IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA9/15

In the matter between:

FLEET AFRICA (PTY) LTD **Appellant**

and

ERICA NIJS **Respondent**

Heard: **18 February 2016**

Delivered: **29 November 2018**

Summary: Enforcement of the settlement agreement. Employer embarking on a retrenchment process pending the outcome of the arbitration award as to whether its employees were transferred in terms of s197 of the LRA to the City of Johannesburg - arbitration award finding that s197 applicable to the dispute between employer and the City – employer contending that it is not bound by the retrenchment agreement entered into with the employee – employee seeking the enforcement of the agreement – Labour Court making the agreement an order of Court.

Held that: once the arbitration concluded that there was a s197 transfer, the City automatically took the place of the employer and this took place on 1 March 2012. The respondent therefore became the employee of the City as and from 1 March 2012 and could have no dispute between the appellant and the respondent *a la* employer-employee as and from that date. The settlement agreement of 12 May 2012 could therefore not be an agreement in settlement of an employment dispute as between the appellant and the respondent. Appeal upheld and Labour Court's judgment set aside.

Coram: Waglay JP, Ndlovu JA and Murphy AJA

JUDGMENT

WAGLAY JP

[1] After the judgment was reserved in this matter, Ndlovu JA who had undertaken to write this judgment fell ill but was still determined to write this judgment. However, after a long illness he sadly passed away. This resulted in the unfortunate delay in handing down this judgment and the Court apologises for the delay.

[2] The appellant appeals against the judgment of the Labour Court (Rawat AJ) which made a settlement agreement entered into by the appellant and the respondent an order of court. The terms of the agreement were *inter alia* that the employment relationship between the appellant and the respondent will terminate with respondent accepting the sum of R 215 145.49 as a voluntary retrenchment package.

Background facts

[3] The circumstances leading to the present dispute are common cause save for the dispute in relation to the validity of the settlement agreement

[4] The appellant is in the business of managing transport fleets. In this respect, the City of Johannesburg ("City") outsourced that function to Super Fleet Power Plus Performance which was later taken over by the appellant. The respondent had been employed by the City from 6 November 1993 to 31 March 2001. When the City outsourced the fleet function to Super Fleet Power Plus Performance, the respondent was transferred to that entity in terms of section 197 of the Labour Relations Act 66 of 1995 ("LRA") on 01 April 2001. The contractual relationship between the appellant and the City spans for some 11 years when the City notified the appellant that the contract would end on 29 February 2012.

[5] Following the termination of the outsourced contract, a dispute arose between the appellant and the City as to whether the appellant's employees would be transferred to the City in terms of section 197 of the LRA. After referring the dispute to the Labour Court, both parties, by agreement, referred the matter to private arbitration.

[6] While awaiting the outcome of the arbitration, the appellant embarked on a retrenchment process in terms of section 189A of the LRA. The predicament faced by both staff and the appellant at the time is set out in the communication by its Chief Executive Officer, Kamogelo Mmutlana. It is worth reproducing the letter:

> '1 March 2012
>
> Staff Communication
>
> Dear Valued Fleet Africa Employee,
>
> **RE: <u>CHANGE IN OPERATIONAL PROCESSES AND STRUCTURES</u>**
>
> Our previous correspondence in this regard has reference.
>
> **BACKGROUND**
>
> Over the past couple of months FleetAfrica has been through quite turbulent times with the uncertainty around the renewal of the Eastern Cape Provincial

Government's and the City of Johannesburg's (COJ) full maintenance lease contracts.

As you know the Eastern Cape Provincial Government's contract terminated on 31 January 2012 and we are in the process of winding down that particular business. Our previous communication in this regard highlighted that the City of Johannesburg nominated (but unconfirmed at the time) a new preferred service provider for the Category "A" contract and we were awaiting a final decision regarding the categories "B" and "C" contracts. Fleet Africa senior management has in the meantime been in constant contact with the City of Johannesburg's management in efforts to extend and/or secure either or both of the remaining contracts.

It is with the utmost of regret, as late as yesterday at 15h42, the City announced that it is not extending contract A114 and that the contract would terminate at midnight on 29 February 2012. Furthermore, the City intends to withhold the awarding of contract A400 and intends to appoint an interim service provider until their tender process has been concluded. This is of course disappointing news as we were positive we would retain some of the City's business.

