remained to be dealt with by the vice-chancellor and were 'therefore not contained in the aforesaid Conditions of Service document'. The meeting decided that a transcript of proceedings at the meeting was needed to resolve the matter. But it transpired that once the minutes are confirmed the tapes are erased, and that no transcript was available.

THE ORAL EVIDENCE

[20] It is necessary to make some introductory remarks concerning the oral evidence. Professor Goba is deceased. The defendant was placed under administration in 2006 (i.e. it ceased, for a period, to be under the control of a council). Consequently, as Mr Ori explained, there is something of a deficit in the defendant's institutional memory. In December 2013 the council finally decided that the disputed benefit would not be extended beyond employees already entitled to it. In the years which intervened between November 2005 and December 2013 the issue served before various committees, and at times council, in a search for a solution to the impasse. One of the solutions proposed was that the defendant should "buy out" the benefit from the former NT employees who were entitled to it. Nothing came of these deliberations. This action commenced in 2014 following the council's decision of December 2013. When the two witnesses gave evidence they were called upon to deal with events which had occurred some 13 years earlier. I venture to suggest that it would be surprising to find that anyone involved in the original process leading up to the meeting of November 2005 would have a memory for the events unsullied by the debates held, and allegations and counter-allegations made, during the intervening years.

[21] I will start with the evidence of Mr Kumar, as he gave the clearest explanation for why it was that the defendant was reluctant to agree to extend the post-retirement medical aid benefits to former MLS employees.

[22] Mr Kumar had been employed by MLS from March 1985 in its finance section. At the time of the merger he served on the Finance and Investment Committee of MLS, and he continues to serve on that committee for the defendant. In 2002 he was the senior manager, finance, and he had to deal with the financial implications of the merger, and in particular those generated by harmonising the conditions of service.

[23] Mr Kumar explained that from the institutional perspective post-retirement medical aid benefits were a funding issue. The question was whether the benefit to NT employees, which was unfunded, was sustainable. At the time an actuarial assessment of the liability taken over from NT was R78 million. No calculation was done at the time of merger in order to determine actuarially the cost of giving the same benefit to former MLS employees. Mr Kumar explained that this was because extending the benefit was, from a finance perspective, not the issue. The issue was how to render the existing liability to NT employees sustainable.

[24] As I understand Mr Kumar's concern that the post-retirement medical aid benefits due to the affected NT employees were "unfunded", it amounts to this. Such a benefit is in the nature of a pension benefit. Such benefits must be supported by an existing fund. If the provision of such benefits is funded from current income, then current income is being expended without any return to the institution. There is no return because the beneficiaries no longer perform any service for the institution. That is what distinguishes the provision of post-retirement medical aid benefits to retirees from medical aid benefits provided for current employees. The fund which ought to have been in place to meet the obligations to NT retirees at the time of merger was R78 million. In fact there was no fund at all.

[25] Concerning the implications for the defendant of extending the post-retirement benefit to former MLS employees, Mr Kumar referred to a report of Arch Actuarial Consulting dated 22 February 2013. That report contains an actuarial valuation as at 31 December 2012 of the liability the defendant would be taking on if it then decided to extend the benefit to former MLS employees. The valuation was a little over R78 million. He also referred to the valuation by the same actuaries reflected in a report dated 7 December 2017. The purpose of that report was to illustrate the financial consequences to the defendant of offering the "buy-out option" to former MLS employees and retirees. At that stage the valuation was just short of R105 million. Mr *Kemp SC*, who appeared for the plaintiffs, pointed out quite correctly that these valuations were not available when the council resolution was passed in November 2005. But in my view it may fairly be said that what these figures illustrate is that by merely having regard to the numbers of affected retirees and potential retirees in the ranks of former MLS employees, the defendant's financial section would have had a fair idea of the extent to which the extension of the benefits to the MLS employees would have compounded the problems they confronted in dealing with the unfunded liability incurred in respect of NT beneficiaries.

[26] Mr Kumar's evidence was that whilst the other issues outstanding at the time of the November 2005 meeting had been resolved quite soon after the meeting, the issue of the demand of former MLS employees to be afforded post-retirement medical aid benefits equal to those of similarly situated former NT employees had not. As I understood his evidence the defendant continues to fund these benefits for former NT employees out of current income.

