IN THE LABOUR APPEAL COURT OF SOUTH AFRICA,

JOHANNESBURG

Reportable

Case no. JA 9/15

In the matter between:

FLEET AFRICA (PTY) LTD Appellant

(First Respondent in the Court *a quo*)

and

ERICA NIJS Respondent

(Second Respondent in the Court *a quo*)

Delivered: 20 January 2017

Summary: Appeal – Interpretation and application of sections 158(1A) and 142A(1), in relation to sect 158(1)(c), of the LRA. – Material distinction between sections 142A(1) and 158(1A) – Issue: Whether settlement agreement made Order of Labour Court (LC) in terms of sect 158(1)(c) complied with the 2002 amendment of that section. No misdirection on the LC in granting order ito sect 158(1)(c). Appeal dismissed with costs.

Coram: Waglay JP, Ndlovu JA *et* Murphy AJA

JUDGMENT

NDLOVU JA

Introduction

[1] This appeal is against the judgment of the Labour Court (Rawat AJ) handed down on 30 May 2014, in terms of which the Labour Court declared that the settlement agreement concluded between the appellant, Fleet Africa (Pty) (Ltd), and the respondent, Ms Erica Nijs, was valid and legally binding, and further ordered that the settlement agreement concerned be made an order of the Labour Court in terms of Section (158)(1)(c) of the Labour Relations Act[1] (the LRA). Leave to appeal was granted by this Court on petition.

[2] The issues in the Labour Court and on appeal can be summarised as follows:

1. whether the Labour Court had jurisdiction to entertain the respondent's complaint against the appellant;

2. whether the appellant was entitled to enter into the settlement agreement with the respondent on 21 May 2012;

3. whether the settlement agreement concluded between the appellant and the respondent on 21 May 2012 complied with the statutory requirements of the LRA and, therefore, valid and binding on the parties; and

4. whether the Labour Court erred in making the settlement agreement an order of the Court, in terms of section 158(1)(c) of the LRA.

[1] Act 66 of 1995.

[3] The respondent was previously employed by the City of Johannesburg (the City) from 6 September 1993 until 31 March 2001. On 1 April 2001, the respondent was transferred from the City to a corporate entity known as Super Fleet Power Plus Performance (SFPPP), in terms of section 197 of the LRA. The SFPPP was later taken over by the appellant, presumably again in terms of section 197. The respondent remained employed by the appellant until 30 June 2012 when her services with the appellant terminated.

[4] Sometime prior to the respondent's termination of employment with the appellant, the City had an outsourcing agreement with the appellant, in terms of which the appellant rendered fleet management services for the City (in respect of the City's vehicles) on an agreed fee structure. The duties performed by the respondent allegedly formed part of the contractual obligations in terms of the contract between the City and the appellant.

[5] When the City terminated its contract with the appellant on 29 February 2012, a dispute arose between the City and the appellant on the issue whether those employees of the appellant, who had mainly performed their duties in terms of the terminated contract, should be transferred to the City in terms of section 197. The respondent was allegedly one of such employees. The dispute was initially brought to the Labour Court for adjudication but was subsequently referred to private arbitration before Advocate Franklin SC. Later it was referred to the arbitration appeal panel. I will return to this aspect in due course.

[6] In or about the same period the appellant lost another similar contract which it had with the Eastern Cape Provincial Government. Consequently, a need to retrench became a reality for the appellant. Hence, whilst the outcome of the arbitration appeal process was awaited, the appellant commenced section 189 consultation process with the respondent and other affected workers. The two processes ran parallel to each other, so to speak.

[7] On 21 May 2012, pursuant to their section 189 consultation, the appellant and the respondent concluded a settlement agreement, in the form of a voluntary retrenchment package. To the extent relevant, the material terms of the settlement agreement are the following:

1. 'The employee [the respondent] has been granted voluntary retrenchment in terms of the voluntary retrenchment policy applicable at Fleet Africa [the appellant] in respect of the restructure of the business. Accordingly, the parties to this agreement have agreed to the termination of the Employee's employment by way of voluntary retrenchment.