SECTION 197 - TRANSFER OF A PART OF A BUSINESS AS A GOING CONCERN PROCESS

In our initial discussions, and up and until 29 February 2012, with the City, the City acknowledged that the termination of contract A114 and the resultant transfer to the City of related fleet assets constitutes a transfer of a business as a going concern with effect from 1 March 2012. This entails that affected staff (Fleet Africa employees who worked directly on the City of Johannesburg contract and/or who's greater part of their performance output was related to the City of Johannesburg contract) would be transferred either to the City or the City's newly appointed service provider(s) and would therefore not be retrenched by Fleet Africa. In its communication to us late yesterday afternoon, the City informed us that it is reviewing its position in this regard. We are presently engaged in efforts to resolve this position and will keep staff informed of progress. Given these developments, the list of staff affected by this provision

has yet to be finalised and confirmed by Fleet Africa and the relevant new employer

In the interests of our staff we wish to advise under section 197 of the Labour Relations Act, the employment contracts of employees affected by these provisions are, by operation of law, transferred to the City and/or [its] appointed service provider(s) with effect from today. Further practical details around this process (such as where these employees are to report for work and the like) will be shared as part of the above process. The process will also finalíse actual physical transfer of the affected employees to the City and/or its appointed service provider(s),

In the interim, staff affected by these provisions should continue to report to their current FleetAfrica offices / places of work. The employees affected by these provisions will be informed as soon the relevant list of affected staff has been finalised and confirmed.

SECTION 189 - CHANGE IN OPERATIONAL REQUIREMENTS PROCESS

The non-retention of the Eastern Cape Provincial Government and City of Johannesburg contracts naturally has an adverse effect on the rest of the Fleet Africa business, which would necessitate a restructuring of the business as a whole in order to adjust to its new operational requirements and subsequent financial position. Take note that such restructuring may include the retrenchment of staff in the absence of any viable alternatives to retrenchment. Therefore, such affected employees, if any, will undergo an operational requirement restructuring process (or also better known •as a retrenchment exercise). Take note that the company has not as yet taken any decision in this regard and that this communication Will be followed up with a further communication to all affected employees explaining the mechanics of further processes and the way forward in such regard.

GENERAL

The Company acknowledges its obligations and employee rights and intends discharging its obligation in this regard lawfully, fairly and in good faith and in accordance with the Labour Relations Act.

The Company is well aware of the impact on morale that this communication and the ensuing discussions is likely to have, and assures you that the process mentioned above will be dealt with as fairly, sensitively and as speedily as possible.

Should you have any questions regarding the contents contained herein, you are most welcome to direct such to the undersigned, or to the Human Resources, Nontuthuko Masuku

Yours sincerely

Kamogelo Mmutlana

Chief Executive Officer'

[7] Subsequent to the above letter, the Chief Executive Officer issued a conditional notice in terms of section 189 of the LRA to all employees on 10 April 2012. The quintessence for the purpose of this appeal reads as follows:

'…

RE: CONDITIONAL NOTIFICATION IN TERMS OF SECTION 189 OF THE LABOUR RELATIONS ACT 66 OF 1995

We refer to the above matter. We enclose herewith a copy of the formal section 189 notification to commence consultations with employees who will be directly **affected by any required restructuring of the Fleet Africa and who are definitely not entitled to transfer to the City by virtue of the provisions of section 197 of the Labour Relations Act.**

…

…**However, an important issue is to determine which employees are entitled to transfer to the City.**

…

The law requires that only those employees who are directly employed exclusively in the business will transfer. As the fleet function represents only a portion of the business of FleetAfrica it will be important to determine **exactly who is entitled to transfer and this may exclude some of the employees originally identified by the Company as entitled to transfer.**

It is imperative that full and proper consultations are engaged upon in respect of all affected employees. **Because we cannot at this stage determine with absolute accuracy which of the employees may ultimately not be successful in being lawfully entitled to transfer, the Company in fairness must conditionally notify you that in the event that it is found that you are not at law entitled to transfer to the City that you will need to be included in the consultation process required for the restructure.**

…'[1] [own emphasis]

On the same day, a formal retrenchment notice was issued. For the present purpose, the relevant excerpts read:

'…

Dear Valued FleetAfrica Employee

CHANGE IN OPERATIONAL PROCESSES AND STRUCTURES: FLEET AFRICÅ NOTIFICATION IN TERMS OF SECTION 189(3) AND 189 A OF THE LABOUR RELATIONS ACT 66 OF 1995

Background

1 We refer to our previous correspondence and meetings in respect of the need to restructure the business of FleetAfrica that have taken place on a regular basis since 1 February 2012.

[1] Record vol 1 pages 40-42.

