



THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case No: CA01/2023

In the matter between:

**AFRICA ONLINE OPERATIONS (MAURITIUS)
LIMITED**

Appellant

and

MICHELE SCANLON AND 13 OTHERS

First to Fourteenth Respondent

**ECHO INTERNATIONAL MANAGEMENT SERVICES
(PTY) LTD (IN LIQUIDATION)**

Fifteenth Respondent

ANGELENE POOLE N.O.

Sixteenth Respondent

MARLENE ELIZABETH RETIEF N.O.

Seventeenth Respondent

ECHOTEL PROPRIETARY LIMITED

Eighteenth Respondent

ECHOTEL INTERNATIONAL PROPRIETARY LIMITED

Nineteenth Respondent

ECHO SP SA PROPRIETARY LIMITED

Twentieth Respondent

Heard: 21 November 2023

Delivered: 31 January 2024

Coram: Waglay JP, Mlambo JA et Davis AJA

JUDGMENT

DAVIS AJA

Introduction

- [1] This appeal from the court *a quo* concerns the question as to whether there was a transfer of business as a going concern to the appellant from ECHO International Management Services (Pty) Ltd (EIMS) after the latter was placed in liquidation in terms of s 197 A (2) of the Labour Relations Act¹ (LRA).
- [2] The court *a quo* declared that, with effect from 12 March 2020, the employment of first to twelfth respondents had been so transferred in terms of s 197 A (2) to the appellant. The order further directed the appellant to instate the first to twelfth respondent with full backpay and without loss of benefits from 12 May 2020 until the date of the order together with interest at the prescribed rate. It is against this order that the appellant has approached this Court on appeal.

The factual background

- [3] The respondent employees were all employed in the management services company I Ways Management Services (IMS) prior to 1 November 2019. As a subsidiary of the Gondwana International Networks (GIN) group of companies, IMS provided management services to business entities thereof. The GIN group held a controlling share of providers of internet services to several companies in Africa, including Uganda, Kenya, Ghana, Zambia, Namibia, Tanzania and Zimbabwe.
- [4] In 1990, the ECHO group (through its holding company ECHOTEL) acquired the business of the GIN Holding Company and the shares of businesses in several of the African subsidiary companies, including the business of IMS. It was agreed between ECHO group (as ultimate purchaser) and GIN (as seller) that the business of IMS would transfer to EIMS as a going concern. The employees (including the applicants) would accordingly transfer to EIMS in terms of s 197 of the LRA.

¹ Act 66 of 1995, as amended.

- [5] The main business of IMS was to provide Shared Services to the GIN Group. The Shared Services are essentially centralised management and support services. These services include the following, which were provided to the operating companies within the GIN Group:
1. Human Resources;
 2. Legal and Regulatory;
 3. Finance;
 4. Technical;
 5. Operations;
 6. Business Support Systems including in respect of billing; and
 7. Sales and Marketing functions.
- [6] IMS was the central management hub for the operating companies which were acquired by ECHOTEL. As a result of the acquisition of the business of the GIN Group, ECHO took over the role of IMS.
- [7] According to Mr Jacques Rautenbach, a director of the appellant, ECHOTEL decided in 2020 that it would no longer pursue the provision of centralised management services to its group subsidiaries. It considered it more effective to move away from a centralised model so that each operating company would thus build a network and add its own or obtain relevant services within their own market. The directors of ECHO and EIMS considered that the business of the latter had no economic prospects and would have to be closed down. Accordingly, a decision was made to place the company into voluntary liquidation, a decision that was taken on 28 February 2020.
- [8] Significantly prior thereto, on 31 January 2020, ECHOTEL sought to embark on a s 189 process with the first to fourteenth respondents which was aimed at their retrenchments. However, this process was abandoned prior to the decision to liquidate EIMS.
- [9] The key to the case of the individual respondents was their contention that since March 2020, the appellant carried on the function of providing shared services

which had previously been undertaken by EIMS. Pursuant thereto, the first to the twelfth respondents launched proceedings before the court *a quo*. They were successful in obtaining a declarator to the effect that their contracts of employment had been transferred to the appellant with effect from 1 March 2020 and that the appellant was obliged to ensure that they receive the requisite backpay.

The reasoning of the court *a quo*

[10] The court *a quo* placed emphasis on the decision of the board of EIMS to apply for the company to be placed into liquidation. The very same directors that served on its board or, at least some of them, in the view of the court *a quo*; were directors of the appellant. Accordingly, De Kock AJ held:

‘there was obviously not a sale given that EIMS was voluntarily placed into liquidation. There was however a transaction that put the business into different hands, the transaction being the decision taken to place EIMS in voluntary liquidation and the decision that at least ‘some of the shared services’ rendered by EIMS be continued with or honoured by AOOML. This decision taken allowed ‘some of the shared services’ to be continued with or communicating to the MD’s that it will be business as usual and that specifically that EIMS’ obligations towards them would be honoured... resulted in some of the shared services moving from one person to the other.’

