REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J2115/12

In the matter between:

ERICA NIJS **Applicant**

and

FLEET AFRICA (PTY) LTD **First Respondent**

CITY OF JOHANNESBURG **Second Respondent**

Heard: **17 January 2014**

Delivered: **30 May 2014**

Summary:

JUDGMENT

RAWAT AJ

[1] This is an application for a declaratory order in terms of which it be found that a valid and binding settlement agreement was concluded between the Applicant and the First Respondent, Fleet Africa Pty Limited (Fleet Africa) in May 2012.

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[2] At the outset of the application, the Second Respondent withdrew as a party to the proceedings with the agreement of the Applicant and Fleet Africa.

Background

[3] The Applicant was employed by the Second Respondent for the period six September 1993 until 31 March 2001, in the Public Safety Department, more particularly in the Logistics Division.

[4] On 1 April 2001, the Applicant was transferred in accordance with the provisions of section 197 of the Labour Relations Act 66 of 1995 ("LRA") to an entity known as Super Fleet Power Plus Performance. This entity was later taken over by Fleet Africa at which the Applicant remained employed until May 2012.

[5] Fleet Africa is in the business of managing transport fleets. Until February 2012, there existed a contractual relationship between the First and Second Respondents in terms of which Fleet Africa rendered Fleet Management Services for the Second Respondent on an agreed fee structure which entailed full maintenance leasing and which included a sale and lease back provision of the vehicles which belonged to the Second Respondent.

[6] Upon the termination of the contractual relationship between the First and Second Respondents, a dispute arose between them as to whether the employees of Fleet Africa who mainly performed their duties in relation to the contract between the First and Second Respondents, were to be transferred to the Second Respondent in accordance with the provisions of section 197 of the LRA. The dispute was eventually resolved on 29 May 2012 by way of an arbitration appeal award in terms of which it was held that upon the termination of the contractual relationship between the First and Second Respondents, certain employees of the Fleet Africa had to be transferred to the Second Respondent with retrospective effect from 1 March 2012.

[7] Pending the outcome of the above dispute, the Applicant and the Fleet Africa began the process of entering into a voluntary retrenchment package. The CEO of the Fleet Africa, Mr. Kamagilo Mmutlaka (Mmutlaka) addressed a

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communication to “Valued Fleet Africa Employee”, dated 1 March 2012 and headed “Change in Operational Processes and Structures”.

[8] Thereafter, there is a regular communication from Mmutlaka to staff. On 10 April 2012, at page 45 of Volume 1 under the heading "alternatives to retrenchment considered" at paragraph 13, a letter from him reads:

> ‘Amongst the alternatives, the company will also consider early retirement as an alternative to retrenchment for those employees qualifying for such early retirement in terms of the Super Groups Pension and Provident Fund Rules.’

[9] In a letter dated 18 April 2012,. Mmutlaka, further indicates the pressure that the litigation and uncertainty of the situation is having on Fleet Africa at page 53 of volume 1, it reads:

> ‘The company has continued to fund the employees’ salaries for March 2012 and to date, but cannot afford to fund the salaries for much longer. Should no clear resolution be obtained from the Labour Court on 18 April 2012 and what employees need to be fully aware of is that the company prima facie view is that it cannot afford paying employees’ salaries indefinitely and an urgent resolution of these issues is required.’

[10] Other correspondence of significance included in the bundle of volume 1 of the documents are copies of several electronic mail transmissions between the Applicant and Madelene Harrington (Harrington) Fleet Africa's Human Resources Manageress regarding details pertaining to voluntary retrenchment (page 65 of volume 1).

[11] In one such communication sent on 10 May 2012 at 01:36pm, the Applicant states:

> ‘Hi Madelene,
>
> Thanks for the details. Sorry, my error, 18 years completed is correct.
>
> Please advise:
>
> 1. What is the taxable percentage after the first R30 000.00?

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2. Can you obtain the 2012 pension / provident figures on my behalf?