2. The parties agree that in **full and final settlement** of any claims of whatsoever nature arising (including but not limited to any outstanding salary obligations, any accumulated leave pay, any severance benefit and any notice obligations, **any entitlement to transfer in terms of section 197 of the Act (to the City of Johannesburg or elsewhere)** and any claims for unfair dismissal whether automatic or not that the Employee may have against Fleet Africa to the following:

   2.1 The Employee's last working day will be (fill in details); [sic]

   2.2 the Employee will be paid the gross sum of R215,145.49 as set out in the breakdown of amounts due attached hereto, less all income tax deductions, and other deductions required in terms of a directive obtained for this purpose;

   2.3 The Employee will be entitled to be paid the credit due to the Employee from any retirement funds maintained by Fleet Africa on the Employee's behalf, which payment shall be made in accordance with the rules of any such fund.

   2.4 The Employee shall keep in strict confidence any information or knowledge that the Employee has acquired while in the employ of Fleet Africa about the business of Fleet Africa, or any related entity,

person, director, employee or the like, and shall not disclose any such information to any third party.

2.5 The Employee will continue to be bound by any restraint, confidentiality or other like agreement contained in his current employment contract.

2.6 The Employee specifically waives his / her right to be ring-fenced and considered as included as an employee of the business that provided the fleet service to the City of Johannesburg in terms of the outsource agreement A114 at any time but more specifically at 29 February 2012.

2.7 The Employee agrees that the extent that it is permissible and required that this agreement is made in compliance with sections 197(2) and 197(6) of the Act and the circumstances of such agreement has [sic] been explained to the employee and the employee has been given the opportunity to take independent legal advice in respect of the consequence[s] of this agreement.

2.8 The Employee shall keep the concluding of this agreement and terms of this agreement confidential.

3 ….

4 The Employee acknowledges that he / she knows and understands the content of this agreement and the effect of this agreement to expunge any claims that he / she may have against Fleet Africa as defined herein and that he/she voluntarily bind himself/ herself to the agreement in exchange for the benefits provided by this agreement.

5 Subject to clause 2.5 of this agreement supersedes, overrides and replaces any other agreements and/or any other terms and conditions of

employment, whether written, implied or oral, that may exist between the Employee and Fleet Africa, and the current employment relationship is replaced in its entirety by this agreement. The Employee confirms specifically and without limiting the foregoing that he/she has no claims of whatsoever nature arising against Super Group Ltd [presumably the holding company of the appellant].

6 This agreement constitutes all the terms of the agreement between the parties in regard to the subject matter thereof.

7 Neither party shall be bound by any express or implied term, representation, warranty, promise or the like not recorded herein.

8 No addition to, variation, or agreed cancellation of this agreement shall be of any force or effect unless in writing and signed by or on behalf of the parties.

No indulgence which either party ("grantor") may grant to the other ("grantee") shall constitute a waiver of any of the rights of the grantor, shall not thereby be precluded from exercising any rights against the grantee which may have arisen in the past or which may arise in the future." (**emphasised**)

[8] Whilst the appellant was entangled in litigation with the City over the section 197 transfer dispute at the arbitration level, the City was apparently unaware that the appellant was, at the same time, engaged in a section 189 consultation with the respondent and others. This apparent lack of knowledge on the part of the City was deliberately caused by the appellant, for what appears to be, its self-serving purposes. In this regard, Advocate William Berry (the appellant's labour specialist) made the appellant's intention clear when he addressed the workers on 16 May 2012:

'If, first of all, **we [are] not going to necessarily disclose to the City that there is this agreement,** okay, because it's our agreement. It's something

we've negotiated between the parties. **So they may not even know there's a settlement agreement.**"[2] (**emphasised**)

[9] In his further address to the workers, Mr Berry made it clear that by signing the settlement agreement the workers thereby limited their rights in that they would have no other claims against the appellant in connection with their termination. He even told them that there was the possibility that they could get a "*double benefit"* if the arbitration appeal award also found that they were entitled to section 197 transfer to the City, that is, they would have got the retrenchment packages plus returning to work at the City. He pointed out that it was so because the City was not a party to the settlement agreement. The following appears in the record:

'ADVOCATE WILLIAN BERRY: …Now what Fleet Africa has done, is (sic) it has made a voluntary retrenchment available okay. Now you might say ja but we [are section] 197 employees, why would we want to go down the route of a voluntary retrenchment, and that's a perfectly valid position to have. But Fleet Africa's position is the following. We want certainty. We not too, well we are concerned by 97/189 what's going to happen, but at the end of the day we want certainty, so Fleet Africa has agreed to have this voluntary retrenchment available to employees. And what it entails is it entails … (inaudible) half severance package, because at the end of the consultation process, you have to be compulsorily retrenched.'[3] …..