[27] It should be observed immediately that it would be surprising indeed, if council had approved the extension of post-retirement medical aid benefits to MLS employees and retirees, that this would not have come to the immediate attention of the finance committee and in particular Mr Kumar. I have already mentioned that it is common cause that such benefits were never actually

paid. There was no evidence that the finance committee had ever produced a budget incorporating such liabilities.

[28] Finally, Mr Kumar gave uncontested evidence to the effect that the resolution of the other issues which had been flagged as outstanding in November 2005 is reflected only in Human Resources policy documents, the conditions of service document having never been updated to reflect the resolution of those issues. Judging from Mr Kumar's evidence the conditions of service document itself has faded into obscurity, certainly insofar as the financial implications of the defendant's employment practices are concerned.

[29] As already mentioned, Mr Ori, who was called by the plaintiffs, was a Union representative at the material time. He came to the defendant from MLS. He was involved in the harmonisation process and, as already mentioned, was one of the signatories to the conditions of service document.

[30] Mr Ori stated more than once during the course of his evidence that he would never have signed the document if it had not contained the clause in question dealing with post-retirement medical aid benefits. He sought to advance the proposition that where one sees in various documents and minutes reference to the fact that medical aid benefits remained in issue, it should not be taken to be a reference to post-retirement medical aid benefits. He also at times sought to advance the proposition that the dispute over post-retirement medical aid benefits concerned the question as to whether they should be extended to all employees, and not whether they should be extended to former employees of MLS who were similarly situated to the former NT employees who were entitled to the benefit. Concerning the dispute over ordinary medical aid benefits he said that what the Unions were after, and apparently did not get, was parity between senior staff and junior staff.

[31] However under cross-examination Mr Ori accepted that when at the council meeting of 31 May 2005 the council approved Version 7 of the document 'except for medical aid, group life, leave and voluntary severance

package' the question of post-retirement medical aid was included in the term "medical aid". As will be seen above, the post-retirement medical aid subsidy featured as item 3.7.3 under the heading 'Medical Aid'. What is immediately apparent on a reading of item 3.7.3 is that what the council was not approving was the extension of the NT benefit to similarly situated MLS employees. That is inconsistent with Mr Ori's attempts to convey to the court that the extension to MLS employees was not the issue.

[32] When referred to the minute of the meeting of the institutional forum held on 6 September 2005, which specifically listed post-retirement medical aid as an outstanding issue, Mr Ori claimed that it was by then wrong to include it amongst the list of outstanding issues. But he gave no evidence as to how and when, between May and September 2005, agreement had been reached on the extension of the benefit to former MLS employees. It would be surprising if that had been done without Mr Kumar being aware of it. There is no documentary record of such an agreement being reached.

[33] At one stage in his evidence Mr Ori claimed that he could not remember it being said or reported to him that extending the subsidy would be too expensive. However he conceded, when referred to the minutes of an executive committee meeting of NT held on 25 March 1999, that he was told that NT had decided that persons employed from 1 January 2000 would not qualify for the benefit because of the cost issue. I consider it most improbable that Mr Ori was not fully aware of the implications for the defendant of taking on a further unfunded liability, in addition to that it inherited from NT.

[34] Concerning the meeting of 23 November 2005, Mr Ori claimed that he could not remember anyone saying that the approval of the document would be subject to the same exclusions as had been minuted at the May meeting, and added that he thought that everybody had accepted Professor Goba's letter which he, Mr Ori, interpreted to convey that everything should be accepted upon the basis that if negotiations justified a subsequent amendment, that could be done. Mr Ori did not claim to have a clear independent recollection of what transpired at that meeting. It struck me that

he chose his words carefully. ("I think that everybody" accepted the letter.) I am inclined to the view that Mr Ori's evidence as a whole, and in particular his evidence concerning the council meeting of 23 November 2005, is somewhat clouded or affected by his strong affiliation to the Union standpoint which he has presumably supported and defended for the last 13 years.

[35] Mr Ori's assertion that council approved the provision now in dispute on 23 November 2005 is inconsistent with Mr Kumar's evidence and the fact that the benefit has actually never been implemented.

