IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR 346/09

In the matter between:

MARIA DOLORES FERRO PESTANA **Applicant**

and

GIDEON PRETORIUS INC. **1st Respondent**

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **2nd Respondent**

COMMISSIONER LUNGILE MTIYA **3rd Respondent**

JUDGMENT

LAGRANGE,AJ

Introduction

1. This matter is a review application. The applicant seeks to set aside a ruling by third respondent in which the third respondent dismissed a condonation application for the late filing of a referral of an unfair dismissal dispute to the CCMA.

2. The applicant was dismissed for operational reasons by her former employer, Gensec Property Services ('Gensec'), on the 30 June 2007, and also alleges that on 1st July 2007 the first respondent, a firm of attorneys, took transfer of the legal department of Gensec.

3. Initially, the applicant timeously referred the dispute in respect of Gensec to the CCMA and subsequently referred an unfair dismissal claim to the Labour court. The applicant did not cite the first respondent as a party to any of those proceedings.

4. The applicant contends that her dismissal was automatically unfair in terms of section 187 (1)(g) of the Labour Relations Act, 66 of 1995, ('the LRA') in that it was the result of a transfer or a reason relating to a transfer, as defined in section 197 of the LRA. Alternatively, she claimed that her dismissal was an unfair retrenchment. In her statement of case, the applicant expands on her claim as follows :

> "9. The cause of the dismissal aforesaid was Respondent's decision to outsource, in its entirety, the legal services division (hereinafter the service) of the Respondent, thereby rendering the applicant's post superfluous.
> 10. The respondent outsourced the service to Gideon Pretorius Attorneys (the service provider) in terms of an outsourcing agreement."

5. The applicant further alleges in her statement of case dated 30 August 2007, that the retrenchment process was embarked upon immediately after the decision to outsource its legal services division. In consequence, she believed that her dismissal and that of the other legal adviser was inevitable.

6. The applicant's case against her former employer was due to be heard late in 2008. According to the applicant's founding affidavit in the condonation application before the CCMA, her attorney became aware of certain case law a week or so prior to trial, which "suggested that an applicant in her circumstances

was obliged also to seek relief against the party to whom the business or portion of a business, undertaking or service had been transferred."

7. The pending trial was postponed with Gensec's consent, and the applicant consulted with counsel. She and her legal representatives decided "out of an abundance of caution" to include the first respondent as the second respondent in the Labour court trial.

8. Somewhat confusingly, the applicant's characterisation of her perceived legal position was expressed as follows: "If the legal position is such that I am obliged to join the first respondent to the proceedings by virtue of the fact that the first respondent became the new employer on or about 1 July 2007 and that simultaneously, despite having been retrenched, my employment was automatically transferred from the second to the first respondent, then I have excellent prospects of success."

9. The applicant's advisers then counselled that, prior to joining the first respondent in those proceedings, it would probably be necessary to conciliate a dispute between the first respondent and herself, even though it might be argued that the first respondent had stepped into the shoes of Gensec and that the conciliation with Gensec would be deemed to have been conciliation with the first respondent.

10. The applicant's attorney also canvassed informally with the attorneys representing Gensec, whether or not they would object to the first respondent being joined in the matter. Although Gensec's attorneys gave no undertaking in this regard, they were clearly doubtful that their client would oppose an application for joinder.

11. In accordance with the view adopted by the applicant's advisers, she lodged a further dispute referral with the CCMA on 17 December 2008, citing the first respondent as the other party for the first time. This occurred nearly 18 months after the termination of her employment.

The Commissioner's ruling

12. Unsurprisingly, the commissioner found the 502 day delay excessive. In assessing the applicant's prospects of success, the commissioner held that the applicant had to prove that she had been unfairly dismissed by the first respondent, which could not have occurred if she had not been employed by it. The commissioner found the answer to this question obvious: the applicant had never been employed by the first respondent in the ordinary sense, nor in the sense that her employment had been transferred to it in terms of section 197.

13. The commissioner found that the first respondent had no say in Gensec's decision to retrench the applicant. Further, as a legal firm, the first respondent could not have taken over part or all of the business of Gensec as a going concern, because it never owned or managed any part of it. Further, because the first respondent is a firm of attorneys it is legally prohibited from owning any other part of a business except that of other attorneys. The commissioner found that the relationship between Gensec and the first respondent was that of client and service provider respectively. The commissioner also accepted that Gensec had outsourced its legal department to the first respondent.

14. In the commissioner's view, section 197 had no application to an outsourcing arrangement such as existed between Gensec and the first respondent.

15. The commissioner found that the applicant as a legal professional ought to 'have known better' and read the LRA, where she would have learnt of the importance of dealing with disputes expeditiously. By implication, the commissioner did not accept that the applicant had provided a reasonable explanation for her delay.