'ADV BERRY: Do you understand what I'm saying. If you don't reach the agreement then, then, you know if they can't, that can never be raised at all by the City. I think if the City raised that you'll be able to, to, um, to beat any defences they might be able to raise it but that's just a point of view that I'm giving you. And so, so what I'm trying to say, maybe I'm being overly cautious but what I'm trying to say is enter into that discussion with an open understanding of what's going on. So, because when you do sign a settlement agreement, you do limit your rights.

[2] Record, Vol 4 at 279 lines 12-15.
[3] Record, Vol 4 at 264 lines 18-24 to 265 lines 1-4.

PERSON D [Worker]: Yes

ADV BERRY: Okay. You will not, and that's the … (inaudible) that's the whole process of the agreement, you will not have any claim against Fleet Africa, and that's our (inaudible) concern."[4] …..

'PERSON J: Let's say for argument sake I take, I decide to take a voluntary retrenchment package, okay.

ADV BERRY: Ja

PERSON J: And section 197 does happen to exist. Does that give, can the City then still approach me and take me back?

ADV BERRY: They have to.'[5]

'ADV BERRY: [The City] have not been part to this at all. This is our exercise. Okay, so when you see the settlement agreement you"ll see it says full and final settle, all claims against Fleet Africa, blah, blah, blah and the City, okay. But the City isn't a party to this agreement. So we have to put it in because of our relationship with the City because we don't want anyone coming back and saying oh you settled with these guys and you didn't tell us, and you have … (inaudible). We want to be able at a later stage to say that, in fact, we have no obligation to include you in this … (inaudible), okay.'[6] …..

'Then you, then if you agreed not to go, you [are] entitled to go.

PERSON J: Oh okay. … (Inaudible). ….

[4] Record, vol 4 at 281 lines 2-13.
[5] Record, vol 4 at 289 lines 8-13.
[6] Record, vol 4 at 290 lines 1-5.

> ADV BERRY: … (Inaudible) that's what you … (Inaudible) **you [are] actually getting a double benefit**.'[7] (emphasised)

[10] On 29 May 2012, the arbitration appeal award was issued, in terms of which it was declared that the respondent had been transferred, in terms of section 197, from the appellant to the City with effect from 1 March 2012. In light of this arbitration appeal award, the appellant sought to resile from the settlement agreement, contending that it meant when the settlement agreement was concluded on 21 May 2012 there was no longer any employment relationship between the appellant and the respondent, which had terminated retrospectively on 1 March 2012 (according to the arbitration appeal award). To this extent, the appellant submitted that the settlement agreement was, therefore, null and void and the Labour Court lacked the requisite jurisdiction to deal with the matter.

[11] Hence, the respondent (as the applicant then) instituted motion proceedings in the Labour Court against the appellant (as the first respondent then) and the City (as the second respondent then). By consent of the other parties, the City was withdrawn from the matter. In its notice of motion the respondent sought an order in the following terms:

> '1. That it be declared that a valid and binding settlement agreement, which terminated the employment of the Applicant with the First Respondent, was concluded between the Applicant and the First Respondent on 21 May 2012;
>
> 2. That the settlement agreement be made an order of the above Honourable Court;

[7] Record, vol 4 at 290 lines 10-12.

3. That the First Respondent, alternatively the Second Respondent be obliged to perform in terms of the settlement agreement; the one paying the other to be absolved;

4. Costs of the application;

5. Further and/or alternative relief.'

[12] Upon consideration of the matter, the Labour Court found in favour of the respondent (Ms Nijs). Amongst other things, the Labour Court found that "the [appellant] was not only entitled to conclude the settlement agreement with the respondent but that it did so, most diligently, conscientiously, and in good faith." The order of the Labour Court is in the following terms:

'1. The agreement of settlement entered into by Fleet Africa and the applicant and which has the dates of 18 May 2012 on which Fleet Africa signed and 21 May 2012 on which the applicant signed is made an order of court.

