



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JA118/2022

In the matter between:

KATISO TRANSPORT AND LOGISTICS CC

First Appellant

GHALIB ISMAIL

Second Appellant

and

EAGLE LINER TRANSPORT (PTY) LTD

First Respondent

**THE SOUTH AFRICAN ROAD PASSENGER
BARGAINING COUNCIL**

Second Respondent

**THE INDIVIDUALS LISTED IN ANNEXURE "A" TO THE
NOTICE OF MOTION**

Third to Further Respondents

Heard: 26 September 2023

Delivered: 30 November 2023

Coram: Mlambo JA, Davis JA et Smith AJA

JUDGMENT

DAVIS AJA

Introduction

- [1] This appeal against an order of the court *a quo* of 5 April 2022 concerns a limited application of s 197 of the Labour Relations Act¹ (LRA) to a group of employees (third to further respondents) who at least until 5 November 2020 had been employed by the first respondent.

The factual background

- [2] The material facts in this case were largely a matter of common cause. The second appellant is the sole member of the first appellant which is the holder of some 102 cross-border operating licenses required in terms of the National Land Transport Act² to conduct bus services to neighbouring countries and, in particular within the context of this dispute, to Zimbabwe. Prior to 1 December 2016, Eagle Liner CC and Cream Magenta 326 (Pty) Ltd made use of the first appellant's cross-border licenses which were issued in the latter's name to provide, *inter alia*, cross-border bus services.
- [3] On 1 December 2016, the first respondent acquired the business of Cream Magenta 326 (Pty) Limited and Eagle Liner CC. The first appellant retained the licences in its name as the licenses had been issued to it and could not be transferred. The second appellant was an employee of the first respondent and managed its operations. Mr Faizel Bhayal (Bhayal) and Mr Mohamed Paruk (Paruk) each held a 38% interest in the first respondent, the balance being held by the second appellant.
- [4] On 10 December 2020, the second appellant, together with Bhayal and Paruk, concluded an agreement in terms of which the former relinquished his 24% interest in the first respondent and, simultaneously obtained ownership of vehicles and trailers to the value of R14 million. In addition, Messrs Bhayal and Paruk paid R2 million to the second respondent. The transaction was structured

¹ Act 66 of 1995, as amended.

² Act 5 of 2009.

in this way as Bhayal and Paruk were unable to meet the balance of the value of the second respondent's 24% shareholding of R16 million. As a result, it was agreed that Bhayal and Paruk would utilise some of the assets of the first respondent to discharge their obligations to the second appellant. Consequently, the second appellant took transfer of 13 busses and trailers that were used to undertake the cross-border service which hitherto had been provided by the first respondent.

- [5] It is also common cause that interprovincial travel in South Africa was also provided by the first respondent, although this constituted a separate part of the business and did not require the employment of cross-border operating licenses. These cross-border operating licenses remained the exclusive property of the second respondent.
- [6] The upshot of this agreement between the parties was the transfer of cross-border services to the second appellant and/or the first appellant, now to be undertaken separately from business (inter-provincial transport services) which continued to be undertaken by the first respondent.
- [7] Three weeks prior to the conclusion of this agreement, that is on 5 November 2020, 88 employees, being the third to further respondents in this appeal, referred a dispute to the CCMA on the basis that the cross-border services had been terminated without notice to them and further that they were not given an official letter advising them of this fact. In terms of the referral to the CCMA, they sought a range of monetary relief.
- [8] This dispute was referred to arbitration which, at the time that the matter was heard before the Court *a quo* and indeed even at the time of this appeal, remained pending. Both the first appellant and the first respondent disputed that they were the employer of these employees. By contrast, the first to further respondents contend that they were employed by the first respondent and that they were unaware of any internal arrangements the between first respondent and the first appellant relating to their employment.

- [9] Within the context of these pending arbitration proceedings, the first respondent approached the Court *a quo* for a declaratory order in the following terms:

‘It is declared that to the extent that the fourth and further respondents were employees of the applicant, their employment has transferred to the first respondent, alternatively, to the second respondent, in terms of s 197 of the Labour Relations Act 66 of 1995, with effect from the implementation of the agreement dated 10 December 2020 pursuant to which the first and/or second respondents acquired the cross-border services business as a going concern.’