3. For how long is this?

[12] To which Harrington responded:

'Hi Erica

Herewith package details as requested:

- Retrenchment benefit is 2 weeks for every completed year of service.
- You mentioned 19 years, please check our date of engagement as I only get 18 completed years of service.
- Leave days are calculated until end of June 2012.
- Notice pay – May and June Salary.

UIF – you can claim after June 2012, as your official termination date will be 30/06/2012.

Pension/provident – withdrawal date will be April 2012, to speed up the processing the claim.

Tax – package the first R30 000.00 is tax free. Pension/Provident – first R315 000.00 tax free, thereafter you get taxed 18% up to R630 000.00, R56 700.00 + 26% of taxable income up to R945 000: R141 750.00 + 36% above R945 000.00.

Please let me know if you have any other questions.

[13] The following electronic mail exchange was made between the Applicant and Harrington.

'Hi Madelene,

Thanks for the details. Sorry, my error, 18 years completed is correrct. Please advise:

1. What is the taxable percentage after the first R30, 000.00? not quite sure, will have to look into this for you.
2. Can you obtain the 2012/provident figures on my behalf? Will request for you today

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3. For how long is this offer valid? Until the 11th May 2012,

Kind regards.'

[14] The last communication from Harrington, was a letter regarding the applicant and which reads as follows:

'Dear Sir/Madam

RE: E NIJS – 7506040001082

Please take of the following:

- The above employee worked for the City of Johannesburg Ref no. 0958226 from 6th September 1993 until 31st March 2001.
- He/she was then transferred to Super Fleet Power Plus Performance Ref no. 1028923 from 1st April 2001. We don't have any records of Black Ginger, as the company's name was Super Fleet Power Plus Performance.
- Super Fleet Power Plus Performance became part of Fleet Africa and therefore the Ref no. 06374012. Super Fleet Power Plus Performance doesn't exist anymore.
- That is the reason as to why we can only use his/her engagement date with our company as from 1st April 2001, as City of Johannesburg is a complete separate entity on its own. Although we recognised their original date of employment for all other reasons, we cant complete the U119 form using this date as his UIF contributions were paid over the City of Johannesburg.

Please feel free to contact me should you have any more queries.

Yours sincerely

Madelene Harrington

HR Officer.'

[15] On 16 May 2012 at the meeting chaired by Mr. William Berry, of William Berry Attorney's, who represents Fleet Africa and a recording and admission of which transcript was objected to and is dealt with hereinunder. The

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significance of the transcript is suitably best included at this stage of the background. The relevant verbatim words of Mr. Berry are:

> 'They have to take you, its 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 an 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

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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.'

[16] The settlement agreement which forms the crux of this application was signed by Fleet Africa on 18 May 2012 and on 21 May 2012. It was signed by the Applicant. It reads:

Settlement Agreement

Between

Fleet Africa (Pty) Ltd

(collectively hereinafter referred as "Fleet Africa")

And

Erica Nijs

(hereinafter referred to as the "Employee")

1. The Employee has been granted voluntary retrenchment in terms of the voluntary retrenchment policy applicable at Fleet Africa in respect of the restructure of the businesses. 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 from(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);

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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 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 informant 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 to 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 been explained to the employee and the employee has been given the opportunity to take independent legal advice in respect of the consequences of this agreement.

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

3. The Employee agrees to return all and any of the property of Fleet Africa (including but not limited to documentation, whether recorded in electronic format or otherwise, credit cards, access cards, petrol card and the like on the Employee's last working day as recorded herein, or as directed by Fleet Africa.

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 are defined herein and that she voluntarily binds himself/herself to the agreement in exchange for the benefits provided by this agreement.

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5. Subject to clause 2.5 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 from whatsoever nature arising against Super Group Ltd.

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.

9. No indulgence which either party ("grantor") may grant to the other ("grantee") shall constitute a waiver of any of the rights of the grantor, who 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.'