OVERVIEW

[36] In my view it is overwhelmingly probable that the costs of extending post-retirement medical aid benefits to MLS employees was the defendant's over-riding concern at the time of considering the proposed conditions of service. That it was proper that the defendant should be so concerned is quite clear from Mr Kumar's evidence. The only proposal concerning post-retirement medical aid benefits which served before the council when it considered Version 7 of the document was the extension of them to similarly situated former MLS employees; not that they might be extended to all employees. I do not accept Mr Ori's evidence that, apparently between May and November 2005, agreement had been reached that the extension should be allowed. There is no record of that.

[37] In my view the outcome of this case turns ultimately on a construction of the minute of 23 November 2005, seen in context.

[38] In construing the minute it has to be accepted that there was at least one reason why the extension of the benefits should be approved, and at least one reason why it should not. As to the former, assuming that the other flagged items were ones with which the council could live, approving the extension would establish final agreement between the defendant and the Unions on all the conditions of service which had been debated. As to the

latter, approving the extension would involve the defendant taking on an unfunded liability beyond that with which it was already burdened.

[39] In interpreting the minute one has to accept that it is imperfect. In the opening paragraph of the letter from Professor Goba distributed in advance of the meeting he stated that Executive Management and the Unions had been asked to sign the document 'except for the four issues … which are still subject to further negotiations'. In his report to the council which, according to the minutes, was made in advance of consideration of the conditions of service document, Professor Goba told the council that the Unions and Executive Management had signed the document 'with the exception of four outstanding issues'. In the note to the statement of what was approved under the heading 'Conditions of Service for DIT', it is stated that the four outstanding issues are 'not contained in the aforesaid Conditions of Service document'.

[40] We know that the four outstanding issues were indeed contained in the document. I do not think that this contradiction can be solved by postulating that council's approval included the four outstanding conditions. In my view the minute must be interpreted to convey, especially where it is stated that the four issues are not contained in the conditions of service document, that council did not approve them. I accept Mr *Kemp's* argument that if this was the case, the minute could have stated that clearly, as it was in the minute of the May meeting. However on the probabilities I conclude that the unclear wording in the minute of the November meeting is the product of poor minute taking. I do not see why the words used

(a) in the minute to convey Professor Goba's report would have been employed unless the minute constitutes an attempt to convey Professor Goba's statement that there had as yet been no agreement on the four items; and

(b) in the note to the resolution, to the effect that the four issues are not contained in the conditions, would have appeared at all in the minute if not to convey that the four issues were not approved.

I am unable to reconcile these entries in the minute with the proposition contended for by the plaintiffs, that the document was approved in its entirety, the only caveat being that it would have to be amended to cater for any subsequent agreement on the four unresolved matters. It seems to me that a conclusion in favour of the plaintiffs involves ignoring the words in the minute mentioned immediately above. Nothing said in evidence, and nothing emerging from the context in which the minute was produced, suggests that such an extraordinary approach to the interpretation of the document is justified. (See *Attorney-General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421 at 426. The rule against assuming superfluity may well apply less vigorously in a context like the present, than it does in the case of statutory interpretation. There must nevertheless be good reason for concluding that a person - in this case the minute taker - wrote something without intending any meaning to be ascribed to it.)

[41] I conclude that on the probabilities the defendant's council did not approve the extension of post-retirement medical aid benefits to former MLS employees.

I make the following order.

The plaintiffs' claim is dismissed with costs, such to include the costs of senior counsel.

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OLSEN J

Date of Hearing:	26 FEBRUARY TO 28 FEBRUARY 2018
Date of Judgment: :	FRIDAY, 11 MAY 2018
For the Plaintiffs:	Mr KJ KEMP SC with Mr H S GANIE
Instructed by:	GARLICKE & BOUSFIELD INC PLAINTIFFS' ATTORNEYS 7 TORSVALE CRESCENT LA LUCIA RIDGE LA LUCIA RIDGE OFFICE PARK DURBAN (Ref.: Shamla Pather/kp/L2394/15) (Tel.: 031 – 570 5300)
For the Defendant :	Mr M PILLEMER SC
Instructed by:	MATTHEW FRANCIS INC DEFENDANT'S ATTORNEYS (Ref.: Y Maharaj/MS/01D008007) (Tel.: 033 – 9401497) **c/o PATHER & PATHER ATTORNEYS** 3 NOLLSWORTH CRESCENT LA LUCIA RIDGE DURBAN (Ref.: Gerard Vadivalu/rg/M2247)) (Tel.: 031 – 3044 212)