2. Fleet Africa to pay the costs of the application.'

[13] It is noted that the order of the Labour Court does not refer to, or deal at all with, the respondent's first prayer, as appearing in her notice of motion, namely: "*That it be declared that a valid and binding settlement agreement, which terminated the employment of the Applicant with the First Respondent, was concluded between the Applicant and the First Respondent on 21 May 2012."* However, I am inclined to conclude that this was most probably an inadvertent omission on the part of the learned Judge *a quo*. I say so, first, because the Labour Court would obviously not have granted the second prayer of making the settlement agreement an order of Court if the settlement agreement was not found to be a valid and binding agreement, in the first

place. Second, none of the parties or their counsel (the appellant in particular) ever raised this omission as an issue.

The appeal

[14] The appellant's grounds of appeal can be summarised as follows:

1. The Labour Court erred in holding that it had the requisite jurisdiction to entertain the claim lodged to it by the respondent.

2. The Labour Court failed to consider that the section 189 consultative process was subject to the outcome of the arbitration proceedings, which was still pending.

3. The Labour Court failed to take into account that although the arbitration appeal award was issued on 29 May 2012, it had a retrospective effect from 01 March 2012, which was long before the conclusion of the settlement agreement signed on 18 May 2012 on behalf of the appellant and on 21 May 2012 by the respondent

4. The Labour Court failed to consider that the retrospective effect of the arbitration appeal award overtook the settlement agreement. In other words, the respondent was entitled only to be transferred to the City in terms of Section 197.

5. The Labour Court failed to consider that in light of the above when the settlement agreement was concluded there was no longer any employment relationship in existence between the appellant and the respondent. On that basis, it was impossible that any labour dispute could arise between the appellant and the respondent.

Submissions by the appellant

[15] Mr *Sniders*, for the appellant, submitted that the Labour Court did not have jurisdiction to entertain the respondent's complaint on the basis that settlement agreements that are within the contemplation of section 158(1)(c) arise as a compromise or resolution to any litigation brought in terms of the LRA. The section ought to be given a narrow meaning as envisaged in section 142A of the LRA. In this regard, he referred us to the decision of this Court in *Molaba and Others v Emfuleni Local Municipality,*[8] *(Molaba)* where it was recognised that the requirements as set out in the definition in section 142A are relevant for the purposes of interpreting section 158(1)(c). In this regard, counsel submitted, section 142A of the LRA narrows the interpretation of a settlement agreement contemplated in section 158(1)(c). Counsel further argued that the *Molaba* decision held that although broader interpretation of the Court's power in terms of section 158(1)(c) of the LRA may be defensible, such an interpretation would entirely undermine the limitations established by section 142A. The settlement agreement referred to in section 158(1)(c) is one which is intended to settle a dispute between employer and employee. Therefore, absent the employer-employee relationship between the parties there cannot be a labour dispute arising between them and, axiomatically, the question of a section 158(1)(c) settlement agreement does not arise.

[16] Mr *Sniders* further sought to emphasise his point by submitting that, since the arbitration appeal award (issued on 29 May 2012) had a retrospective effect from 1 March 2012, the settlement agreement (signed on 18 and 21 May 2012) was overtaken by the events, to the extent, counsel submitted, that at the time the settlement agreement was concluded between the appellant and the respondent, they were no longer the employer and the employee of each other, retrospectively.

[8] (2009) 30 ILJ 2760 (LC).

Submissions by the respondent.

[17] According to Mr *Cowley*, for the respondent, it was common course that, at the time of the conclusion of the settlement agreement i.e. 21 May 2012, there was indeed an employer-employee relationship between the appellant and the respondent. It is clear from the wording of the settlement agreement that the parties entered into it intentionally and in good faith. There was nothing in the agreement which pointed to the fact that its operation was dependent on the outcome of the arbitration process. He sought the appeal to be dismissed.