[17] On the same day, the arbitration award of A.E. Franklin S.C. was signed and released. It reads:

'(a) It is declared that the transfer of assets and other rights and obligations (which constitute a fleet service business operated by the First Applicant until 1 March 2012) from the First Applicant to the First Respondent on the expiry of the second outsourcing service agreement between the First Applicant and the First Respondent, which expiry occurred on 1 March 2012, is a transfer of a business as a going concern in terms of Section 197 of the Labour Relations Act 66 of 1995;

(b) It is declared that the date of such transfer of the business as a going concern is 1 March 2012l

(c) The First Respondent is ordered to comply with its obligations in terms of Section 197 of the Labour Relations Act (in respect of the employees of the transferred business)

(d) The First Respondent is ordered to pay:

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(i) The Applicants' costs, including the costs of the Arbitrator and of the Labour Court proceedings; and

(ii) NUMSA's costs in the arbitration proceedings;

Such costs to be taxed on the High Court scale on a party and party basis.'

[18] This award was challenged by way of an appeal which confirmed the award of Franklin S.C. and that award is dated the 29 May 2012.

[19] The need for this application for a declaratory order arose when Fleet Africa refuted the validity of the settlement agreement signed on 18 May 2012 by the Fleet Africa and 21 May 2012, when it was signed by the Applicant.

[20] In order to create a quick and effective reference to the events as outlined in the background, the Court considers it beneficial and necessary to include the tabulation of the timeline of events in this matter. The timeline, as prepared by Advocate Cowley and agreed to by Advocate Buirski, appears hereunder.

No.	Date	Event
1	6 September 1993 to 31 March 2001	Applicant employed by Second Respondent
2	1 April 2001	Section 197 transfer of employment of Applicant from Second Respondent to Fleet Africa
3	29 February 2012	Contractual relationship between First and Second Respondents terminated
4	1 March 2012	Transfer of business would take place from First to Second Respondent
5	1 March 2012	Fleet Africa informs its employees (including Applicant) that retrenchment process would commence
6	10 April 2012	First staff communication of Fleet Africa to inform the Applicant about the retrenchment process

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7	10 May 2012	Fleet Africa informs Applicant about the details of her retrenchment package
8	16 May 2012	Meeting between Fleet Africa and its employees
9	18 May 2012	Applicant accepts the correct retrenchment package
10	18 May 2012	Retrenchment contract (aka as "SETTLEMENT AGREEMENT") of Applicant signed by Fleet Africa
11	21 May 2012	Applicant signs retrenchment contract
12	21 May 2012	Fleet Africa informed Applicant about result of arbitration between the First and Second Respondents and that it was subjected to appeal
13	29 May 2012	Arbitration appeal's outcome
12	11 June 2012	Fleet Africa repudiates the Applicant's retrenchment contract
13	25 June 2012	Applicant demands specific performance
14	28 June 2012	Fleet Africa states reasons for repudiation

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[21] It is to be specifically mentioned that there are no material disputes of fact on the papers. Rather, the parties differ in their approach to the legal consequences which results from the circumstances of the background to the matter. Fleet Africa contends that the termination of the second outsourcing agreement (and the events which followed) gave rise to the transfer of a business as a going concern as contemplated under section 197 of the Labour Relations Act 66 of 1995 (LRA), whilst the Applicant contends that her employment with Fleet Africa terminated on the conclusion of the settlement agreement.

