IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA108/14

In the matter between:

ATLAS PACKAGING (PTY) LTD **Appellant**

and

STYLIANOS PALIERAKIS **Respondent**

In Re

STYLIANOS PALIERAKIS **Applicant**

and

ATLAS CARTON AND LITHO CC (IN LIQUIDATION) **First Respondent**

ATLAS PAPER SACKS CC **Second Respondent**

ATLAS PACKAGING (PTY) LTD **Third Respondent**

Heard: **10 September 2015**

Delivered: **21 October 2015**

Summary: Application of s197A of the LRA in respect of a scheme of arrangement or compromise entered into in order to avoid winding up – court should examine the true nature of the contractual agreement. Appellant contending that a scheme of arrangement or compromise was entered into

between it and another party to avoid the winding up of the latter for reasons of insolvency and consequently s197 of the LRA does not apply - contractual arrangements between parties not making use of the provisions of s311 of the Companies Act of 1973 - purpose of a scheme of arrangement or compromise to avoid a winding up order - –arrangement or compromise between the parties not serving its intended purpose but to circumvent the provisions of s197 of the LRA – Appeal dismissed with costs.

Coram: Davis JA, Coppin JA and Savage AJA

JUDGMENT

DAVIS JA

Introduction

[1] This is an appeal against an order of Molahlehi J of 20 June 2014 in which, he dismissed a preliminary point raised by appellant that a dispute concerning an alleged unfair dismissal claim of respondent stands to be determined in terms of s197A (1)(b) of the Labour Relations Act No.66 of 1995 ('LRA').

[2] Briefly, the background can be described thus: Respondent was dismissed for operational reasons by third respondent on 14 April 2010. On 29 September 2010, first respondent ('Atlas Carton') and second respondent ('Atlas Paper') concluded a business sale agreement with appellant. On 5 August 2011, Atlas Carton and Atlas Paper were placed into voluntary liquidation which was later converted into compulsory liquidation on 7 September 2011. Appellant contends that, although the transfer of the business from Atlas Carton took place as a going concern, the provisions of s197 of the LRA do not apply, as the dispute is governed by s197A of the LRA.

[3] The significance of this argument is that, in the event that s197A of the LRA is found to be applicable, respondent would have no claim against appellant because the latter would bear no liability in respect of the alleged claim. By contrast, if the decision of Molahlehi J is upheld, the matter would have to proceed further on the merits of the alleged dismissal as well as in respect of a determination of quantum.

Appellant's case

[4] Appellant's case is based on s197 A of the LRA which provides:

'197 A Transfer of contract of employment in circumstances of insolvency

(1) This section applies to the transfer of a business-

(a) if the old employer is insolvent; or

(b) if a scheme of arrangement or compromise is being entered into to avoid winding-up or sequestration for reasons of insolvency.

(2) Despite the Insolvency Act, 1936 (Act No. 24 of 1936), if a transfer of a business takes place in the circumstances contemplated in subsection (1), unless otherwise agreed in terms of s 197 (6) –

(a) the new employer is automatically substituted in the place of the old employer in all contracts of employment in existence immediately before the old employer's provisional winding up or sequestration;

(b) all the rights and obligations between the old employer and each employee at the time of the transfer remain rights and obligations between the old employer and each employee;

(c) anything done before the transfer by the old employer in respect of each employee is considered to have been done by the old employer;

> (d) the transfer does not interrupt the employees' continuity of employment and the employee's contract of employment continues with the new employer as if with the old employer.
>
> (3) Section 197 (3), (4), (5) and (10) applies to a transfer in terms of this section any reference to an agreement in that section must be read as a reference to an agreement contemplated in s 197 (6).
>
> (4) Section 197 (5) applies to a collective agreement or arbitration binding on the employer immediately before the employer's provisional winding up or sequestration.
>
> (5) Section 197 (7), (8) and (9) does not apply to a transfer in accordance with this section.'

[5] Critical to appellant's case is the contention, based upon s197A (1)(b), that there was a scheme of arrangement or compromise entered into between appellant and Atlas Carton to avoid the winding up of the latter for reasons of insolvency.

[6] It is common cause that the contractual arrangements between appellant and Atlas Carton did not make use of the provisions of s311 of the Companies Act of 1973, the relevant portion of which provides:

> 'Where any compromise or arrangement is proposed between a company and its creditors or any class of them, or between a company and its members, the court may, on application of the company or any credit member of the company, or in the case company being wound up, of the liquidator, or if the company is subject to judicial management order, the judicial manager, order a meeting of the company or class creditors, or the members (as the case may be), to be summoned in such matter as the court may direct.'

[7] However, in *Henochsberg* On the Companies Act *71 of 2008*[1] at 536 – (7) it is contended that specific reference is not made to s311 of the Companies Act of 1973 in s197 A, which, on this line of argument is intended to apply not only to a

[1] P Delport *Henochsberg* *On the Companies Act* *71 of 2008* Vol 1 (LexisNexis 2011).

compromise or scheme of arrangement implemented in terms of s311 of the 1973 Companies Act, but also in respect of common law arrangements and compromises.