2 As stated previously and debated in the meetings, the non-retention of the Eastern Cape Provincial Government and City of Johannesburg contracts naturally has an adverse effect on the rest of the FleetAfrica business, which it would appear necessitates a restructuring of the business as a whole in order to adjust to what is foreseen as its new operational requirements and to ensure the financial stability of the business. Furthermore, we stated that such restructuring may include the retrenchment of staff after full and comprehensive consultations have been concluded to avoid; alternatively minimize; alternatively change the timing of any unavoidable retrenchments and to address the adverse consequences of any unavoidable retrenchment. It has now become imperative that the consultation process in respect of those employees affected by the restructure commences. **The process has been delayed during the months of February and March 2012 as FleetAfrica has sought to engage with the City of Johannesburg to accept its obligations in respect of section 197 of the Labour Relations Act and take back into employment those employees previously engaged in the City of Johannesburg's fleet function.** This process is ongoing but can no longer delay the present consultation process that is primarily aimed at those employees such as yourself that are affected by the commercial rationale of the cancellation of the **contracts but that were not directly or predominantly employed on the City of Johannesburg's fleet function**.

3 At the outset, it is important to note that at this stage it is envisaged by the Company that the only persons that will be directly affected by the restructuring process are those employees whose functions are not completely or predominantly concerned with servicing and maintaining the City of Johannesburg fleet. **As you may be aware, it is the considered position of the Company that these erstwhile employees are entitled to transfer to the City, by virtue of the expiry of the second outsource service agreement and the retransfer of the vehicles that make up the fleet to the City.** This issue has been referred for an expedited mediation for resolution. **Those employees will**

therefore not be part of the present process. In other words, the notice is intended for employees who did not work directly on the City of Johannesburg contract and/or spend the majority of their working days on City of Johannesburg. At present however, as the mediation process will also include an assessment of who the employees are that are entitled to transfer to the City, a copy of this letter will be sent to all those employees as well in the event that any of those employee initially identified as falling outside of this present process are found to indeed be ultimately affected by this process.

4. To this end, this letter serves as a formal notice of the commencement of the consultation process in terms of section 189(3) of the Labour Relations Act (IRA), Act 66 of 1995, as amended **in respect of those employees who are not entitled to transfer to the City of Johannesburg but who will be affected by the restructuring required by the expiry of the Eastern Cape Province and City of Johannesburg contracts and as conditional notice to those erstwhile employees who are ultimately found not to qualify to transfer to the City.**

…

At this stage those employees who are entitled to transfer to City of Johannesburg will not be taken into account in this selection process but should some of the employees originally ear marked for transfer be found to be employees that are not entitled to transfer then their positions may need to be reconsidered and they may be incorporated in the selection process. We require employees affected by the current process to consider which positions would be suitable for them and apply for those positions. You are therefore invited to apply for any of the vacant positions (job descriptions available at the Human Resources Department)…'[2] [Own emphasis]

[2] Record vol 1 pages 45-47.

[8] Extensive consultations took place between the parties and one instance which warrants mentioning is a consultation meeting chaired on 16 May 2012 by Mr. William Berry, of William Berry Attorneys, representing Fleet Africa. The relevant part of the transcript though disputed records:

> 'They have to take you, it [is] part of their transfer; part of their process… the only time that you won't be… and that was what I was trying to explain to you pertaining to that settlement agreement is that it does not include the City saying that they have not been party to this at all. This is our exercise. So when you see the settlement agreement you will see that it says in full and final settlement of all claims against Fleet Africa, bah bah bah 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 them coming back and saying that you settled with these guys and you didn't tell us and you're hammering us. We want to be able to at a later stage to say that we in fact had no obligations to include you in this agreement, but what I'm saying to you is that if it's a legal right for you to transfer, is what this arbitration is going to do then even if you agreed not to go, you are entitled to go**. You are actually getting a double benefit.** Fleet Africa didn't' have to do this, they could simply say we are going to wait for the 197…. We could wait for the 197 one way or the other a simply say we are not giving you anything, but because they want certainty, they have agreed to put money into a pot for that, because we don't… we foresee that this is going to be an on-going dispute with the City because the City doesn't want (inaudible). We are saying we want a closure cut off and were prepared to pay you some money.
>
> Whether they want you or not, if the decision is made by the arbitrator that the business transfers the same as it did in 2001 you will go across to the City, whether they like it or not, okay. So that is the first answer. The second answer is Fleet Africa is giving a retrenchment but it is doing it as a voluntary retrenchment at this point in time, okay. So at this point in time, we are giving more than we would have to do if we have to retrench, okay, mainly because we want the settlement agreement signed up so that you don't sue Fleet Africa, so you get the extra because you are foregoing the right to sue Fleet Africa, but you are not