[11] De Kock AJ went on to hold that:

‘insofar as the same directors were involved in the decision to apply for EIMS to be voluntarily liquidated and were also involved in the business of AOOML, their decision to do so amounts to a transaction which created rights and obligations that required EIMS to transfer or at the very least to undertake to honour any such obligation or at least part of their ‘shared services’ in favour of AOOML. This is also then the very action that the respondents argued must have in place for s197 transfer to take place, that is some deliberate handing over or shifting of a business. The transfer did not happen by coincidence ... and did not have to arise from the purchase of an insolvent business. There were indeed two positive steps

in this transfer being the directors of EIMS and the directors of AOOML who happen to also have been directors of EIMS.'

The appellant's case

[12] Mr Redding, who appeared together with Mr Bosch on behalf of the appellant, submitted that the three fundamental requirements, which are contained in s 197 of the LRA, and which must be met before it can be concluded that a transfer of a going concern had taken place, are an act of transfer, that the transfer be of a business which had to be in the form of a going concern.

[13] To the extent relevant s 197 of the LRA reads as follows:

'197. Transfer of contract of employment

(1) In this section and in section 197A –

- (a) "business" includes the whole or part of any business, trade, undertaking or service; and
- (b) "transfer" means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.'

[14] Mr Redding therefore submitted that the key to a case of this kind was to locate the identity of the economic entity which existed prior to the transfer and the economic entity that existed after the transfer had taken place. Thus appellant's central submission was that AOOML did not perform the same tasks as had been undertaken by EIMS prior to its liquidation. It was a different economic entity that performed different tasks. In short, the appellant's case was based on its contention that the evidence did not show that there was an entity (AOOML) which was designated as a shared services company which would assist the operating companies in the same manner as EIMS had prior to its liquidation. Neither EIMS as an entity nor its business in providing shared services in the operating companies was replicated by any other identity.

- [15] Mr Redding submitted that the individual respondents could not identify the individual entity which carried out the EIMS business, that is providing shared services to the operating companies. In this connection, Mr Redding relied on the judgment of the Constitutional Court in *Road Traffic Management Corporation v Tasima (Pty) Ltd*² (*Tasima*):

'Legal *causa* is a prerequisite for the application of s197. 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.'

- [16] In Mr Redding's view this *dictum* clearly illustrated that, whatever form it takes, a transfer for the purpose of s 197A involves rights and obligations on or between the transferor and the transferee where the former has the obligation to effect a transfer or allow a transfer to happen and the transferee will receive the transfer. In the present case, he submitted that no transaction was taken to move the business of EIMS to any other entity in the Group. No rights or obligations were created in respect of EIMS which was the alleged transferor or between EIMS or between any transferee where EIMS had the obligation to effect a transfer or allow a transfer to happen and the transferee would receive the transfer.
- [17] Furthermore, Mr Redding submitted that the court *a quo* had no basis for emphasising that the board of directors of EIMS was the same as AOOML nor was there evidence of a decision by the board of AOOML to transfer anything to AOOML nor that it undertook to honour any obligations or do anything else in respect of EIMS' provision of shared services. There was thus no evidence of a decision by the board of directors of AOOML that the shared services performed by the employees in EIMS should be so transferred nor was there any decision that AOOML would honour the obligations of EIMS with respect to shared services.

² [2020] ZACC 21; [2020] 41 ILJ 2349 (CC) at para 37.

Evaluation

- [18] The essence of the respondents' case was to urge this Court to examine the substance of the steps taken to liquidate EIMS and thus the consequent role of AOOML. In this connection, there was much debate about a letter generated by Mr Rautenbach of 12 March 2020 in which he informed the interested parties within the group of the consequences of the liquidation of EIMS. He wrote:

'Please note that the liquidation of the EIMS does not effect [sic] any of the businesses outside of South Africa which are held under a different group of legal entity so it should be business as usual for you and your teams.'

He then went on to say:

'The following important points regarding the running of the business are effective immediate.'

- [19] He noted that a country MD within the group should report directly to him. He then wrote "*Solid support calls – need to be logged directly with the Solid team...*" and further "*Mauritius and SA client support – Rudy Cloete would be contracted to Echo Service Provider and would be responsible for ensuring that these clients are supported.*"

- [20] Of even greater significance was a letter written to the Namibian operating company by Mr Rautenbach on 12 March 2020 in which he said the following:

'As a result, we cannot meet obligations to suppliers and other trading partners, and the company is as of today, in the hands of the liquidators once they are appointed by the court. This means that with immediate effect, the offices in Parow, Cape Town and Monte Casino, Johannesburg are closed and all employees including those working remotely from Pretoria/ Centurion are no longer employees of any Echo Group company.'

Please note that the liquidation of EIMS does not affect any of the businesses outside of South Africa, which are held under the different Group legal entity, so it is business as usual for the teams.

Dharmesh and I remain on the Board and we would like to reassure you that the Interim Services Agreement you have with EIMS will remain unchanged and will be honoured under Africa Online Operations Mauritius Limited t/a Echo International.'