<u>Fleet Africa's Objection</u>

[22] Advocate Buirski raised the point that a transcript of a meeting held on 16 May 2012 and which was filed under the heading "Index Additional Documents" was inadmissible as it had been filed without a supporting affidavit and therefore has no status. Advocate Cowley responded and drew the Court's attention to Volume 2 of the record, page 173 to 176, which is an affidavit of one Alexander Nathaniël Van Zyl (Van Zyl) and which affidavit reads:

> '2 I am an adult male diesel mechanic and at all times materially relevant to the application an employee of the First Respondent, whose employment has been transferred to the Second Respondent as is the case with the Applicant.
>
> 3. I confirm that I have read the Replying Affidavit of the Applicant and confirm the correctness thereof insofar as same relates to me.
>
> 4. I confirm that on or about 16 May 2012, myself together with other unionised staff members of the Fleet Africa attended a consultation in terms of Section 189 with the First Respondent.
>
> 5. The First Respondent was represented by its HR Executive, Nontuthuko Masuku and its legal representative Mr William Berry.
>
> 6. During the said consultation, whilst voluntary retrenchment packages were being discussed, Mr Berry informed all present verbatim of the following:
>
> "They have to take you, its 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 in full and final settlement of all claims against Fleet Africa, bah bah bah and 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 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 say that we in fact had no obligations to include you on this agreement, but what I'm saying to you is

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> that it’s a legal right for you to transfer, is what this arbitration 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 conditions and 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 retrench and 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.”’

[23] In the rebuttal affidavit, sworn to by Harrington, at page 199 paragraph 20, says the following:

> ‘[I]n respect of the Applicant’s submissions in paragraph 24 and the affidavit of Van Zyl the consultation was likewise recorded by the First Respondent and I submit that the Applicant is required to submit a sworn translation of the recording for it to be properly taken into account in the present application. I submit in this regard that the consultation took place with the non-unionized employees who attended the meeting in their individual capacities. The Applicant was not present at the meeting, nor was she represented.’

[24] This affidavit of Van Zyl was attested to by a Commissioner of Oaths at Parkview Police Station on 18 September 2012 and was filed by the attorneys of record on the same day being 18 September 2012.

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[25] In response, the Applicant filed a copy of the transcript, to which a certificate of veracity is attached from transcribers Lubbe and Meintjies CC and which is dated 22 October 2012 and was faxed to William Berry Attorneys on 2 December 2013.

[26] It, therefore, appears evident to this Court that the Applicant had remedied the flaw identified by Harrington in her rebuttal affidavit and in fact complied with the suggestion to submit a sworn translation of the recording. From this point, Fleet Africa did not raise any further objections on this issue.

[27] The objection raised by Advocate Buirski was also not raised at the outset of the application as a point *in limine*, not only when Advocate Cowley referred to it in his address to the Court, where it became apparent that Advocate Buirski had not seen the document.

[28] Advocate Buirski, upon the Court's questioning as to why he had not seen the transcript before, *inter alia,* responded that he himself may have been at fault. Advocate Buirski also admitted from the Bar that the meeting did take place and did not dispute the contents of the transcript.

[29] The Court, therefore, finds that the transcript of the meeting held on 16 May 2012 and attended by Mr. William Berry for the purpose of consulting with non-unionised affected employees is admissible. The Court has already referred to this transcript in its summary of the background for the purposes of proper chronology of events.

<u>The Issues</u>

[30] The legal issues to be decided are:

1. Whether this Honourable Court has jurisdiction to entertain this Application;

2. Whether Fleet Africa was entitled to enter into the settlement agreement;

3. The validity of the settlement agreement;

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[31] Fleet Africa contended that this Honourable Court does not have jurisdiction to entertain this application on the basis that settlement agreements that are within the contemplation of section 158(1)(c) are settlement agreements that arise as a compromise or resolution to any litigation brought in terms of the Act.

[32] Section 158(1)(c) of the Act provides as follows

> 'The Labour Court may:
>
> "Make any arbitration award or any settlement agreement an order of the Court."'

[33] Fleet Africa relies on the decision of *Molaba and Others v Emfuleni Local Municipality*,[1] where it was recognised that the requirement in the definition in section 142A are relevant for the purposes of interpreting section 158(1)(c). In this regard, section 142A of the Act may make any settlement agreement in respect of any dispute that has been referred to the Commission an arbitration award and that a settlement agreement is a written agreement in settlement of a dispute that a party has a right to refer to arbitration or to the Labour Court.