16. A central pillar of the commissioner's reasoning rests on her finding that an outsourcing arrangement could not be construed as a transfer of a service or undertaking under section 197 and that no transfer could occur without the sale of Gensec's legal department which did not take place and was legally impossible because the first respondent, as a firm of attorneys, could not acquire ownership of any entity other than the business of other attorneys.

17. It is clear that the commissioner did not have regard to case law which has established that a transfer under section 197 does not necessarily entail the sale of a business. She also appears to have been of the view that a service could not be the subject matter of a transfer. Her failure to have regard to the case law on the transfer of services in the context of outsourcing arrangements meant she did not consider the possibility of a section 197 transfer any further. It is now trite law that a transfer for the purposes of s 197 does not necessarily entail the sale of a business.[1] It is also well established that outsourcing arrangements, even of non-core business, can give rise to a transfer under section 197.[2] The commissioner's contrary views prevented her even contemplating these possibilities, resulting in a material misdirection on her part regarding a central issue in the matter before her.

18. The Commissioner critically assessed the applicant's failure as an attorney to appreciate what ought to have been done and she would have realised what was necessary had she only read the LRA. However, as the question of the appropriate respondent in such matters was an issue that had only been dealt with by the LAC in the same year, it seems the commissioner unreasonably expected that ordinary scrutiny of s 197 of the LRA would automatically have clarified matters.

The Delay and Reasons for the delay

19. The delay amounts to some 502 days, which is excessive by any standard. It appears that the first time the question of the first respondent's involvement was considered was when the applicant and Gensec concluded a pre-trial minute on 16th July 2008. In paragraph 2 of the supplementary pre-trial minute, the applicant alleges that the transfer of the legal services portion of Gensec's business ought to have resulted in an automatic transfer to the first respondent, and accordingly she ought not to have been dismissed by Gensec.

[1] See ***NEHAWU v University of Cape Town & others*** **(2003) 24 ILJ 95 (CC)** at 125 par [71]
[2] ***SAMWU v Rand Airport Management Company (Pty) Ltd [2005] 3 BLLR 241 (LAC)***

20. Gensec's response to this claim was that it denied that the service agreement it had concluded with the first respondent constituted a sale of a business as a going concern falling within the terms of section 197. However, if it had been, the applicant's claim relating to the unfair dismissal lay against the first respondent and not against Gensec. Accordingly, it contended that the applicant should have joined the first respondent in the proceedings.

21. In the supplementary pre-trial minute, Gensec reiterated that the applicant was fairly dismissed for operational reasons, and maintained its version that the service agreement concluded between it and the first respondent did not constitute the sale of a business as a going concern within the meaning of section 197.

22. The essence of the explanation for the delay lies in applicant's new appreciation of the law applicable to her situation at the end of 2008. At the hearing of this application the applicant revealed that it was the Labour Appeal Court decision in ***Anglo Office Supplies [Pty] Ltd v Lotz*** **(2008) 29 ILJ 953 (LAC)**, which led to a change of view. That judgment was handed down on 22 November 2007, and was reported in the Industrial Law Journal in April 2008. It is not entirely clear when that particular volume was actually published, but it would seem that some time between its publication and the trial in November, the applicants' legal representatives became aware of the judgment.

23. Relying on previous authorities, the LAC held in *Lotz'*s case that unless there is an agreement with employees or their representative to the contrary, the new employer assumes liability for all the actions of the old employer done in relation to each employee. Thus, if an employee is dismissed before the transfer of the business or the relevant part of the business the new employer is liable for such dismissal even though it is the old employer which actually dismissed the employee. All the rights that the dismissed employee had against the old employer at the time of the transfer of the business, including the right to pursue legal proceedings in the dismissal dispute, become rights that he has against the new employer. Consequently, the court held that where an employee has instituted proceedings against the old employer, he must pursue those proceedings

against the new employer instead of the old one.[3] It is true, if one has regard to this decision, that such a procedural outcome might have been foreseen on the basis of the earlier authorities referred to in the *Lotz* judgment. However, it seems that this was the first decision which unequivocally pronounced on the question of the proper respondent in such cases.

24. In view of this, I'm inclined to accept that the applicant's legal representatives were not unduly remiss in reaching this conclusion only during the latter half of 2007. At first sight, it seems difficult to understand why the applicant did not simply join the first respondent in the Labour Court proceedings. However, it could well be argued that the new employer ought to have been a party to the conciliation proceedings, as a matter of necessity, since the original conciliation could only have taken place after any supposed transfer of an undertaking. In that case, the abundant caution exercised by the applicant's legal advisers might prove to have been justified and the applicant's legal position might not have been adequately protected by simply joining the new employer at the trial stage.

