REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable/Not reportable

Case no.:J 175/12

In the matter between:

BIFAWU obo MEMBERS **Applicant**

and

ZURICH INSURANCE CO. SA **Respondent**

Heard: 7 January 2014

Summary: The nature of an Employer's obligation to consult transferring employees or their representatives on a Section 197 transfer.

Test for making a settlement agreement an order of Court.

JUDGMENT

WILKEN, AJ

Introduction

[1] This is an application to make a settlement agreement an order of Court in terms of Section 158(1)(c) of the Labour Relations Act 60 of 1995 (" LRA").

Background

[2] The settlement agreement in question was concluded under the auspices of the Commission for Conciliation, Mediation and Arbitration ("CCMA") in respect of the dispute referred to the CCMA by the Applicant concerning the outsourcing of Respondent's liability function. Respondent contemplated the transfer of all employees engaged in its liability function to a third party service provider.

[3] The Applicant contended the Respondent was obliged to engage it in consultation in terms of Section 197(6)(a) and (b) of the LRA.

[4] For reasons that do not appear from the Court file, the Respondent concluded a settlement agreement with the Applicant at conciliation on the following terms:

> '1. The parties to meet not later than 30 November 2011 to discuss and finalise employment contracts as per Section 197 of the LRA.
>
> 2. During the same meeting parties could consult on matters as per document A'"

[5] Document A lists the following documents:

> *'1.* Old contracts of employment (ZISCA);
>
> 2. New contract of employment (Trustco);
>
> 3. Agreement between ZISCA and Trustco,;
>
> 4. ZISCA Group Strategy;
>
> 5. Service Level Agreements'"

[6] It is common cause no meeting as envisaged took place, and that only some of the documents were provided by the Respondent on or about 2 December 2011. Whilst it is not clear exactly when the Respondent's

employees transferred to the third party service provider, it is common cause that the transfer occurred.

The obligation to consult

[7] The purpose of the LRA is to, *inter alia,* give effect to fundamental rights entrenched in the Bill of Rights of the Constitution of South Africa, of 1996 including the right to fair labour practices. The purpose of Section 197 of the LRA, is to give effect to the right to fair labour practices in relation to the transfer of businesses on the one hand, and also to facilitate commercial transactions to avoid the constraints common law places upon the transfer of contracts of employment. [1]

[8] At the hearing of this matter, it appeared to be common cause that all the employees represented by the Applicant, barring one transferred back to the Respondent during 2012. Nothing however, turns on that in the application, as it is not the substance of the transfer(s) which is at stake, but the process agreed upon (as opposed to the substance) of the 2011 transfer.

[9] Section 197 of the LRA lays down the minimum requirements employers must comply with when the whole or part of a business transfers as a going concern. Employers are not prevented from concluding agreements to bestow greater rights upon employees, or the trade unions of such employees than that contained in Section 197. Whilst it may not be necessary in terms of Section 197 of the LRA to engage a trade union in consultation with employees who transfer on terms in compliance with Section 197(2) from the older employer to the new employer, nothing prevents the employer from concluding an agreement that it will nevertheless consult.

Analysis

[1] *NEHAWU v University of Cape Town* (2003) 24 ILJ 95 (CC) at para 14.

[10] Respondent submitted the settlement agreement ought not be made an order of Court as:

10.1 Respondent was not required by law to consult with Applicant;

10.2 Respondent had no *locus standi* in respect of the employees it represents, they, or some at least, not being members of the Applicant and/or they or at least some having terminated the union's mandate; and

10.3 it would not be possible to comply with the agreement.

[11] The settlement agreement concluded under the auspices of the CCMA clearly amounted to an agreement creating rights for the Applicant greater than that provided for under Section 197 of the LRA. Such interpretation is not only consistent with the agreement concluded, but also with the communication by the Respondent to its employees. An email sent by "People Management" of the Respondent dated 13 December 2011 is instructive:

> 'Dear Colleagues
>
> Casper Kruger, the HR Manager of TRUSCO, will be visiting our offices today to issue letters of appointment to transferring staff.
>
> We are unable to transfer your employment to TRUSCO until the union is in agreement with this process. This means that all your CPC information will stay the same and will only be changed on the date of transfer.
>
> Please contact Arno Jacobs for consultation should you have any further queries.
>
> Regards
>
> People management'

[12] This communication by the Respondent, which was transmitted after having concluded the settlement agreement with the Applicant, stands in

stark contrast with the position the Respondent takes in its opposition to the application to have the settlement agreement made an order of Court. In fact, the Respondent does not deny that it did not comply with the terms of the settlement agreement, but contends that it was not obliged to consult as Section 197 does not oblige it to consult with the Applicant. Whilst the Respondent contended in argument there was substantial compliance with the settlement agreement, this line of argument was, correctly so, abandoned.

[13] The Respondent further contends that the Applicant had no authority to represent the transferring employees as some of the employees were not members of the applicant and some had requested their transfer.