[34] Fleet Africa argued that the *Molaba* decision held that although a broader interpretation of the Court's power in terms of the section 158(1)(c) of the Act may be defensible, such an interpretation would entirely undermine the limitations established by section 142A and blur the lines between contractual claims and claims that could be resolved by orders under section 158(1)(c).

[35] Further, it was held that a narrow interpretation of the section was preferred to limit the application of section 158(1)(c) of the Act to those instances where a party has validly referred a dispute to the court for adjudication and where a dispute at any time after the referral has been settled.

[36] Fleet Africa argued that in the present case no matter of mutual interest had been validly referred to the court for adjudication prior to the conclusion of the settlement agreement that the Applicant seeks to enforce by way of this application.

[1] (2009) 30 *ILJ* 2760 (LC).

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[37] However in *Greef v Consol Glass (Pty) Ltd*,[2] the Learned Court in overturning the decision of the Court *a quo*, found that in following *Molaba*, its interpretation of section 158(1)(c), without taking into account section 158(1)(A), but with reference to, in particular section 142(A)(1), the equivalent of which was desirably excluded from Section 158, was wrong.

[38] Section 158(1)(c) must be read with section 142(1)(A) which reads:

> 'For the purposes of subsection (1)(c) a settlement agreement is a written settlement agreement of a dispute that a party has the right to refer to arbitration or to the Labour Court ...'

[39] The Learned Court, in the *Greef* decision said:

> '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 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 (c), must (i) be in writing, (ii) be in settlement of a dispute (ie it must have as its genesis a dispute); (iii) 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 not be of the kind that a party is only entitled to refer to arbitration in terms of s 22(4), or s 74(4) or s 75(7).'[3]

[40] At the time of the settlement agreement that the Applicant and the Fleet Africa had entered into, Fleet Africa was one of the Applicants in a dispute with the City of Johannesburg. The Motor Industry Staff Association was the Second Applicant and the National Union of Metal Workers of South Africa, the Third Applicant.

[41] The essence of the dispute here was that Fleet Africa concluded two successive "Outsource Service Agreements" in 2001 and 2006 respectively. Fleet Africa, in terms of these two agreements operated and managed the City's vehicle fleet. The second outsourcing agreement terminated on 29

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[2] (2013) 34 *ILJ* 2821 (LAC) at para 17.
[3] Ibid at para 19.

February 2012. According to Fleet Africa, termination of the second outsourcing agreement and the re-purchase of vehicles which followed triggered the operation of section 197 of the Act. The City disagreed with this contention. It took the stance that no business was transferred to it upon termination of the second outsourcing agreement. All that happened, the City maintained, was that the services provided by Fleet Africa were put out to tender and would in due course be rendered by a new service provider. The City, therefore, contended that section 197 does not apply.

[42] In order to resolve this dispute (and in an effort to obtain clarity in regard to the position of the employees who had been engaged in providing the fleet management business for the City), Fleet Africa approached the Labour Court by way of an urgent application launched on 13 March 2012. It sought the following relief:

> 'Declaring that the transfer of assets and other rights and obligations (which constitute a fleet service business operated by the Applicant until 1 March 2012 from the Applicant to the Respondent, on expiry of the second outsource service agreement between the Applicant and the Respondent, which expiry occurred on 1 March 2012, is a transfer of a business as a going concern in terms of Section 197 of the Labour Relations Act 66 of 1995 ("the Act");
>
> Declaring that the date of such transfer of the business as a going concern is 1 March 2012;
>
> Ordering the Respondent to comply with its obligation in terms of Section 197 of the Act (in respect of the employees of the transferred business).'

[43] The parties later referred the application to be decided before A.E. Franklin S.C. at an arbitration process. The parties agreed to, *inter alia,* the following term of reference to the Arbitrator:

> '2.3. The Arbitrator will have the powers to make a decision or order, including as to procedural matters and costs that a Judge of the Labour Court would have had in dealing with this matter. The costs of the Labour Court proceedings will be costs in the arbitration.'