25. Any claim for unfair retrenchment, can of course still be pursued against Gensec, if it is subsequently established that no transfer of a service or undertaking to the first respondent did take place. The applicant expressly disavows any intention of seeking relief for her unfair retrenchment from the first respondent, in the form of alternative relief.

26. In these circumstances, where the very issue of the existence of a transfer is in dispute, it is prudent for the applicant to include both the old and the possibly new employer in the proceedings.

Prospects of Success

27. The first respondent contends that the applicant could never succeed in establishing that a transfer of an undertaking had occurred, since a firm of

[3] Judgment at 962, par [22].

attorneys cannot acquire ownership of another business except that of other attorneys. The applicant's response is that she was part of a legal services department of JH Isaacs which was previously taken over by Gensec, and that Gensec decided to outsource those services to the first respondent.

28. Relying on the authority of ***SAMWU v Rand Airport Management Company (Pty) Ltd [2005] 3 BLLR 241 (LAC)*** the applicant points out that even the outsourcing of a non-core service can constitute a transfer in terms of s 197. As already mentioned, it is now established law that a transfer for the purposes of s 197 does not necessarily entail the sale of a business.[4]

29. The applicant alleges that the legal services described in the scope of work which the first respondent offered to Gensec in its service proposal, are the same services she previously provided in-house to Gensec. The first respondent disputes that it took over the functions of the legal department mainly because it could not legally acquire ownership of such an entity and also because it provided legal services using its own resources without acquiring any assets from Gensec. It further contends the in-house legal department still exists and has at least one employee, though no specificity is provided in this regard.

30. The first respondent does not directly dispute the applicant's claim that she performed functions now encompassed by the first respondents' service proposal. Another factor indicating that there might have been a transfer of a service or undertaking is Gensec's response to the applicant's claims in the supplementary pre-trial minute. Gensec does not dispute that a decision was taken to outsource its legal function in April 2007, but contends that this decision was only taken after two retrenchment consultation meetings had already taken place.

31. In the circumstances, the applicant has advanced a tenable basis for arguing that the first respondent took over the role and function previously performed in the in-house legal department, and her prospects of establishing that the provision of certain legal services formerly provided in-house were transferred to the first

[4] See fn 1 *supra*

respondent are not unreasonable. Because the consultation meetings commenced on the basis that they would address the "possible outsourcing of the legal department", there also appears to be a reasonable basis for believing that the termination of her services was linked to the outsourcing decision when it was taken in April 2007. As such, I believe she has demonstrated a reasonable prospect of succeeding with a claim that her dismissal was for a reason related to the transfer or a business, in terms of section 187(1)(g).

Prejudice

32. It is true that the first respondent is now facing the prospect of litigation it ought to have been confronted with in the latter of half of 2007. On the other hand, it is possible if the first respondent is not a party to the proceedings, the applicant may be deprived of a remedy for an automatically unfair dismissal, if a transfer of an undertaking did in fact take place and the first respondent were properly held liable for the actions of Gensec that resulted in the termination of her services. Moreover, if in law the first respondent is the party that ought to be held liable for such a claim as the new employer, to shield it from the risk of being held to account for such liability as a result of a bona fide error on the part of the applicants' legal advisors, which was not unreasonable and which they did act upon once it was appreciated, would tip the balance of prejudice too far in the first respondent's favour in my view.

Conclusion

33. As set out above, the commissioner's failure to appreciate the law relating to the application of section 197 to the outsourcing of services resulted in her misdirecting her analysis of the prospects of success. For this reason her award must be set aside

34. On the evaluation above, I am satisfied that the applicant has made out a sufficient case for the late referral of the dispute to the CCMA in respect of the first respondent to be condoned, and it would serve no purpose in this instance, and

entail unnecessary further delay to refer the condonation application back to the CCMA for reconsideration.

Order

35. Accordingly, it is ordered that:

35.1. the condonation ruling of the third respondent under CCMA case number GAJB 37691-08 dated 30 January 2009 is reviewed and set aside;

35.2. the condonation ruling of the third respondent is substituted with an order granting the applicant condonation for the late referral of her dismissal dispute in respect of the first respondent to the Commission for Conciliation, Mediation and Arbitration;

35.3. no order is made as to costs.

ROBERT LAGRANGE
ACTING JUDGE OF THE LABOUR COURT

Date of hearing: 26 January 2010
Date of Judgment: 13 April 2010

Appearances:

For the Applicant: J D Crawford of Crawford & Associates Attorneys

For the First Respondent : Advocate A Landman
Instructed by Gideon Pretorius Inc.