

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 366/2003

In the matter between:

RUDOLF BOCK APPLICANT

And

SIYEMBILI MOTORS SWD (PTY) LTD RESPONDENT

CORAM:

JOSIAH YENDE : MEMBER

NICHOLAS MANANA :MEMBER

FOR APPLICANT : J. WARRING

FOR. RESPONDENT : Z. JELE

R U L I N G - 4 February 2004

The Applicant by notice of motion sought for an order in the following terms:

1. Ordering and compelling the Respondent to pay all benefits accruing to the Applicant in terms of Section 33 bis of the Employment Act of 1980 as amended totaling to E154,540.00 (One Hundred and Fifty Four Thousand Five Hundred and Forty Emalangeneni),

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2. Costs of suit.

The application is supported by the Founding Affidavit of the Applicant.

The Applicant worked at the Respondent's body shop earning a salary of E7,500. On the 4th March 2003 Lonhro Motors announced a 'management buy out' in that the existing Directors Altsar Lyle, Phil Perry and Jeff Perry and Chris Simoes from Construction Associates had completed a 'management buyout' of Lonhro Motors Swaziland Ltd t/a Leites Motors Toyota with immediate effect. The new directors continued to hold the Toyota and Hino franchises for Swaziland and continued to operate at the same premises in Mbabane and Manzini,

It was communicated that no employees position had been prejudiced as a result of the 'Buyout'.

The name of the company was changed to "SIYEMBILI MOTORS LTD". Employees were encouraged to work and cooperate with the 'new owners who in essence are the same management that has been in place for many years."

On the 8* March 2002, 4 days later, a memo marked "C" was written to allay fears of workers regarding 'accrued habbits' xxxxxx . provisions, leave pay etc.

It was explained that only the shareholding had changed but the business was still owned by Lonhro Motors Swaziland Ltd t/a Leites Motors. It retained all assets and employee contracts were still with the same company.

Mr. Lyle the author of the memorandum added that 'if in the future a staff member decides to leave or

retires then the company will still be liable to pay whatever severance/ retirement/ leave pay entitlements that are due to him or her from the date she/he joined Lonhro Motors/Leites Motors'.

The letter ended thus:

"any person who wishes to leave the company owing to the change of ownership is free to leave voluntarily at his/her own accord but will only receive whatever pay is due to him/her plus any outstanding leave pay. Nobody is being retired/retrrenched as a result of the take over and therefore no 'terminal' benefits would accrue to them as a result."

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What is apparent is that the words 'management buy out', 'new owners', 'share ownership', change of ownership' were all used by the managing director to describe what had taken place in the memorandum marked 'B' and 'C.

It is clear to the court however that which had taken place was within the purview of Section 33 bis (1) of the Employment Act No, 5 of 1980. Through Mr. Lyles's mouth, the employees were informed in not so many words that the company had changed ownership and that there had been a take over by new directors, some from within and others from without. This falls squarely within the contemplation of Section 33 bis (1) (a) and (b) which states that:

"(1) An employee shall not;

- (a) sell his business to another person; or allow a take over of the business by another person; unless he first pays all the benefits accruing and overdue for payment to the employees at the time of such sale or take over."
- (b) There is an exception however in terms of Section 33 bis(2) which states:

"Notwithstanding subsection (1) if the person who is buying the business or taking it over, makes a written guarantee which is understood by and acceptable to xxxxxx employer that all benefits accruing at the termination of his previous employment shall be paid by him within JO days and by mutual agreement agreed in writing and approved by the Commissioner of Labour, subsection (1) shall not apply,"

The previous employee of the Applicant did not pay out the terminal benefits nor did the new owners invoke the provisions of Section 33 bis {2} by entering into a mutual agreement with the employees that they would pay all accrued terminal benefits within 30 days, The Commissioner of Labour was not brought in either in terms of the subsection.

It is clear however that all employees upon the explanation made by Mr. Lyle in his memorandum chose to continue working for the new owners and none was paid their terminal benefits because their contracts were not terminated.

On the 30th April 2003, the Applicant tendered his resignation after working for the new owners since the 4th march 2002. Effectively the resignation was after a period of about 12 months. The Applicant did not give reasons for the resignation in the letter dated 30 April 2003, but sought to claim terminal benefits from the new owners who were effectively his employers.

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In terms of the Employment Act, where an employee voluntarily resigns from his employment, unless the employer grants him an ex-gratia terminal package, there is no obligation on the part of the employer to pay notice pay, additional notice, and severance allowance.

The case of the Applicant does not fall within the contemplation of Section 33 bis and the Application is definitely misconceived.

Had the Applicant terminated his employment immediately upon the take over/or upon knowledge of it, and reported to the Commissioner of Labour, the previous employer Lonhro Motors would have

been obliged to pay all his terminal benefits and/or the new employer would have undertaken to pay the same within 30 days from the date of the take over.

The court emphasizes that Lonhro Motors Swaziland (Pty) Ltd should have sought exemption from the operation of the provisions of Section 33 bis of the Employment Act to the Minister of Enterprise and Employment in terms of Section 6 of the Employment Act. This example was set in the case of the take over by Standard Bank (Swaziland) Ltd of the assets and management of Barclays Bank Swaziland Limited in 1997. By not doing so, and at the same time going ahead with the sale of the company to new owners, the company committed an offence in terms of Section 33 bis (3).

That notwithstanding, the Applicant has no recourse against Siyembili Motors Swaziland (Pty) Ltd t/a Leites Motors.

The application is dismissed. No order as to costs. The members agree.

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JUDGE PRESIDENT

INDUSTRIAL COURT