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[44] In addition, the primary purpose of the settlement agreement on the part of Fleet Africa was specifically to, in writing, obtain the Applicants consent to a voluntary retrenchment package and in return to waive her right to lodge a dispute in whatever forum. This is best captured by reference to the relevant clause in the settlement agreement:

> '2. The parties agree that in full and final settlement of any claims of whatsoever nature arising from (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);
>
> 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 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

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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 to 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 been explained to the employee and the employee has been given the opportunity to take independent legal advice in respect of the consequences of this agreement.

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

[45] This Court is satisfied that this matter is consistent with the preferred broader interpretation of section 158 (1)(c),158 (1A) and 158(1)(a), as held in *Greef* which in turn followed the case of *Bramley v John Wilde t/a Ellis Alan Engineering and Another*.[4]

[46] In the interim, pending the outcome of, first, the referral to the Labour Court and thereafter, the referral of one and the same matter to Arbitration, Fleet Africa embarked on an extensive process of consultation in terms of section 189 of the Act. The background and the timeline sketch a clear and uncontested chronology of these consultations and related events.

[47] On the contention of Fleet Africa that the arbitration award effectively takes over the settlement agreement, the Court would have to, *inter alia,* find:

1. That the employment relationship between Fleet Africa and the Applicant became non-existent at the time of the retrenchment consultations because of the appeal award of 29 May 2012 which made a retrospective order that an effective section 197 takeover occurred on 1 March 2012.

[4] (2003) 24 ILJ 157 (LC).

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2. That the settlement agreement is null and void as it was signed on 18 May 2012 by the Fleet Africa and 21 May 2012 by the Applicant.

3. That this Court has no jurisdiction to hear this application as the effect of the retrospective order was that the Applicant was transferred to the Second Respondent.

4. That the rights under section 197 of the Act exonerate Fleet Africa from its obligations from the date of the transfer.

[48] In consideration of these consequences which Fleet Africa contends ought to be found, the court deems it appropriate to examine section 197 and its correlation to section 189 of the Act.

[49] The extensive and diligent process of consultation in terms of section 189 embarked on from March to May 2012 and which has been referred to in sufficient detail herein, is clearly that of an astute employer who in its own words is acting as:

> 'A company (which) acknowledges its obligations and employee rights in this regard lawfully and in good faith and in accordance with the Labour Relations Act" and "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.'

[50] Section 197(2) of the Act reads:

> '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;

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(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 of 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.'

[51] On a broad interpretation of section 197(2), the automatic consequences of a transfer of business taking place are as stipulated in paragraphs (a) to (d). What is of immense importance is the intention encapsulated by the exclusion contained in "Unless otherwise agreed in Subsection 6".

[52] Section 197(6)(a) reads:

'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 new employers acting jointly, on the one hand; and

(ii) the appropriate person or body referred to in section 189 (1), on the other.'

[53] In this instance, a transposing of the parties in this matter would be, in terms of section 6(a)(i), the old employer and in terms of section 6(a)(ii), the employee. This is in terms of section 189(1) which establishes the hierarchy of parties in a consultative process. Section 189 (1) reads:

'When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult-

(a) any person whom the employer is required to consult in terms of a collective agreement;

(b) if there is no collective agreement that requires consultation-

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(i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and

(ii) any registered trade union whose members are likely to be affected by the proposed dismissals;

(c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or

(d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.'

[53] This criteria of consulting parties essential to the process of consultation in terms of section 189 is crucial and if not allowed will result in the agreement being invalid.[5]

[56] This is indicative of the flexibility of section 197 in that it specifically caters for alternative possibilities to its consequences, whilst at the same time ensuring a standard of compliance that the agreement is required to be in writing and has to meet the criteria of section 189(1).