[14] The Respondent's arguments relating to lack of *locus standi* and Respondent not being required by law to consult Applicant is without any merit for the following reasons:

14.1 whilst Section 197 may not require consultation in circumstances where employees transfer in terms provided for in terms of Section 197(2) read together with Section 197(3) of the LRA, nothing prevents an employer from concluding an agreement which requires consultation such as the one concluded between the Applicant and Respondent;

14.2 it is incomprehensible on what basis the Respondent can contend that there was no obligation to consult if its own communication to employees clearly stated the union's agreement was required to effect the transfers;

14.3 by engaging the employees directly regarding the transfer it not only excluded the Applicant improperly, but acted in a manner directly in conflict with the agreement concluded with the Applicant;

14.4 the Respondent's questioning of the Applicant's authority is at odds with it engaging and concluding an agreement with Respondent in respect of the very same employees. If the Respondent wished to challenge the Applicant's authority it should have done so that time of the conciliation or lay a proper basis for such challenge in the answering affidavit and not attempt to do so in its heads of argument. The purpose of heads of Argument is to elaborate on those submissions and facts contained in the record of proceedings and the affidavits filed and not to introduce new facts.

[15] Whilst Section 159(1)(c) of the LRA grants the Labour Court jurisdiction to make a settlement agreement concluded in respect of the matter arising within the scope of the LRA an order of Court, this does not mean that the order is there for the taking. The Labour Court has discretion to make it an order of Court, even if it otherwise meets the criteria provided for in Section 158(1)A read together with Section 158(1) of the LRA.[2]

[16] The purpose of making a settlement agreement an order of Court is to enforce compliance with the settlement agreement. The Court will refuse to make a settlement agreement which is ambiguous or equivocal, and therefore open to dispute, an order of Court. Before the Labour Court will grant an order sought in terms of Section 159(1)(c) of the LRA, it must be satisfied at the very least that:

'(i) The agreement is one which meets the criteria set out in s158 (1)(c) read together with Section 158(1)A of the LRA;

(ii) that the agreement [or award] is sufficiently clear to have enabled the defaulting party to know exactly what it is required to do in order to comply with the agreement [or award]; and

(iii) there has not been compliance by the defaulting party with the

[2] *C Maryka Greef v Consol 'Glass (Pty) Ltd* (unreported decision of the LAC), Case No. CA02/12 delivered on 21 May 2013, followed in *South African Post Office Limited and CWU obo Permanent Part Time Employees* (unreported decision of the LAC), Case CA15/12 delivered on 28 August 2013.

terms of the agreement [or the award]."[3]

[17] Even if the Court is satisfied with all of the above it must nevertheless exercise its discretion whether to grant or refuse the order, which discretion will require the Court to take relevant facts and circumstances into account such are necessary to satisfy the demands of law and fairness. There is no closed list of factors to be taken into consideration by the Court when exercising its discretion.

[18] In the present circumstances I am disinclined in making the settlement agreement concluded at the CCMA an order of Court for the following reasons:

18.1 the agreement concluded was aimed at the very best to ensure that transferring employees would transfer to the service provider on terms and conditions on the whole not less favourable than those which applied during their employment with the Respondent. Whilst it was advanced from the Bar by Mr Nhlapo that employees did not transfer as contemplated in terms of Section 197(2), it is evident from the papers filed in the Court file that this was indeed the intention of the Respondent;

18.2 it is common cause no consultation took place as agreed between the parties. As the envisaged consultation sought to ensure employees transfer on terms on the whole not less favourable than those which governed their employment whilst in the employ of the Respondent, and there is no evidence that employees transferring on terms on the whole not less favourable, no purpose will be served in making the agreement an order of Court;

18.3 if employees did indeed transfer on terms on the whole less favourable (as was contended by Mr Nhlapo when arguing the application), the employees and/or the union could challenge their

[3] *South African Post Office Limited supra* at para 21.

transfer and the terms thereof and the fact that the Respondent failed to comply with an agreement to consult to ensure that this did not occur, would be a factor the tribunal considering such dispute will take into account; and

18.4 the employees transferred to the third party service provider more than 2 years ago, making it wholly impractical to require the parties to now engage in consultation on events which happened so long ago especially if they had, all but all, transferred back to the Respondent. As indicated above, if the employees are aggrieved on the terms of their transfer, the trade union or the employees have a remedy to pursue to address their concerns.

[19] Both parties are seeking their costs in this matter. The Applicant for having been required to launch this application on account of Respondent's non-compliance with the agreement and the Respondent for having opposed what it believes is a misplaced application.

[20] The normal rule that costs follow the result does not apply to Labour Court proceedings. The issue of costs in Labour Court proceedings depends on law and fairness. Policy considerations requires the Labour Court to adopt an approach which would not deter litigants from defending or prosecuting *bona fide* actions for fear of adverse costs awards.[4] Factors such as the continued relationship, *bone fides* of the parties in bringing and defending proceedings instituted matter, and the financial state of the parties are all considerations which are relevant.[5] The *bona fides* of the Applicant and the common cause fact that Respondent did not comply with the agreement is a material factor to take into account why Applicant ought to be awarded its costs despite the Court not making the settlement agreement an order of Court, but the likely continued relationship with the Respondent is a factor in favour of the Respondent why costs should not be awarded against it. On the other hand, the undisputed failure of the

[4] *MEC for Finance, Kwa Zulu-Natal and Another [*2008] 6BLLR 540 (LAC).
[5] *Ball v Bambalela Bolts (Pty) Ltd* [2013] 9 BLLR 843 (LAC).

Respondent to comply with the agreement concluded counts heavily against the Respondent being granted its costs of opposing the application despite it being successful. In the circumstances I make no order as to costs.

Wherefore, I make the following order:

1. The Application is dismissed.

2. Each party to pay its own costs.

Wilken,AJ.

Acting Judge of the Labour Court of South Africa

23 January 2014

APPEARANCES:

FOR THE APPLICANT:	Mr Nhlapo of BIFAWU
FOR THE RESPONDENT:	Mr Sangoni of Norton Rose Fullbright