Evaluation

[18] Early in this judgment, I indicated the crisp issues before the Labour Court and on appeal in this matter. For the sake of convenience, I propose to restate them, namely:

1. Whether the Labour Court had jurisdiction to entertain the respondent's complaint against the appellant;

2. whether the appellant was entitled to enter into the settlement agreement with the respondent on 21 May 2012;

3. whether the settlement agreement concluded between the appellant and the respondent on 21 May 2012 complied with the statutory requirements of the LRA and, therefore, valid and binding on the parties; and

4. whether the Labour Court erred in making the settlement agreement an order of the Court, in terms of section 158(1)(c) of the LRA.

[19] It is settled law that, provided there is a contractual employer-employee relationship between the parties to a dispute, neither the Labour Court nor the Commission for Conciliation Mediation and Arbitration (the CCMA) nor an accredited bargaining council, possesses the requisite jurisdiction to entertain the dispute. We know that the appellant's version is that the Labour Court did not have jurisdiction to deal with the matter because the respondent's employment with the appellant had already been terminated at the time the two parties concluded the settlement agreement on 21 May 2012, on the basis that the dispute was resolved retrospectively on 1 March 2012 through the arbitration appeal award dated 29 May 2012; and that the settlement agreement was accordingly null and void.

[20] It is important to note that the settlement agreement in question is not just any settlement agreement, but one envisaged in section 158(1)(c) of the LRA. Therefore, for its valid and binding nature, it ought to comply, first, with the common law requirements of a valid contract; and second, with the statutory requirements of a section 158(1)(c) settlement agreement. I am mindful that the appellant does not challenge the common law validity of the settlement agreement. The challenge is grounded on the alleged non-compliance with the statutory requirements. However, for the sake of background and completeness, I propose to refer briefly to the common law perspective of it.

[21] Recently, this Court in *Universal Church of the Kingdom of God v Myeni*[9] restated the essential aspects of a valid and legally enforceable agreement under common law:

> 'It is settled law that the intention of the parties in any agreement - express or tacit - is determined from the language used by the parties in the agreement[10] or from their conduct in relation thereto.[11] Further, that not every agreement

[9] *Universal Church of the Kingdom of God v Myeni & Others* (2015) 36 ILJ 2832 (LAC); [2015] 9 BLLR 918 (LAC); [2015] JOL 33521 (LAC); at para 44.
[10] *Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at para 465.
[11] *Irvin & Johnson (SA) Ltd. v Kaplan* 1940 CPD 647 at para 650.

> constitutes a contract.[12] For a valid contract to exist, each party needs to have a serious and deliberate intention to contract or to be legally bound by the agreement, the *animus contrahendi*.[13] The parties must also be *ad idem* (or have the meeting of the minds)[14] as to the terms of the agreement. Obviously, absent the *animus contrahendi* between the parties or from either of them, no contractual obligations can be said to exist and be capable of legal enforcement.'[15]" (footnote omitted)

[22] Due to the recent amendments brought to bear on the contextual and elaborative interpretation of a section 158(1)(c) settlement agreement, namely, section 158(1A)[16] of the LRA, it follows that the definition of a settlement agreement in terms of section 158(1)(c) must be read subject to section 158(1A)[17].

[23] Section 158(1)(c) provides that *"[t]he Labour Court may … make any arbitration award or any settlement agreement an order of the Court."* Section 158(1A) reads as follows:

> 'For the purposes of subsection of (1)(c), a settlement agreement is a written agreement in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court, excluding a dispute that a party is only entitled to refer to arbitration in terms of section 22(4), 74(4) or 75(7).'

The exclusionary latter part of section 158(1A) relates to (1) disputes about organisational rights; (2) disputes involving essential services; and (3) disputes involving maintenance services.

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[12] *Bourbon-Leftley en Andere v Wpk (Landbou) Bpk* 1999 (1) SA 902 (C); *Electronic Building Elements v Huang* 1992 (2) SA 384 (W) at 387E
[13] *Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 465.
[14] *Macdonald Ltd v Radin NO and the Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 at 487.
[15] At para 44.
[16] Inserted by s36(c) of Act 12 of 2002.
[17] *Greef v Consol Glass (Pty) Ltd* (2013) 34 ILJ 2821 (LAC) at para 19.