[57] Section 197(2) starts with the word "if": "If" in this context, according to Websters New World Dictionary means "on condition", "in case that" and could also mean "in anticipation of". This meaning and the explicit use of the word "If", in the Court's view, extends the notion of flexibility even further, creating the perfect space for the situation as arose in this matter where there was a lacuna between the referral of the matter, first in the Labour Court and then, to arbitration and the delivery of the appeal award on 29 May 2012. During this time, Fleet Africa was faced with responsibility of retaining and maintaining its staff complement which rendered services to the Second Respondent. On the facts before this Court, it was appropriate for Fleet Africa

[5] See *Douglas and Others v Gauteng MEC for Health* [2008] 5 BLLR 401 (LC) and *SAMWU and Another v SALGA and Others* [2010] 8 BLLR 882 (LC).

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to mitigate its losses and to commence the consultation process that it undertook in terms of section 189.

[58] Section 189, in parallel with section 197, involves communication between the employer and employee directly or via the accepted representation channels. In a world as technologically connected as ours at present is, the old English concept of the employment relationship being one of “master and servant”, has long gone been outgrown.

[59] In the global village of economy, transnational and multi-national corporations with tentacles extending far and wide have impacted or rather redefined the traditional and neat employment relationship. At national level, the picture is no different in a country as South Africa, with its impeccable Constitution, the arena of Labour Law has become firmly defined and statutory intensive. This has to some extent, led to the development of “core business emphasis”.

[60] Businesses today prefer to contain their business activities to what their “core business” is and to outsource other necessary activities in their scope and employment, to other “core-business” companies. This is what the relationship was in respect to the First and Second Respondents. The foundation of a relationship of such a kind, is the tender award which defines all the terms and conditions of the two parties. Fundamental to this, is the inevitable period of existence which has a definite start and a definite termination.

[61] The harsh reality is that whilst the contracting parties, in this instance the First and Second Respondents, obviously ensure a profitable and constructive consequence of the contractual relationship for each other, it does have a double–edged sword effect on the employees who serve in such a relationship.

[62] On the one hand, employees enjoy security for a defined period. But there is the knowledge that at the end of the period of the contract, it could mean that they could well join the ranks of the unemployed. Even where the possibility of a section 197 takeover existed as in this case, it was subject to the determination of, at first, the Labour Court, and then, the Arbitrator.

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[63] It is, and one does not require a psychologist to pronounce on this, a most frightening time for both the company as well as the affected employees. The prospect of having a regular income with benefits possibly, of having a place which creates a format of life to a person, who more often than not, has others who likewise, depend on the stability, comfort and provision that such a position of employment inevitably provides.

[64] In this instance, the Applicant, Erica Nijs, was employed by the Second Respondent, the City of Johannesburg, from 6 September 1993 to 31 March 2001. She was part of a Section 197 takeover which took effect on 1 April 2001. The final contractual relationship between the First and Second Respondents terminated on 29 February 2012. On 1 March 2012 and only finally pronounced on 29 May 2012, would be the transfer of business from the Fleet Africa to the Second Respondent. On 1 March 2012, Fleet Africa informed its employees (of which the Applicant was one) that the retrenchment process would commence. This process has been referred to hereinabove in the background and timeline.

[65] This timeline and the explicit and obviously *bona fide* communication of Harrington and the Applicant regarding her retrenchment package against the background of this situation between the First and Second Respondents lends itself to a complete mosaic of "corporate events" as it unfolded in this scenario.

[66] On 29 May 2012, the Applicant commenced her contract of employment with the Second Respondent, as it was in the circumstances, the natural thing to do.

[67] Has she, as argued by Fleet Africa, waived her rights in terms of the settlement agreement by assuming her employment with the Second Respondent?

[68] This court thinks not and this is where the words of Mr. William Berry, as the Fleet Africa's labour specialist, tasked with the addressing of and advising of the affected employees as part of the consultation process of section 189, is of utmost relevance.