[8] I remain uncertain as to how a common law compromise or scheme is to apply in the context of s197 A. In *Henochsberg* On the Companies Act *71 of 2008*, it is cited as support for his proposition the judgment in *Ex Parte NBSA Centre Ltd* 1987 (2) 783 (T) (*Ex Parte NBSA)* and an earlier judgment in *Ex Parte Lomati Landgoed Beheerende Eiendoms Bpk* 1985 (2) SA 517 (W).

[9] Unquestionably, Coetzee DJP in *Ex Parte NBSA (supra)* accepted that not every so called arrangement is an arrangement in terms of s311. Coetzee DJP went on however to say at 802B that “only an arrangement between the company and its members or creditors or a class thereof can be an arrangement. When member’s shares are to be transferred to or to be obtained by a third person or other members of the company this question arises. In every case it would have to be determined on a consideration of all the relevant aspects of the scheme and the surrounding facts whether it is such an arrangement between the company and its members or creditors”.

[10] In this *dictum,* the learned judge clearly envisaged that a court would have no jurisdiction to recognize some other form of arrangement outside of the provisions of s311. Most certainly these two judgments do not afford definitive support for the contention that s197 A can be interpreted to include a compromise or scheme which is not implemented in terms of s311 of the Companies Act, but rather under the common law.

[11] Nonetheless, for reasons that will become apparent, it is not necessary to decide this question definitively. A prior question arises, in this case, namely, was there a genuine scheme of arrangement or compromise, which had been entered into to avoid the winding up of Atlas Carton.

[12] In evaluating the relevant contract, a court must be cognisant of the doctrine regarding simulated transactions. This doctrine was definitely expounded in *Commissioner of Customs and Excise v Randles Brothers and Hudson Limited*[2] where Watermeyer JA said:

> 'I wish to draw particular attention to the words "a real intention, definitely ascertainable, which differs from the simulated intentions", because they indicate clearly what the learned Judge meant by "disguised" transaction. A transaction is not necessarily a disguised one because it is devised for the purpose of evading the prohibition in the Act or avoiding liability for the tax imposed by it. A transaction devised for that purpose, if the parties honestly intend it to have effect according to its tenor, is interpreted by the Courts according to its tenor, and then the only question is whether, so interpreted, it falls within or without the prohibition or tax.
>
> A disguised transaction in the sense in which the words are used above is something different. In essence it is a dishonest transaction: dishonest, in as much as the parties to it do not really intend it to have, *inter partes*, the legal effect which its terms convey to the outside world. The purpose of the disguise is to deceive by concealing what is the real agreement or transaction between the parties. The parties wish to hide the fact that their real agreement or transaction falls within the prohibition or is subject to the tax, and so they dress it up in a guise which conveys the impression that it is outside of the prohibiting or not subject to the tax. Such a transaction is said to be in *fraudem legis*, and is interpreted by the Courts in accordance with what is found to be the real agreement or transaction between the parties.
>
> Of course, before the Court can find that a transaction is in *fraudem legis* in the above sense, it must be satisfied that there is some unexpressed agreement or tacit understanding between the parties. If this were not so, it could not find that the ostensible agreement is a pretence. The blurring of this distinction between an honest transaction devised to avoid the provisions of a statute and a transaction failing within the prohibitory or taxing provisions of a statue but

[2] 1941 AD 369.

> disguised to make it appear as if it does not, gives rise to much of the confusion which sometimes appears to accompany attempts to apply the maxim quoted above.'[3]

[13] From this approach to the proper classification of a contact, a court is manifestly entitled to examine the substance and purpose of the agreement in order to determine its true nature. See for more recent authority *Roshcon v Anchor Auto Body Builders and Others* 2014 (4) SA 319 (SCA) at 332-334.

[14] It follows that the threshold question which arises in this case requires that this Court looks into the true nature and substance of the contract between appellant, Atlas Carton and one Nicolas Gargassoulas, which the appellant alleges was a scheme of arrangement or compromise entered into to avoid the winding up of Atlas Carton. From the papers, it is clear that Mr Gargassoulas controlled both the corporate entities which were parties to this agreement.

[15] It is now necessary to drill down into the fundamentals of the agreement. In terms of the agreement, Carton Atlas agreed to sell to the appellant "the business as a going concern including the subject matter. The business was defined as the packaging material business currently carried on by the seller as a going concern at the premises." The subject matter was defined as including the current assets, the fixed assets, goodwill, the intellectual property rights, the right title and interest in and to the contracts, the sold liabilities and the employees. It excluded "any benefit or risk to the Seller arising pursuant to the Mondi Litigation and any other assets or liability not specifically mentioned or referred to in this clause."

[16] The purchase price was in an amount equivalent to the net asset value. Net asset value was defined as follows:

> '"Net Asset Value" – the net asset value of the Seller as at the Effective Date, determined with reference to the Effective Date Accounts and which shall comprise –

[3] At 395 – 396.

1. the aggregate value of the Fixed Assets and Current Assets of the Seller at the Effective Date (excluding Goodwill, Intellectual Property Rights and other intangible assets) less-

1.1 the total of all provisions (made in terms of generally accepted accounting practice) in respect of such assets; and less

1.2 the Sold Liabilities.'

[17] Sold liabilities was defined as follows:

'The liabilities of the Seller to be assumed by the Purchaser and comprising –

1. the trade liabilities of the Seller in respect of the Business as at the Effective Date, incurred in the ordinary, normal and regular course of business, including without limitation, all employee related liabilities;

2. the amount owing by the Seller by way of bank overdraft as at the Effective Date;

3. the Member's Loans;

4. any third party loans owing by the Seller and any other non-current liabilities of the category described in the Base Date Accounts;

5. the liability of the Seller and the Business in respect of taxation;

6. any claims against the Seller and/or the Business in respect of product liability or breach of contract, the cause of which arose or was incurred prior to the Effective Date, but specifically excluding the amounts (including legal costs), owing by the Seller pursuant to the Mondi litigation.'

[18] The agreement provided that the purchaser shall discharge the sold liabilities as defined as and when they fell due for payment. However, specific provision was made for the repayment of the member's loan; that is the loan to Mr Gargassoulas. In this connection, the agreement provided:

> 'The purchaser hereby undertakes to assume the Member's Loans and repay same to Gargassoulas or to any third party to whom Gargassoulas may cede his claim as and when it is in a position to do so, and to this end, the same terms and conditions that applied to the repayment of the Member's Loans by the Seller, shall apply mutatis mutandis to the Purchaser. The Purchaser undertakes as its costs to pass and cause to be registered in favour of Gargassoulas or to any third party to whom Gargassoulas may cede his claim a Special and General Notarial Bond over the Business and the Fixed Assets in an amount of R 5 000 000, 00 (FIVE MILLION RAND) to secure the repayment of the Member's Loans such bond to be registered by 2010.'

[19] One final clause requires attention. Clause 19 dealt specifically with employees. It reads as follows:

> 'It is recorded that as the Business is sold as a going concern, in terms of s 197 A of the Labour Relations Act, 1995, all contracts of employment between the Employees and the Seller as at the Effective Date shall continue in force between the Purchaser and the employees without interruption of the employee's continuity of employment.
>
> The Seller hereby indemnifies the Purchaser and holds it free and harmless against any and all claims which may be made against the Purchaser by any employee in respect of unpaid salary, leave pay and any other employee related benefits to the employee's employment by the Business prior to the Effective Date including all legal costs which may be incurred by the Purchaser in the defence thereof and in the enforcement of this indemnity.'

<u>The applications of s 197 A</u>

[20] It is now possible to return to s197 A which applies to a transfer of a business, pursuant to a scheme of arrangement or compromise which has been entered into to avoid winding up. When the agreement, which I have described, is read as a whole, it is clear that the only certainty that flowed therefrom was that Carton Atlas would, indeed, be wound up. Upon the conclusion of the agreement, Carton Atlas' entire business structure had been transferred to appellant. The purchase

price was structured so that, given the valuation of the fixed assets in the amount of R 4.2209,00, which was to be valued at the lower of the actual cost price and the market value thereof, Carton Atlas would have no assets, no infrastructure and presumably, little if any, cash.

[21] While an arrangement connotes a far wider class of agreement than a compromise, which is an agreement to settle a dispute over rights or to modify undisputed rights where a difficulty exists over their enforcement, within the context of the specific wording of s197 A, there can be little doubt that the entire arrangement or compromise must have as its primary purpose, the avoidance of a winding up order.

[22] There is no basis by which this conclusion can be justified upon an analysis of the structure of this agreement. Clause 19 might proclaim that the business was to be sold as a going concern in terms of s197 A. But this only confirms that this proclaimed characterisation of this agreement sought to obscure its true purpose. That purpose was not to nurse the Carton Atlas back to commercial health so that it could avoid an order of winding up. The purpose appears to be in an attempt to circumvent the provisions of s197 of the LRA at worst for appellant and, at best, an asset stripping exercise, but not a compromise or arrangement even within the meaning of the common law.

[23] Viewed accordingly, the transaction was a sham. It cannot, in any way, be characterised as one which falls within the scope of s197 A of the LRA.

[24] For these reasons therefore, the appeal is dismissed with costs.

Davis JA

Coppin JA and Savage AJA concur in the judgment of Davis JA

APPEARANCES:

FOR THE APPELLANT:	Mr A Christophoran of Biccari Bollo Matiano Inc
FOR THE FIRST RESPONDENT:	Adv N Lombard Instructed by Goldberg Attorneys