



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Of interest to other judges

Case no: JR 1676/16

In the matter between:

EOH MTHOMBO (PTY) LTD

Applicant

And

ADRIAAN MATHYS NAUDE

First Respondent

FONTANELLA CONSULTING (PTY) LTD

Second Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION & ARBITRATION**

Third Respondent

BONGANI KHUMALO N.O.

Fourth Respondent

Heard: 27 February 2018

Delivered: 20 March 2018

**Summary: Labour Relations Act 66 of 1995: Review of award in terms of s145
– Transfer of business as going concern – Cancellation of sale of business
contract reversing transfer – Contract of employment of employee *ipso facto***

reverting to seller – Employee allegedly dismissed after cancellation – Seller real employer of employee at time of alleged dismissal – Award set aside and matter remitted for determination of fairness of alleged dismissal.

JUDGMENT

LEKALE, AJ

Background and introduction

- [1] On or about 06 February 2013 the applicant and the second respondent concluded a sale of business agreement in terms of which the former took transfer of the business of the latter known as Fontanella business unit as a going concern, thus, triggering the operation of the provisions of section 197(2) of the Labour Relations Act (“the LRA”) with regard to automatic transfer of employment contracts of the employees of the said business.
- [2] The first respondent was, as at the date of transfer of the business in question, in the employ of the second respondent and, as such, his employment contract was transferred to the applicant. At the time of the conclusion of the sale agreement and the transfer the business of the second respondent was managed by one Grobler, who continued to manage it on behalf of the applicant as an employee after the transfer.
- [3] It was a material term of the sale agreement that should the business not meet profit warranties the applicant could cancel the agreement. The profit warranties could, in fact, not be met and the applicant proceeded to cancel the agreement with effect from 06 August 2015.

- [4] The first respondent continued rendering services to the business after the cancellation and was paid salaries for August 2015 and September 2015 in error by the applicant. The applicant, further, paid him for October 2015 on what it calls “humanitarian grounds” when he queried non-payment. The second respondent, on his part, paid him for services rendered for November 2015.
- [5] The first respondent had issues with the position he found himself in and referred the dispute concerning alleged unfair dismissal to the third respondent against the applicant citing the date of dismissal as 19 November 2015.
- [6] The first respondent, further, confronted Grobler in respect of the status of his employment on 25 November 2015 and the latter advised him that he, as the second respondent, could not afford to employ him on the same terms and conditions as the applicant and offered him employment as a consultant.
- [7] The dispute remained unresolved after an attempt at conciliation on 08 January 2016. The first respondent, thereafter, directed an email to the second respondent on 11 January 2015 indicating, *inter alia*, that the latter was obliged in terms of section 197 of the LRA to take transfer of his employment contract on the same terms and conditions applicable as at the date of transfer of business back to it.
- [8] The second respondent was, thereafter, joined as co-respondent before the third respondent and the matter, eventually, proceeded to arbitration before the fourth respondent who found, in his award, that the applicant was the employer and directed it, *inter alia*, to pay compensation to the first respondent.

- [9] The applicant feels aggrieved by the award and now approaches the court in terms of section 145 of the LRA for its review and setting aside.
- [10] The matter serves before the court on an unopposed basis with the first, third and fourth respondents expressly abiding by the decision of the court.

Issue for determination

- [11] The question for determination is whether or not the award of the fourth respondent is the one that could reasonably not be made on the material properly before him with specific reference to whether or not the applicant was the first respondent's employer at all times material to the alleged dismissal.
- [12] In the event of a positive determination of the preceding question, I am enjoined to either substitute the decision of the fourth respondent as to the identity of the first respondent's employer at the relevant time or remit the matter as a whole to the third respondent for arbitration *de novo* before a commissioner other than the fourth respondent.

Contentions for and on behalf of the applicant

- [13] Mr Lennox submits for the applicant, *inter alia*, to the effect that the fourth respondent misconstrued and/or ignored the evidence before him insofar as it was patent from the same that there was a "reverse" transfer of business such as confirmation by the second respondent's Mr Grobler, in opposition of application for summary judgment before the High Court, that the sale agreement was cancelled. In this regard he, further, refers the court, *inter alia*, to a letter from the said Grobler to the first respondent confirming the offer made to the latter for consultancy position as opposed to retaining him

as an employee in terms of the employment agreement between him and the applicant.

- [14] In Mr Lennox's view, the reasonable conclusion on available evidence is that following cancellation of the sale of business agreement the Fontanella business unit transferred back to the second respondent and that, by operation of law, the employment contract of the first respondent also transferred back to the second respondent.