- [10] As Van Niekerk J sitting in the Court *a quo* said:

‘What Eagle Liner seeks is an order to the effect that by virtue of the application of s 197, at least with effect from 10 December 2021, the agreement signed on that date triggered the application of s 197 in respect of the employment contracts of any of [the] fourth to further respondents who may be found to have been employed and dismissed by Eagle Liner.’

The judgment of the court *a quo*

- [11] Reviewing the impressive body of jurisprudence which has been created in terms of disputes related to s 197 of LRA, Van Niekerk J concluded thus:

‘So while it is correct, as counsel for Ismail and Katiso submitted, that the agreement was no more than an arrangement for the sale of Ismail’s beneficial interest in Eagle Liner in which Ismail was paid for his shares partly in cash and in assets, that is not the end of the enquiry. What is in issue is the substance of the transaction. Any transfer of assets, whatever the underlying causa, will ordinarily be a relevant factor in any enquiry into the application or otherwise of s 197. In the present instance, the transfer of the buses and trailers enabled Ismail and/or Katiso to continue with the cross-border service, it also having been agreed that Ismail would retain the cross border operating licences necessary for the conduct of that part of Eagle Liner’s business.’

- [12] As a consequence of this finding, Van Niekerk J made the following order:

'It is declared that to the extent that the fourth and further respondents were employees of the applicant, their employment was transferred to the first respondent, alternatively, the second respondent, in terms of s 197 of the Labour Relations Act 66 of 1995, with effect from the date of the implementation of the agreement dated 10 December 2021, pursuant to which the applicant's cross border services business was transferred as a going concern.'

The appeal

- [13] Mr Van As, on behalf of the appellants, reduced his submissions to one fundamental argument. In terms of the agreement, it appears that the second appellant acquired 13 busses and trailers that had previously been utilised in the course of the first respondent's overall business. As such, there were significant assets which remained in the possession of the first respondent, comprising infrastructure, management, operational resources, mechanics, workshops and the balance of the busses which were employed in the first respondent's business.
- [14] It was not disputed by Mr Van As that s 197 clearly provides that, with respect to a transfer of business for the purposes of the section, business "*includes the whole or part of any business, trade undertaking or service*". Accordingly, he did not place into dispute the finding of the Court *a quo* that, although the first respondent retained the inter-provincial transport business, the fact that the cross-border operations had now been transferred to the appellant was sufficient justification for the conclusion that part of the business had been transferred to appellants as a going concern, in terms of s 197 of the LRA.
- [15] Mr Van As' fundamental submission was that the manner in which the order of the Court *a quo* had been couched was that, to the extent that the third to further respondents were employees of the first respondent, their employment contracts now fell to be treated in terms of s197 of the LRA. He contended that the problem was that, save for the service provided by the 13 buses and the employees necessary to ensure that the cross-border service could operate, the balance of

the assets as well as the employees of the first respondent were not so transferred. Whatever the dispute of these employees' dismissal might have been, that part of the business had not been transferred and could not therefore fall within the scope of s 197 of the LRA.

Evaluation

- [16] There was in effect no opposition to this submission offered by Mr Boda, who appeared on behalf of the first respondent. His main point was that the order clearly referred to the cross-border service only and did not need any further clarification. However, as Mr Van As submitted, the effect of the order will be that the appellants, and for that matter the individual respondents, would be precluded in law, based on the doctrine of *res judicata*, from disputing in the arbitration proceedings, to which reference has been made, that the individual respondents were employed in respect of inter-provincial bus services. Their service contracts had remained with the first respondent, notwithstanding the implementation of the agreement and thus had to be excluded from the ambit of the declaratory order.
- [17] For this reason, the order granted by the Court on 5 April 2022 needs to be set aside and replaced by an order that reflects the accurate position, namely that only those employees who were employees in respect of the cross-border services should be covered by the declaratory order so issued.
- [18] For this reason, the order of the Court *a quo* of 5 April 2022 is set aside and substituted with the following order:

Order

1. The cross-border service of the first respondent, consisting of 13 busses and drivers thereof, has been transferred as a going concern from the first respondent to the first appellant.

2. There is no order as to costs.
3. There is no order as to costs in the appeal.

DAVIS AJA

Mlambo JA and Smith AJA concur.

APPEARANCES:

THE APPELLANT:

MJ van AS

Instructed by Mayet Vittee Inc

THE RESPONDENTS:

FA Boda SC

Instructed by Jajbhay Attorneys