necessarily foregoing the right to transfer to the City. **So you could get two, you can get your job with the City of Johannesburg with all your length of service and terms of service and terms of conditions and if you signed up the voluntary retrenchment with Fleet Africa, you get your severance as well, so you're getting a double benefit.** If we don't succeed on the 197, and they say that there wasn't this transfer to the City, then we will have to retrenchment then if you haven't signed the voluntary retrenchment your package is going to be smaller, but then you can sue, then you can go to court and say that it was unfair and the dismissal was unfair retrenchment because you wouldn't have signed the settlement agreement. You see that is the difference. Fleet Africa is prepared to pay extra to get a settlement from you.' [own emphasis]

[9] Subsequent to this meeting, there was extensive communication with the respondent and Ms Madelene Harrington (Harrington) Fleet Africa's Human Resources Manager regarding details pertaining to the voluntary retrenchment. The respondent signed the voluntary retrenchment settlement on 18 May 2012. The appellant signed the settlement agreement on 21 May 2012. On the same day 21 May, the Chief Executive Officer announced to the staff that the arbitrator had found that section 197 of the LRA applies and those employees engaged with the fleet operation were transferred to the City retrospectively from 1 March 2012. Of significant importance is that she said:

'To clarify the position on the voluntary retrenchment process, the options [were] available to employees who were not entitled to transfer to the City in terms of section 197 of the Labour Relations Act.

At the sole discretion of Fleet Africa, the voluntary retrenchment was also considered on a case by case basis for those employees who are not 100% engaged in the fleet function of the City. Only in very exceptional cases will the voluntary retrenchment be considered for those employees who are 100% engaged in rendering the fleet function to the City.'[3]

[3] Record vol 1 pages 78-79.

[10] It is common cause that the City's appeal of the arbitration outcome was dismissed on 29 May 2012. Thereafter, the appellant repudiated the settlement agreement on the basis that the 197 transfer applied to the respondent. Unhappy with the appellant's stance, the respondent sought a declaratory order that the settlement agreement be made an order of court.

Labour Court's proceedings

[11] At the outset of the hearing, the appellant raised an objection to the transcript of the meeting held on 16 May 2012. To which the court found that the defect was cured by a sworn affidavit of Van Zyl which was filed on 18 September 2012. Further that the respondent filed a certificate of veracity from the transcribers which was faxed to the appellant's attorneys on 2 December 2013. The court *a quo* then found admissible the transcript of the meeting held on 16 May 2012 chaired by Mr. William Berry.

[12] Turning to the merits of the matter, the court *a quo* was to consider the appellant's objection to its jurisdiction and the contention that there exists no employment relationship between it and the respondent at the time that the settlement agreement was concluded.

[13] In respect of the jurisdiction of the Labour Court, the appellant contended that the settlement agreement could not be made an order of court in terms of section 158(1)(c) of the LRA in that there was no dispute between the parties. The court *a quo,* relying on the judgment of *Greef v Consol Glass (Pty) Ltd*[4] rejected this contention on the basis that the settlement agreement met the requirements of section 158(1)(c)(iv) read with section 158(1A) of the LRA. The court held that the dispute between the appellant and the City was referred to both the Labour Court as well as to private arbitration and there is a written settlement agreement which, the respondent had the right, in her own capacity as employee, to refer to

[4] 2013 (34) ILJ 2821 (LAC).

mediation/arbitration and the Labour Court. Further that, no term of the settlement agreement was disputed. The court reasoned that the contention by the appellant that the settlement agreement was made conditional to the arbitration award is unsustainable because no such clause exists in the settlement agreement. The court then ruled that it had jurisdiction to entertain the matter.

[14] Regarding the validity of the settlement agreement, the court found that although the appellant was not entitled to conclude the settlement agreement, it did so, most diligently, conscientiously and in good faith. This is so because settlement agreements concluded between parties in terms of section 189 and against the backdrop of an anticipated section 197 transfer, are agreements concluded with the purpose of the LRA in the foreground, namely, to advance economic development, social justice, labour peace and the democratisation of the workplace.