[24] The appellant specifically relies on its proposition on the other 2002 amendment in the LRA, namely, section 142A(1),[18] which reads:

> '(1) The commission may, by agreement between the parties or on application by a party, make any settlement agreement in respect of any dispute that has been referred to the Commission [the CCMA], an arbitration award.
>
> (2) For the purposes of subsection (1), a settlement agreement is a written agreement in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court, excluding a dispute that a party is entitled to refer to arbitration in terms of either section 74(4) or 75(7).'

[25] The distinction between sections 158(1A) and 142A(1) is obvious. There is no way that these two amendment provisions can or should be read together as if they are mutually inclusive. Whilst, on the one hand, section 158(1A) is concerned with the Labour Court making "any settlement agreement" an order of the Court; on the other, section 142A(1) pertains to the situation where the CCMA makes "any settlement agreement" an arbitration award. In other words, section 142A(1) merely adds to the powers of the CCMA; whilst section 158(1A) elaborates on the powers of the Labour Court in terms of section 158(1)(c). What is important is that section 158(1A) seeks to clarify that a settlement agreement envisaged in section 158(1)(c) does not refer to *"any settlement agreement"* as the literal reading of the section appears to suggest. The position of an arbitration award as referred to in section 158(1)(c) is not affected by the section 158(1A) amendment. The Court in *Greef v Consol Glass,*[19] stated as follows:

> 'So properly interpreted, in terms of s 158(1)(c), read with s 158(1A), the Labour Court may make any arbitration award an order of court and may only make settlement agreements, which comply with the criteria stated in

[18] Inserted by s31 of Act 12 of 2002.
[19] *Greef v Consol supra*, at para 19.

> s158(1A), orders of court. A settlement agreement that may be made an order of court by the Labour Court in terms of s 158 (1)(c), must (i) be an order of court by the Labour Court in terms of s 158 (1)(c), must (i) be in writing, (ii) be in settlement of a dispute (i.e it must have as its genesis a dispute; (ii) the dispute must be one that the party has a right to refer to arbitration, or to the Labour Court for adjudication, in terms of the LRA; and (iv) the dispute must be of the kind that a party is only entitled to refer to arbitration in terms of s 22(4), or s 74(40 or s 75(7)'.

[26] The Court, in *Greef v Consol*, supra, effectively overturned the decision of the Labour Court in *Molaba,* saying that *"[Molaba's] interpretation of s158(1)(c), without taking into account s 158(1A), but with reference to, in particular s 142A(1), the equivalent of which is deliberately excluded from s 158, was, with respect, wrong."*

[27] The appellant submitted that the settlement agreement did not arise from any dispute between the parties because at the time of its conclusion there was no such dispute in existence. According to the appellant, the settlement agreement came about from the desire on the part of the respondent to take voluntary retrenchment package. Indeed, it is imperative that for a settlement agreement to conform to the requirements of section 158(1A) there must be a dispute between the parties, which either *"party has the right to refer to arbitration or to the Labour Court, excluding a dispute that a party is only entitled to refer to arbitration in terms of section 22(4), 74(4) or 75(7)"* of the LRA. The question which arises: Was there such a dispute between the parties in this instance? The answer, in my view, is in the affirmative.

[28] The settlement agreement was the product of a long and protracted consultation and negotiation between the appellant and the respondent, aimed at fulfilling the objections laid out in section 189 of the LRA. However, this process did not just pop up without there being any dispute between the parties which had not been resolved. There was a long-outstanding dispute between the parties in respect of which the appellant ultimately decided to

engage a two-pronged strategy in desperately trying to resolve the dispute. It is common cause that the section 189 consultation process started at the time when there was an arbitration appeal proceedings underway and which had reached a stage where the parties were only awaiting the issuance of the arbitration appeal award from the arbitrator. The section 189 consultation process and the arbitration appeal process had one common objective, namely, the attainment of a resolution of exactly the same dispute between the appellant and the respondent. This was the kind of dispute which either party was entitled to refer to the CCMA (or accredited council) for arbitration or to the Labour Court for adjudication, as the case may be, unless otherwise by agreement of settlement between the parties in terms of section 158(1)(c), read with section 158(1A); and section 197(6) of the LRA, individually alluded to elsewhere in this judgment..

