THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN

Case: C1083/2018
Of interest to other judges

In the matter between

MENZI HLOPHE **Applicant**
and
TS GALAXY formerly known as
CAPE TOWN ALL STARS FOOTBALL CLUB **Respondent**

Date of Hearing: 28 April 2021
Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 15h00 on 09 May 2022

Summary: (Claim for contractual damages - Jurisdictional issues – Whether a transfer under 197 had taken place – Whether the parties had agreed on a full and final settlement of the dispute despite Applicant not signing settlement agreement - Applicability of arbitration agreement – Court having no jurisdiction to entertain the dispute in the absence of a transfer, and it would be contrary to public policy to entertain his claim for damages on the facts of the case – unnecessary to determine whether dispute ought to have been referred to private arbitration)

JUDGMENT – IN LIMINE OBJECTIONS

LAGRANGE J

[1] The applicant in this matter, Mr M Hlophe ('Hlophe') a professional football player was previously employed by Cape Town All-Stars football club ('All-Stars' or 'the club'). He had been employed on a two-year fixed term contract which was due to end on 30 June 2018. After barely six months, All Stars's contract was prematurely terminated on 19 January 2017, following a hearing before a panel

looking into his alleged poor performance, which had recommended the termination of his contract.

[2] All-Stars claimed he agreed to the termination of his contract even though he did not sign a settlement agreement setting out the terms of his termination. Hlophe's version is that he was dismissed by All-Stars.

[3] On 17 April 2018, more than a year after his dismissal, Hlophe referred an unfair and unlawful dismissal dispute against All-Stars to the NSL Dispute Resolution Chamber, but withdrew it a month later on 15 May 2018.

[4] On 6 November 2018, Hlophe instituted these proceedings in which he is now suing the respondent ('Galaxy'), which bought a franchise held by the club from its owner after the termination of his services. Hlophe claims the business of All-Stars was transferred as a going concern to Galaxy and is claiming the balance of his remuneration for the unexpired portion of his contract.

[5] Galaxy has raised a number of *in limine* objections which are the subject matter of these interlocutory proceedings. Galaxy claims that -

5.1 There was no transfer of a business as a going concern from All-Stars to Galaxy. All that was sold was the right to participate in the National Soccer League ('NSL') First Division. That sale is subject to article 14 of the NSL handbook and it makes no provision for the transfer of a business as a going concern.

5.2 The labour court has no jurisdiction to adjudicate the matter because the applicant is bound by article 23.5 of the NSL handbook to refer all disputes against a club to the dispute resolution chamber for arbitration rather than to courts or administrative tribunals.

5.3 Hlophe is bound by a termination of employment agreement, which he concluded with All-Stars.

[6] To address these preliminary issues before trial commenced, they were enrolled for argument after an exchange of affidavits and heads of argument between the parties. The hearing was conducted virtually using Zoom.

Evaluation

Was there a transfer of an undertaking between the two clubs under s 197 of the Labour Relations Act, 66 of 1995?

[7] The purpose of the sale agreement concluded between All Stars and Galaxy on 22 May 2018, was the transfer of the franchise *to participate* in the first division of the NSL. All-Stars also ceded all *continuing* contracts, documents, books of account, registers, other documents and records etc. to Galaxy, Galaxy undertook to honour the obligations in those contracts transferred. In terms of clause 6 of the agreement, All-Stars also undertook to discharge all liabilities of the club which arose before the date of signature. It also indemnified Galaxy against any claims made against it arising from those liabilities.

[8] Galaxy made reference to the constitutional court judgment in *Road Traffic Management Corporation v Tasima (Pty) Ltd; Tasima (Pty) Ltd v Road Traffic Management Corporation* (2020) 41 ILJ 2349 (CC), in which the court emphasised that the legal *causa* must be identified in which the source of the rights and obligations to be transferred and the entitlement to receive them is determined that a court can then proceed to consider whether section 197 applies to the facts of the case before it[1]. In *Tasima* the very origin of the obligations purportedly transferred

[1] At para [39], viz:

> "[39] A legal causa is a prerequisite for the application of s 197. It follows that only once the source of the respective rights and obligations to effect and receive transfer has been identified, can it be determined whether the jurisdictional facts for the application of s 197 are present. Once the legal causa is identified, the factual enquiry outlined in NEHAWU can be conducted. Thus, an enquiry as to the causa must be conducted before applying the test in s 197 to the facts. Otherwise one is looking at facts without the legal parameters being in place."

was a matter of controversy and understandably this made the legal *causa* a disputed issue the court had to settle.[2]

[9] In this instance, the legal transaction giving rise to the disputed s 197 transfer between All-Stars and Galaxy is common cause. As the applicant correctly states it is the "Sale of A Football Franchise Agreement" concluded between them in terms of which Galaxy bought the right and entitlement to play football in the first division of the NSL from All-Stars. The preamble of the franchise sale agreement recorded that:

> " A. The seller is the owner of the right, title and interest to a football franchise registered under the name of Cape Town All-Stars Football Club, a professional football club participating in the National First Division and in the National Soccer League.
>
> B. …
>
> C. The parties are entering into this agreement to record the terms upon which the conditions subject to which the seller sells the franchise to the purchaser."

[10] The next question then is to consider if section 197 has application to that transaction, which requires the court to determine if a business was transferred as a going concern.[3] The applicant advanced a number of reasons for contending that the sale of the franchise had this effect. Firstly, it points out that the sale of the franchise and commercial value consisting of the right, title and interest to operate, participate or conduct business in the league. Secondly, Galaxy would become the employer of the professional footballers who were still employed by it under contracts which remained in force up to and after the effective date of the sale (the 'continuing contracts'). Thirdly, All-Stars ceded to Galaxy "all the documents and books of account, registers and other documents and records relating to the Club, which shall include without limitation, all certificates of title or proof of ownership in relation to the franchise purchased". In addition, All-Stars undertook to discharge all the liabilities of

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[2] *Tasima,* at para [41].

[3] *Tasima* at para [33].

the club before the agreement was signed and indemnified Galaxy against any claims made against it in respect of any of those liabilities.

[11] The applicant argues that what was sold was All-Stars's 'business' of playing football in the league to Galaxy. The 'tools of the trade' of the business so transferred consisted of the professional players. The business amounted to an economic entity and was a going concern as it retained its identity after the transfer.

[12] Galaxy contends that the applicant failed to discharge the onus of proving the existence of a section 197 transfer between All-Stars and Galaxy because he failed to advance sufficient evidence to support such a finding. Firstly, it argues that there was no evidence that any other tangible or intangible assets of All-Stars were transferred, apart from its right to participate in the NSL first division. In this regard, Galaxy places some reliance on the judgment in *Imvula Quality Protection and others (Red Alert TSS (Pty) Ltd and others as Intervening applicants) v University of South Africa* [2017] 11 BLLR 1139 (LC) in which this court emphasised that the question under s197 is whether it is the entity conducting a particular business or providing a particular service which has been transferred and not simply whether the same service or commercial activity has been continued, viz:

> "[25] The present case is to be distinguished on the facts from *Aviation Union*. [4] In that instance (also a dispute about insourcing in which the application of section 197 was upheld), it was common cause that on termination of the outsourcing agreement the fixed assets, inventory and the like would transfer from the service provider to the client on insourcing, or to a new service provider in terms of any new outsourcing agreement. This is not the case here – there is no transfer of assets, corporeal or incorporeal, nor is UNISA taking over any existing infrastructure consequent on the termination of the service agreements and the offers of employment that it has made.

[4] *Aviation Union of SA & another v SA Airways (Pty) Ltd & others* 2012 (1) SA 321 (CC); (2011) 32 ILJ 2861 (CC)

[26] Counsel for the applicant also relied on *SAMWU and others v Rand Airport Management Co (Pty) Ltd* (2005) 26 ILJ 67 (LAC) [also reported at [2005] 3 BLLR 241 (LAC) – Ed] in support of the submission that the taking over of employees was in itself sufficient to trigger section 197. In *Harsco Metals SA (Pty) Ltd and another v Arcelormittal SA Ltd and others* (2012) 33 *ILJ* 901 (LC), in relation to the requirement that there be a transfer of a business, the court said the following:

". . . In relation to the definition of a 'business 'for the purposes of s 197, the judgment of the Labour Appeal Court in SAMWU & others v Rand Airport Management Co (Pty) Ltd remains the authority by which I am bound. In that case, the court concluded that the outsourcing of gardening and security functions at an airport managed by the employer will business is capable of being transferred in terms of s 197, despite the fact that it did not appear that any assets, goodwill, operational resources or workforce were to be transferred. A distinction was drawn between a business that is largely employee reliant, as opposed to an asset reliant business. Nor was it suggested that in the former, greater weight or to be attached to the number of employees transferring as opposed to the net instance in which the number of assets transferring might attract lighter weight. If, as in that case, a grouping of relatively unskilled employees and the work they perform, with no assets appearing to be the subject of any transfer, comprises a 'business for the purposes of s 197, then it is difficult to conceive, in the context of an outsourcing transaction, of an economic entity that would not be capable of transfer in terms of the section."

[27] That statement was made prior to the decisions by the Constitutional Court in *Aviation Union* and *Rural Maintenance*.[5] To the extent that the Labour Appeal Court in Rand Airport relied primarily on the inclusion of the word 'service' in the definition of 'business' to conclude that because they were services, the gardening and security functions comprised a business capable of being transferred, it is now clear that section 197 requires a

[5] *Rural Maintenance (Pty) Ltd & another v Maluti-A-Phofung Local Municipality* (2017) 38 *ILJ 295 (CC)*

> determination of the existence of a business that supplies the service – the existence of the service cannot in itself trigger the application of section 197. The Constitutional Court's judgments require this court to avoid confusing form and substance – the relevant enquiry is into the existence or otherwise of a discrete economic entity in the form of the variety of components that go to make up a business, including assets, goodwill, workforce, management staff and the manner in which the business is organised and performed, the operational resources available to the business, and the like. In other words, the single component of the statutory definition of business (ie a service) ought not to elevate what was intended to be illustrative to a determinative level."
>
> (Emphasis added – footnotes in the extract omitted)

[13] Annexure A to the sale agreement, in which the names of any professional players who were transferred should have appeared, was blank. Consequently, Galaxy contends there is no information about how many, if any, players actually became employees of Galaxy in terms of the sale agreement.

[14] It is quite conceivable that transfer of ownership of a football club as a going concern to another club could amount to a transfer of an undertaking as a going concern under section 197. As the courts have repeatedly emphasised, each case falls to be determined on the facts specific to it[6].

[15] In this instance, on the limited evidence available, it can be concluded that All-Stars sold its right to participate in the First Division of the NSL to Galaxy. Further, insofar as there were an unidentified number of professional players still employed by All-Stars at the date of signature, Galaxy undertook to fulfil All-Stars's further obligations under those contracts and All-Stars indemnified Galaxy against claims

[6] *Imvula Quality Protection (Pty) Ltd & others v University of South Africa* (2019) 40 *ILJ* 104 (LAC) at para [30].

against All-Stars arising before that date. There was also a cession of documentary and accounting records of All-Stars to Galaxy.

[16] The Constitutional Court has made it clear that the transfer of employees to another entity, without a transfer of any assets, may not necessarily give rise to a transfer of an undertaking under section 197[7]. In this case, the right to play in a particular division of the NSL was an asset which was sold to Galaxy. What is not known is whether the transaction amounted to much more than that. Factual details to substantiate that the club as a functional entity with a team of players and organisational support structure, including any other staff, was handed over to Galaxy as a going concern are simply lacking. The applicant argued that the business transferred was "the business of playing football" in the NSL First Division, but that is more of a description of an activity than a description of an operational entity that was engaged in fielding a team in First Division fixtures. I am not satisfied, without more, that the applicant has established that a transfer of an undertaking under section 197 took place with the conclusion of the sale agreement between the owner of All-Stars and Galaxy.

[17] Consequently, All-Stars's liability for Hlophe's claim for contractual damages has not been transmitted to Galaxy by virtue of s 197(2) and the court cannot entertain such a claim against Galaxy.

The disputed termination agreement between Hlophe and All-Stars

Implications of the non-variation provision in the contract of employment

[18] Even if the transaction between All-Stars and Galaxy could have been construed a transfer under section 197, Hlophe needed to first establish that he was

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[7] *Road Traffic Management Corporation v Tasima (Pty) Ltd; Tasima (Pty) Ltd v Road Traffic Management Corporation* (2020) 41 *ILJ* 2349 (CC) at para [95]:

> "[95] In determining whether there has been a transfer as a going concern, a primary consideration is the nature of the business. A distinction is generally drawn between labour intensive and asset-reliant services. This consideration arises because the transfer of employees alone, without the transfer of any assets, may not necessarily give rise to the transfer of a business as a going concern."

(footnotes omitted)

not precluded by his purported settlement agreement with All-Stars from pursuing his claim against All-Stars or any successor in title.

[19] It was common cause that Hlophe was provided with a proposed termination agreement on 19 January 2017 and that he did not sign it.

[20] Clause 3 of the unsigned agreement states that the agreement is in full and final settlement of any claims that might exist between the parties arising out of the applicant's employment by All-Stars or the termination thereof.

[21] However, it is a matter of dispute whether he accepted the termination agreement given that he did not sign it. The pertinent extracts from clause 1.3 of the unsigned agreement stated:

> "1.3 the parties agree that:
>
> 1.3.1 The employment contract with the company be terminated as per Cape Town All-Stars Fc internal DC committee. And as per coaches report regarding a performance.
>
> 1.3.2 the company will pay the employee the following amounts as full and final settlement:
>
> 1.3.2.1 One (1) months' salary (January 2017) providing the player does not owe the club any monies outstanding.
>
> 1.3.2.2 On (1) plane ticket to DURBAN."

(*sic)*

Clause 3 of the agreement read:

> "3 FULL AND FINAL SETTLEMENT

This agreement shall be in full and final settlement of any claims that may exist between the parties hereto arising out of the employee's employment with the company or the termination thereof. The company warrants that it has no further claims of what so ever nature against the employee and likewise the employee has no further claims of what so ever nature against the company."

[22] Galaxy argues that the applicant tacitly accepted the terms of the agreement because he accepted the payment of one month's salary and used the air ticket that was provided to him to travel to KwaZulu-Natal. The written agreement was drafted in settlement of the dispute and the agreement provided for him to be issued with a plane ticket which was not something recommended by the chairperson of the performance enquiry. All-Stars claimed he never had any intention of settling with All-Stars and did not accept the settlement offer proposed. He further relies on the non-variation clause in his contract of employment which stated:

"21.1 No addition to or variation, consensual cancellation or novation of this contract and no waiver of any rights arising from this contract or its breach or termination shall be of any force or effect unless it is reduced to writing and signed by both parties or their duly authorised representatives.

21.2 No latitude, extension of time or other indulgence which may be given or allowed by either party in respect of performance of any obligation or the enforcement of any right arising from this contract, unless confirmed in writing, and no single or partial exercise of any right by any party shall under any circumstances be construed to be an implied consent by such party operate as a waiver or a novation of, or otherwise affect any of that party's rights in terms of or arising from this contract or stop such party from enforcing, at any time and without notice, strict and punctual compliance with each and every provision or term hereof."

(emphasis added)

[23] Galaxy contends that it is trite law that a non-variation clause must be narrowly interpreted and a subsequent settlement agreement is not the type of agreement which the non-variation clause would forbid. The rationale for this principle is that the new agreement does not vary any of the substantive terms of the employment contract but constitutes a new substantive contract settling a dispute (see *Hawken v Olympic Pool (Pty) Ltd* 1979 (3) SA 224 (T) at 228 C-F and *Randcoal Services Ltd v Randgold and Exploration Co Ltd* 1998 (4) SA 825 at 842A-D).

[24] While the limited benefits of the purported settlement agreement, cannot be traced directly to the contents of the employment contract the proposed settlement agreement was described as being in full and final settlement of all claims between the parties at the time of the termination of his employment. The provision of the plane ticket was not provided for in the contract as a benefit on termination and the implicit waiver of the right to pursue a claim for damages for the unlawful termination of the contract, which were both issues contained in the settlement proposal, clearly varied some of Hlophe's existing benefits and entitlements that would have otherwise applied on the termination of his employment. At the very least, his financial benefits on termination were varied and the waiver affected his rights arising from the termination of the contract. Both issues fell within the scope of clause 21.1 of the employment contract and should have been reduced to writing and signed by both parties. Accordingly, if that were the only consideration, the court would not accept that Hlophe's tacit assent to the proposed settlement agreement was a binding agreement which prevented him from pursuing his claim for contractual damages.

Public policy considerations

[25] However, even if the non-variation clause invalidates the settlement agreement, the non-variation clause should not be enforced in this instance for the reasons below.

[26] Despite maintaining that he never accepted the settlement proposal, Hlophe provided no explanation why he never raised any objection to the financial benefits he received in terms of the settlement agreement. He also made no claim that he

ever advised Galaxy, directly or indirectly, that he did not accept the proposed settlement. Further, he did not purport to accept the benefits, but subject to a reservation of his rights. In addition, he has never tendered to reimburse either All-Stars or Galaxy for the benefits received, despite maintaining that he never accepted the settlement proposal in terms of which they were offered.

[27] Having pursued and withdrawn an unfair and unlawful dismissal dispute, which he had referred to the NSL dispute resolution chamber 15 months after his termination, he only launched the claim for contractual damages against Galaxy on 6 November 2018. Everything about his conduct after obtaining the proposed settlement agreement was consistent with someone who had accepted its terms at the time it was offered, even if he did not say so in so many words.