Grounds for appeal

[15] The appellant's grounds for appeal may be summed thus that:

i the settlement agreement does not meet the criteria in section 158(1)(c) read with s158(1A) of the LRA and could therefore not be made an order of court.;

ii the appellant did not have the contractual capacity as there existed no employment relationship as the arbitration award retrospectively transferred the respondent to the employ of the City as from 01 March 2012;

[16] The respondent opposed the appeal and prays for the appeal to be dismissed with costs thereby giving effect to the order of the Labour Court.

Reinstatement of the appeal and condonation for the late filing of the power of attorneys

[17] The appellant seeks condonation for the failure to file its power of attorneys and the reinstatement of the appeal having failed to file its record within 60 days of the granting of leave to appeal as contemplated by the rule governing proceedings before the Labour Appeal Court. In view of the stance taking in this appeal, it is my view that the appeal be reinstated and condonation for the late filing of the power of attorneys be granted.

Appeal

[18] At the heart of this appeal is the validity and the enforcement of the settlement agreement. The appellant's contention is that the voluntary settlement agreement was conditional pending the outcome of the arbitration award about the transfer of the employees to the City.

[19] Indeed, the correspondence issued to staff by the appellant's Chief Executive Officer clearly indicated that because the appellant could not at the initial stage determine with absolute accuracy which employees would be transferred to the City, the appellant conditionally included each employee in the 189 consultation process. The appellant took a cautious approach to avoid the eventuality of an employee being left out of the consultation process but who could not be transferred or that the arbitrator may find inoperative the section 197 transfer.

[20] In light of this cautious approach, the appellant maintains that because the settlement agreement was conditional on the outcome of the award, the settlement agreement signed is of no effect as the respondent was transferred as of 01 March 2012 to the City. It is common cause that the respondent was a former employee of the City and she became an employee of the appellant as a result of the outsourcing of the fleet function to the appellant. This was reiterated to her by the appellant's Chief Executive Officer that the voluntary retrenchment process was available to employees who were not entitled to be transferred to the City.

[21] The respondent, on the other hand, denied that she could be transferred in terms of s197 into the employ of the City. She argued that notwithstanding the award, she wanted the agreement enforced and also relied on the minutes of the meeting of 16 May 2012 which she said made it plain that even if she was found to benefit from the 197 transfer she would still be able to get the voluntary severance package.

[22] By virtue of this being an application process, I am obliged to accept the version by the appellant (the respondent in the court *a quo*) which was that in terms of the agreement, the respondent was indeed transferred and thus an employee of the City as and from 01 March 2012. There is nothing in substance or credible on the papers to satisfy the view that the respondent was not one of the employees who was transferred in terms of s197 into the City's employ from 1 March 2012.

[23] With that as the starting point, the question is that can the respondent nonetheless enforce the settlement agreement she concluded with the appellant. It is common cause that for her to do, she was obliged to make that agreement an order of court as the appellant disavows being bound by it. Its argument is that the settlement was concluded in the event of the respondent not being found to be an employee of the City. Having been so found, the settlement is simply of no force and effect.

[24] Respondent disagreed and applied to have it made an order of court in terms of s158(1)(c). This section read with s158(1)(A) reads:

Section 158 (1)(a)…

(b)….

(c) make any arbitration award or any settlement agreement an order of the Court.

(d)…'

> *(1A) for the purposes* of subsection (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…*

[25] Hence, before a settlement agreement can be made an order of court, it must meet the following requirements:

(a) It must be in writing;

(b) It must be in settlement of a dispute or an alleged dispute;

(c) The dispute must be one that either of the parties has a right to refer to arbitration or the Labour Court in terms of the LRA for resolution.

[26] In this matter, I fail to see what the dispute was between the parties. Once the arbitration concluded that there was a s197 transfer, the City automatically took the place of the appellant and this took place on 1 March 2012. The respondent, therefore, became the employee of the City as and from 1 March 2012 and could have no dispute between the appellant and the respondent *a la* employee employer as and from that date. The settlement agreement of 12 May 2012 could therefore not be an agreement in settlement of an employment dispute as between the appellant and the respondent.

[27] In the circumstances, the appeal must succeed and the following order is made:

(i) The appeal is reinstated;

(ii) The late filing if the appellant's power of attorneys is condoned;

(iii) The appeal is upheld;

(iv) The order of the Labour Court is substituted with the following order:

"**the application is dismissed."**

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Waglay JP

I agree

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Murphy AJA

APPEARANCES:

FOR THE APPELLANT:	Adv Snider
	Instructed by Schlebusch Attorneys
FOR THE RESPONDENT:	Adv Cowley
	Instructed by Marting Hennig Attorneys