[29] The appellant was not sure of the outcome of the arbitration appeal process. Hence he tried the section 189 consultation process, as an alternative. Therefore, I do not agree with the appellant's submission that when the appellant and the respondent engaged in section 189 negotiations, culminating in the conclusion of the settlement agreement on 21 May 2012, there was no dispute between the parties and that the negotiations were only in contemplation of a voluntary retrenchment of the respondent.

[30] Section 197 of the LRA provides, *inter alia*, the following:

> '(2) 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 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;

(c) Anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act unfair discrimination, is considered to have been done by or in relation to the new employer, and

(d) The transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.' (emphasised)

Section 197 (6):

'(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 and the new employers 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 (i), must disclose to the person or body contemplated in subparagraph (ii), all relevant information that will allow it to engage effectively in negations.

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

[31] The words *"unless otherwise agreed in terms of subsection (6)" in section 197* clearly envisage, in my view, that parties in a dispute concerning section 197 transfer, are not precluded from resolving their dispute through a settlement agreement, as an alternative means. In such event, the dispute on section 197 transfer falls away, because that would otherwise mean awarding a claimant with a "double benefit". It seems to me there would be no just and legal cause to claim under section 197 again.

[32] Indeed, the settlement agreement was concluded by the appellant and the respondent "*in full and final settlement of any claims of whatsoever nature arising (including but not limited to any outstanding salary obligations, any accumulated leave pay, any severance benefit and any notice obligations* any entitlement to transfer in terms of section 197 of the Act (to the City of Johannesburg or elsewhere)"*.* The appellant's labour specialist, Mr William Berry, confirmed this point when he addressed the workers on 16 May 2012. He said: *"[S]o what we said it's a full and final settlement of all claims against Fleet Africa and the City*."[20] However, notwithstanding these utterances, Mr Berry still advised the affected employees that they could further claim against the City in terms of section 197 and thus get a "double benefit" – an obvious contradiction on his part.

[32] The settlement agreement went on to provide that *"**no addition to, variation, or agreed cancellation of this agreement shall be of any force or effect unless in writing and signed by or on behalf of the parties" (clause 8).*** Thus the only legal means to rescind this agreement was in terms of this clause. (emphasised)

[33] The appellant contended that the conclusion of the settlement agreement was always known between the parties, to be conditional on the outcome of the arbitration appeal award. In its answering affidavit, the appellant, *inter alia*,

[20] Record at 279 lines 3-4.

avers:[21] ***"The [appellant] was very careful, on each occasion, to make it abundantly clear that the [s189] consultations were always subject to the outcome of the [arbitration] process to compel the [City] to accept transfer of the employment contracts of those employees employed on the A114 contract."*** *(emphasised)*

[34] Stressing this point, in its answering affidavit, the appellant further stated:[22] *"Throughout the process a clear distinction was drawn between those employees, such as the [respondent], who were consulted with in terms of section 189 of the Act conditional on it being found ultimately that their contracts of employment would not transfer to the [City] in terms of section 197 of the Act."* Indeed, Mr Sniders in his argument before us reiterated the appellant's contention that the respondent was *"not under any illusion"* of what was happening, namely, that there was a possibility that the events would come to pass that she would, in fact, be transferred to the City at the end of the arbitration appeal process.

[35] What I have just eluded to the above makes it abundantly clear that, had the existence of this alleged suspensive condition been real and true, it would have been one of the most material and important terms of the settlement agreement. Strangely, though, not the slightest mention is made in the settlement agreement of such a condition. Why? Mr Sniders conceded, wisely so, in my view, that this was a stumbling block in his argument, which was *"difficult to challenge".*

[36] In the present instance, therefore, once the parties concluded the settlement agreement on 21 May 2012 the employment relationship between the appellant and the respondent ceased to exist. That contractual transaction (the settlement agreement) disposed of the dispute (or whatever name the appellant prefers to call it) between the appellant and the respondent. In the circumstances, the outstanding arbitration appeal process ought to have fallen

[21] The appellant's answering affidavit: Record at p109 vol 2, para 7.28.
[22] The appellant's answering affidavit: Record at p109 vol 2, para 7.32.

away forthwith. In other words, the arbitration appeal proceedings were no longer necessary and justified to be pursued, and the respondent was no longer entitled to the section 197 transfer to the City because that would mean an undue double benefit for her. However, that is what happened.