Applicable legal position

- [15] Transfer of business as a going concern takes place when the economic entity that comprises the business retains its identity after the transfer.¹
- [16] Cancellation of a contract restores the *status quo ante* with the result that each party is obliged reciprocally to make restitution to the other party².
- [17] Section 197(6) of the LRA regulates consensual variation of the statutory consequences of transfer of business as a going concern and prescribes that an agreement in that regard be in writing.³

Application of legal position to the facts and findings

- [18] The fourth respondent was first seized with the question as to who between the applicant and the second respondent was the real employer of the first respondent as at the date of the alleged dismissal.

¹ *NEHAWU v University of Cape Town & Others* (2003) 24 ILJ 95 (CC) and A van Niekerk et al Law@work 4 LexiNexis 2018 at page 370.

² *Van Heerden v Sentrale Kunsmis Korporasie* (Edms) Bpk 1973 1 SA 17 (A).

³ *SAMWU & Another v SALGA & Others* [2010] 8 BLLR page 882 (LC) and Law@Work supra at page 381.

- [19] It was, effectively, common cause between the parties at arbitration level that the applicant cancelled the sale of business agreement and the first respondent continued rendering services to the Fontanella business after such cancellation. The parties were, further, effectively in agreement that the first respondent got remunerated for at least November 2015 by the second respondent for services he rendered. It was, furthermore, undisputed before the arbitrator that the second respondent, through Grobler, declined to take over the first respondent as an employee on the terms and conditions of the agreement the latter had with the applicant before the cancellation of the sale of business agreement.
- [20] A perusal of the impugned award reveals that the fourth respondent, in fact, regarded the cancellation of the sale of business agreement in the instant matter “as a gross violation of any procedural and legal requirements”. He, further, concluded that “there was no “reverse” transfer to justify that [the second respondent] was the [first respondent’s] employer”.⁴
- [21] The reason for the foregoing conclusion by the fourth respondent appears to be the fact that there existed no agreement contemplated by section 197(2) read with section 197(6) of the LRA insofar as the arbitrator found that:
- “50. The [first respondent] was never required to enter into an agreement contemplated in terms of section 197(6) of the LRA with either EOH or Fontanella as alleged employers”.
- [22] The effect of section 197(6) of the LRA is to make it possible for employers and employees to reverse the default position in the event of transfer of business as a going concern insofar as it provides that:

“(6)(a) 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”.

[23] The default position which arises from the transfer of business within the contemplation of section 197(1) of the LRA is that the new employer (purchaser/transferee) of the business steps into the shoes of the old employer as far as, *inter alia*, existing employment contracts of the employees of the relevant business are concerned in the absence of any written agreement to the contrary.⁵

[24] The fourth respondent misconstrued the provisions of section 197 of the LRA insofar as he understood that for the first respondent’s employment contract to revert to second respondent either the applicant, the second respondent or both of them acting jointly should conclude a written agreement with the first respondent substituting the second respondent for the applicant as the employer. To this extent the arbitrator lost sight of the fact that the default position eventuates *ipso facto* once transfer of business takes place within the contemplation of section 197(1)(b) of the LRA. The parties are only obliged to conclude an agreement in writing where they wish to alter the default position. The question which fell for determination by the arbitrator was whether or not there was transfer of business as a going concern in favour of the second respondent. A positive answer to that question would have, without more, identified the second respondent, and

⁵ See section 197(2)(a) of the LRA and Law@Work *supra* at page 381-382.

not the applicant, as the employer in the absence of a written agreement to the contrary as a matter of law.

[25] The material properly before the arbitrator indicates that there was cancellation of the sale of business agreement which resulted in the transfer of the business, as a going concern. back to the second respondent. That the second respondent took transfer of the business as such is evident from the fact that the first respondent continued to serve it and, in fact, received remuneration at least in November 2015 from it as well as the fact of the correspondence sent to him by Grobler on behalf of the second respondent and the former's deposition before the High Court in Johannesburg.

[26] I am, thus, persuaded that the impugned award could not reasonably be made on the material before the fourth respondent.

[27] I am, however, not in the position, on available evidence, to confirm or substitute the arbitrator's findings as to the alleged dismissal and compensation with specific reference, *inter alia*, to the position of the second respondent as far as the justness and equitability of the compensation awarded is concerned.

Order

[28] In the result:

1. The arbitration award issued by the fourth respondent under case number GAEK 9755/2015 and dated 01 August 2016 is reviewed and set aside;

2. The arbitration award is substituted with a finding that the second respondent was the employer of the first respondent at all times material to the alleged dismissal;
3. The matter is remitted to the third respondent for a fresh arbitration hearing by a commissioner other than the fourth respondent on the fairness of the alleged dismissal as well as related issues;
4. I make no order as to costs.

LJ Lekale

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr MA Lennox
Instructed by: Botoulas Krause & da Silva Inc.

For the Respondent: No Appearance

LABOUR COURT