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[69] He stated, *inter alia*, and it is repeated, yet again here:

> 'We want to be able to at a later stage say that we in fact had no obligation to include you in this agreement, but what I'm saying to you is that its 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 do so". You are actually getting a double benefit.'

[70] And this is precisely what the Applicant did.

[71] This Court does not consider it even necessary but for the sake of exploring all aspects on the issue of jurisdiction refers to the case of *Franks v University of the North*,[6] where the learned Court found that the provisions of section 77 of the Basic Conditions of Employment Act 75 of 1997, confers concurrent jurisdiction on the Labour Court with a Civil Court to hear and determine any matter concerning a contract of employment, irrespective of whether any basic conditions of employment constitutes a term of the contract.

[72] This Court has deliberately elected not to proceed with each issue that it has been tasked with adjudicating on, under separate headings. The facts here are convoluted and as such are best referred to from a holistic perspective as opposed to a compartmentalised approach. The court will proceed to make findings on all issues pertaining to this matter.

<u>The issue of jurisdiction</u>

[73] Section 158(1)(c)(iv) read with section 158(1A) is met in every respect. The dispute between the First and the Second Respondents was referred to both the Labour Court as well as to private arbitration and there is a written agreement of settlement, which the Applicant had the right, in her own capacity as employee, to refer to mediation/arbitration and the Labour Court. In this case, no term of the agreement of settlement was disputed. What was contended was that the agreement of settlement was made conditional to the arbitration award. No such clause is contained in the agreement of settlement which appears in its totality in this judgment.

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[6] (2001) 22 ILJ 1158 (LC) at 15.

[74] Whilst Fleet Africa would like to convince this court that it did not have the relevant juristic capacity to enter into such an agreement of settlement, its long, thorough and direct communications with its employees as a whole and with the Applicant, herself, speak otherwise.

[75] The Labour Appeal Court in *South African Post Office Limited v CWU obo Permanent Part – Time Employees*,[7] held that there was a dispute between the parties about the interpretation of the said agreement and it was ordered that the dispute between the parties about the interpretation of the agreement be referred to the CCMA.

[76] No such dispute exists in this matter.

[77] The agreement of settlement and having satisfied all the requirements in relevant sections of the Act and the cases above, which has been extensively canvased. This being so, this Court is in a position to exercise its discretion to determine whether, on all the further facts and circumstances, the agreement of settlement be made an order of court.

[78] The second issue is whether Fleet Africa was entitled to enter into the settlement agreement with the Applicant. Much has been traversed on the consideration of all the facts in the context and background of the dispute between the First and Second Respondents. In fact, the in-depth and incisive interpretation of section 197(2) read with section 197(6) and its particularly language in the use of the word "if" and the opening sentence of the section, lead to this Court's finding that the flexibility afforded in this section read together with section 189 in so far as it is of relevance here, that the agreement of settlement made against the background of this matter and in contemplation of and anticipation of a transfer of a contract of employment. In which event, the consequences of section 197(2)(a) and (b) and (c) come into effect. Section 189 is to be seen as running parallel to section 197 in this context.

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[7] (2014) 35 ILJ 455 (LAC) at para 24.

[79] This Court holds the view that agreements of settlement 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 Labour Relation Act in the foreground, namely, to advance economic development, social justice, labour peace and the democratisation of the workplace.

[80] The Court finds that Fleet Africa was not only entitled to conclude the agreement of settlement but that it did so, most diligently, conscientiously and in good faith, for all the reasons already traversed.

[81] The Court makes the following order:

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.

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Rawat, AJ

Acting Judge of the Labour Court

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APPEARANCES:

For the Applicant:	Adv. HH Cowley
Instructed by:	Martin Hennig Attorneys
For the First Respondent:	Adv. P Buirsky
Instructed by:	William Berry Attorneys
For the Second Respondent:	Mr. C Todd
Instructed by:	Bowman Gilfillan

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