[37] The appellant was clearly aware that the affected employees (the respondent in particular) could possibly get a double-benefit in this way. It is common cause that the City was unaware of the existence of the section 189 negotiations between the appellant and the respondent, let alone the settlement agreement that culminated therefrom. The appellant deliberately withheld this information from the City. Instead, the appellant used this factor as a means of enticing and influencing the respondent, in particular, to sign the settlement agreement, in order to get *a "double benefit",* to the detriment of the City.

[38] Consequent to the City not knowing about the settlement agreement concluded on 21 May 2012, the arbitration appeal process was not stopped or withdrawn until 29 May 2012 when the arbitration appeal award was issued, declaring that the respondent's (and other affected workers') termination of employment with the appellant amounted to their *"second generation transfer"* back to the City in terms of section 197. Indeed, it was not disputed that the respondent subsequently reported for duty with the City in compliance with the arbitration appeal award. As to the propriety or otherwise of the appellant's conduct in this regard, I prefer not to comment, for an obvious reason: the issue is not before us and therefore completely irrelevant.

[39] Mr *Snider* further submitted that, in terms of the law, the appellant was not entitled to conclude the settlement agreement with the respondent on 21 May 2012 because the arbitration appeal award was already in place, having taken effect on 1 March 2012. With respect, the appellant is being disingenuous. Even though the appellant does mention the fact that the arbitration appeal award was actually issued on 29 May 2012, with retrospective effect from 1

March 2012, the appellant is seemingly deliberately shy and reluctant to address the issue of the validity of the retrospectivity aspect of the award. Whether the appellant was entitled to conclude the settlement agreement on 21 May 2012, as the appellant did, is an issue which ought to be determined in relation to that date, i.e. 21 May 2012 and not 29 May 2012 when the appeal award was issued. In fact, the appropriate test, in my view, is whether the arbitrator was entitled to issue the award on 29 May 2012 with retrospective effect from 1 March 2012 when, by that time, the settlement agreement was already legally in force. However, the arbitrator is not to blame, but the appellant itself through its Mr Berry who deliberately and potentially fraudulently withheld the truth about the section 189 negotiations from both the City and the appeal arbitrator, as alluded to above.

[40] In my view, the settlement agreement complied with all the requirements of both the common law and as envisaged in section 158(1)(c) read with section 158(1A) of the LRA. In my judgment, I would hold as follows: **(1)** that the Labour Court possessed the requisite jurisdiction to entertain the respondent's complaint against the appellant which culminated in the conclusion of the settlement agreement between the parties on 21 May 2012; **(2)** that the appellant was legally entitled to conclude the settlement agreement with the respondent on 21 May 2012; and, **(3)** that the settlement agreement so concluded between the parties is valid and legally binding between the parties to it namely, the appellant and the respondent; **(4)** that the settlement agreement conformed to the requirements of section 158(1)(c), read with section 158(1A) of the LRA; and, **(5)** that the Labour Court was within its discretionary power to make the settlement agreement an order of court and that it properly exercised its discretion in this regard. The appeal must accordingly fail.

[41] In light of the effect of this judgment, it seems to me that determining the merits of the appellant's preliminary condonation applications, at this stage, would serve no purpose and would merely be an academic exercise which is ordinarily impermissible, save in exceptional instances where the interests of

justice demands it to be done. This case, in my view, does not belong in that category. In accordance with the considerations of the law and fairness, I think the appellant must bear the costs of the appeal.

[42] In the result, the following order is made:

1. The appellant's applications for condonation of its late filing of the appeal record and for reinstatement of the appeal, are granted.

2. The appeal is dismissed with costs.

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Ndlovu JA

Waglay JP and Murphy AJA concur in the judgment of Ndlovu JA.

APPEARANCES:

FOR THE APPELLANT:	Mr AN Snider
	Instructed by Charlene Schlebusch Attorneys, Rivonia, Jhb.
FOR THE RESPONDENT:	Mr H Cowley
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