[28] Galaxy argues it is unacceptable for Hlophe to have accepted benefits due to him on the basis that he agreed to the settlement proposal, only to then attempt to resile from that agreement on the basis that it was at odds with the non-variation clause in his employment contract.

[29] In any event, whether or not the settlement agreement ought to have been signed by both parties, Hlophe accepted the benefits offered in terms of the proposed settlement. Those benefits were specifically offered on the basis that they were in full and final settlement. His acceptance of the benefits, and his failure to dispute the terms on which he received them or to tender repayment thereof is consistent with him tacitly agreeing to it. This conduct is inconsistent with his belated pursuit of his claim for contractual damages. Hlophe had ample time to consider restitution if he wished to continue with his claim but did not do so.

[30] In *Nkosi v SSG Security Solutions (Pty) Ltd* (2020) 41 *ILJ* 1408 (LC) the Labour Court reiterated the approach adopted in such cases:

> [20] In *Makiwane v International Healthcare Distributors* the court dealt with the effect of an agreement where payment was effected as full and final settlement of all claims the employee might have against the employer. The court held as follows:

‘[18] It is common cause between the parties that the applicant has been paid all the monies set out in the settlement agreement, that he has kept such monies and has made no tender to return them to the respondent. To my mind this clearly signifies his acceptance of such monies in full and final settlement of his claims against the respondent.

[19] Our law is trite that where a party accepts the benefits under any settlement agreement in full and final settlement of the benefits owing to him by his former employer arising from the termination of his employment relationship with such employer, and has abided by such acceptance of those benefits, he has placed himself beyond the jurisdiction of this court (see *United Tobacco Co Ltd v Baudach* (1997) 18 *ILJ* 506 (LAC)).

[20] Similarly, in the present case I am of the view that when the applicant signed the agreement, thereby signifying his acceptance of its terms, and later accepted the benefits paid to him in terms thereof, the dispute between him and the respondent was finally settled. From that time onwards there was no live dispute between the parties (see also *Spillhaus & Co (WP) Ltd v CCMA & others* [1997] BLLR 116 (LC)). There being no live dispute for this court to determine, it follows that this court has no jurisdiction to deal with this matter.’

[21] The applicant accepted the money paid to him in terms of the agreement and he never made any tender to pay back the monies he had received. The applicant cannot try to escape the consequences of an agreement on the one hand and retain the benefits he had received from the same agreement on the other hand. Simply put, the applicant cannot have his cake and eat it.”

(footnotes omitted)

[31] There is no reason the principles above should not apply in this case, even though the agreement was not signed. Hlophe accepted the money paid to him and the plane ticket offered. Under the settlement proposal these were conditional on him

waiving his rights to pursue disputes arising from his termination, and he never offered restitution of the same. He did not claim he did so under duress or as a result of a mistake or misrepresentation. He never even purported to have accepted them, subject to a reservation of his rights. In the circumstances, it would be contrary to public policy to allow him to repudiate the settlement offer he tacitly accepted, on the basis of the non-variation clause in his contract, without restitution of what he obtained by doing so. The terms of the proposed settlement, which Hlophe tacitly accepted consequently remain binding on him and there is no live dispute for the court to determine.

Conclusion

[32] In light of the above, I am satisfied that it would be contrary to public policy to entertain the applicant's claim and, in any event, the court has no jurisdiction to consider his claim for contractual damages against Galaxy as the respondent. It is therefore unnecessary to consider the further question whether or not the proceedings should be stayed so that he can pursue his claim through private arbitration, or whether the court has no jurisdiction to consider the claim because it should have been determined in private arbitration proceedings.

[33] On the issue of costs, I do not feel in this instance it would be appropriate to make a cost award according to the requirements of law and fairness.

Order

For the reasons stated above -

> [1] The Respondent's *in limine* objection that the Court has no jurisdiction to entertain the Applicant's claim for contractual damages against the Respondent, in the absence of a section 197 transfer having taken place between the Applicant's former employer and the Respondent, is upheld.

[2] The Applicant's claim for contractual damages arising from the termination of his employment by his former employeer, Cape Town All Stars Football Club, is unenforceable on grounds of public policy.

[34] Accordingly, the Applicant's referral is dismissed.

[35] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

Appearances/Representatives

For the Applicant	**C Goosen instructed by Van Gaalen Attorneys**
For the First and Second Respondents	**G Leslie SC instructed by Tim Sukazi Inc.**