- [21] Mr Rautenbach was carefully cross-examined about a passage in his letter of 12 March 2020 which read thus:

'Please note that the liquidation of EIMS does not affect any of the businesses outside of South Africa, which are held under a different Group Legal entity, so it should be business as usual for you and your teams.'

- [22] The significance of this passage was that the six individuals mentioned had been employed by EIMS and then, subsequent to the liquidation, were contracted to AOOML. Mr Leslie, on behalf of the individual applicants, put the following to Mr Rautenbach:

'You were the CEO and you are now telling the OPCOs that you still have business as usual, you still have access to the following investment management team resources who contracted to Echo International Mauritius in the following capacities.'

To this proposition, Mr Rautenbach was constrained to answer in the affirmative.

- [23] In order to ensure that the operating companies enjoyed the services of these key individuals hitherto employed by EIMS, Mr Rautenbach conceded that independent contractor contracts with AOOML and six key individual employees previously of EIMS had been concluded.
- [24] Mr Rautenbach had extreme difficulty in denying that, with the liquidation of EIMS, AOOML did not ensure 'business as usual' as is evident from the following extract of cross-examination by Mr Leslie:

'In order to ensure business as usual for the OPCOs you are looking for a new home for certain of the things that EIMS does.

To ensure business as usual for the operating companies certain of the services that EIMS did had to be housed elsewhere within the group. You are looking for a new home for them.

MR RAUTENBACH: Can you be specific around those services, whether they are shared services or ...

MR LESLIE: Yes, the shares services.

MR RAUTENBACH: Okay. Well no, I do not agree with that.'

[25] However, in the cross-examination that followed, Mr Rautenbach could not rebut the point that AOOML was not exclusively performing services itself but it continued to provide shared services as had EIMS previously. The way in which Mr Rautenbach described the post-liquidation position was that it was not feasible immediately to implement a decentralised model in that the group was "*building an aeroplane in the air*"; that is the implementation of a decentralised model would take time.

[26] In summary, Mr Rautenbach's luminously evasive evidence pointed to one conclusion, AOOML had assumed the key obligations to the group precisely undertaken by EIMS.

[27] Of further relevance to the dispute was the treatment and role of the SOLID platform. It was described as a 'Single End to End Internet Service Provider' automation platform built for fibre, wireless VSAT and ADSL providers. SOLID automates lead generation and customer management. It enables provisioning, billing, collections and customer support and self-service functions to customers. It was described by Ms Scanlon, in her founding affidavit as "*the engine room for the services provided by the ECHOTEL Group particularly those services provided by the operating companies*". According to Ms Scanlon, without access to the

SOLID platform and the services related to it, the operations of the ECHOTEL Group would simply not be able to function. Previously had been centrally managed by EIMS. After the liquidation of EIMS, AOOML entered into a contract with SOLID Tech (Pty) Ltd to retain the SOLID platform. The implication was that the retention of the SOLID platform meant the retention of uninterrupted services to the OPCOs after the liquidation of EIMS, now to be provided by AOOML.

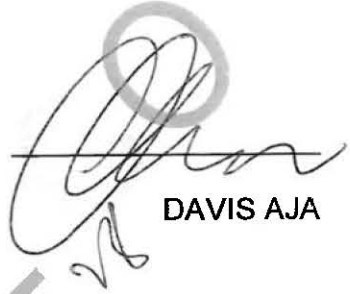
- [28] Perhaps more tellingly was the basis by which AOOML at the same time as the liquidation of EIMS took place sought to contract with six of the previously employed key EIMS personnel. Further attempts were also made to obtain the services of Mr Sedeya and Ms Adams. The independent contracts concluded by these personnel revealed that in effect they were to perform the same activities as they had done as employees of EIMS which had the aim of ensuring that similar services as previously provided by EIMS would now be undertaken by AOOML.
- [29] In its decision, the court *a quo* was correct to look at the substance as opposed to the form of these transactions. Manifestly AOOML replaced EIMS as the relevant business entity and ensured, as had been promised by Mr Rautenbach in his letter of 12 March 2020, to which reference has been made, that there would be no interruption in services so provided.
- [30] In this, the court *a quo* followed a dictum of the Constitutional Court in *Tasima*, *supra* at para 15:

'Section 197 requires that there must be a transfer of the business. A transfer entails the movement of the business from one party to another, and is a concept that was intended to be widely construed. A transfer under s 197 can take the form of a myriad of legal transactions, including mergers, takeovers, restructuring within companies, donations and exchanges of assets. In *NEHAWU*, this court held that the substance rather than the form of the transaction is relevant to the determination of whether a transfer has taken place. The mode of transfer is irrelevant, and it is of no consequence whether there is a contractual link between the transferor and the transferee.'

[31] To find for the appellant in this case would effectively be to place form over the manifest substance of the transaction. The latter was designed to effect a transfer of a going undertaking but in circumstances where it would subvert the purposes of s 197 and the protection that which it provides to employees.

Order

[32] In the result, the appeal is dismissed with costs.



DAVIS AJA

Waglay JP and Mlambo JA concur.

APPEARANCES:

FOR THE APPELLANT:

FOR THE RESPONDENTS: