

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 292/01

In the matter between:

WACO AFRICA LIMITED

Applicant

And

BHEKISISA H. MOTSA

1st Respondent

NHLANHLA MABUZA

2nd Respondent

AMOS FANA GAMEDZE

3rd Respondent

**THE SHERIFF FOR THE DISTRICT
OF MANZINI**

4th Respondent

In re:

BHEKISISA H. MOTSA

1st Applicant

NHLANHLA MABUZA

2nd Applicant

AMOS FANA GAMEDZE

3rd Applicant

And

CAPE CONTRACTORS (PTY) LIMITED

Respondent

CORAM:

NSIBANDE S. : Acting Judge

THWALA P.: Member

NKAMBULE A.M.: Member

MR. MNISI: For Applicant

MR. HLOPHE: For 2nd and 3rd Respondents

JUDGEMENT - 22/10/2008

1] This is an urgent application instituted by the Applicant for an order:

"1. Dispensing with the normal Rules of Court as to time limits, services, forms and procedure as prescribed by the Rules of this Honourable Court and directing that the matter be heard as one of urgency.

2. That the fourth Respondent is directed to immediately stay the warrant of execution issued by the first, second and third Respondents against Cape Contractors (Pty) Limited under Case No. 292/01 pending the outcome of the further relief claimed by the Applicant in paragraph 3,4, 5 and 6 of this notice of motion.

3. That the fourth Respondent is directed to release from attachment all goods attached by the fourth Respondent at Usuthu Pulp, Bhunya, district of Manzini, pursuant to the warrant of execution issued by first, second and third Respondents against Cape Contractors (Pty) Limited under case number 292/01.

4. That the first, second and third Respondents pay the cost of this application.

5. That the fourth Respondent pays the costs of this application only in the event that the fourth Respondent opposes this application.

6. Further and/or alternative relief"

2] The Applicant alleges in its founding affidavit that it is a company duly registered and incorporated with limited liability according to the laws of South Africa which purchased Cape Contractors (Pty) Limited, a company against whom the Second and Third Respondents issued the writ of execution that is the subject matter of this application.

3] The Second and Third Respondents hold a judgement against the said Cape Contractors (Pty) Limited for a combined amount of E19 187.27 arising out of claims for unfair dismissal.

4] The Fourth Respondent is the Deputy Sheriff for the District of Manzini, who in executing the writ of execution against Cape Contractors (Pty) limited has attached goods belonging to the Applicant.

5] The Applicant's case is that the Fourth Respondent, carrying out his duties as a Deputy Sheriff, has attached its goods instead of those of Cape Contractors (Pty)

Limited against whom the writ was issued. Applicant points out that the Respondents are not entitled to attach goods belonging to the Applicant in satisfaction of a judgment granted against Cape Contractors (Pty) Limited and not the Applicant. Consequently Applicant seeks a release of the attached goods.

6] The Second and Third Respondents who oppose the application do so on two grounds; firstly, that the agreement of sale between the Applicant and Cape Contractors (Pty) Limited transfers liability for past actions of Cape Contractors (Pty) Limited to the Applicant and secondly, that in terms of **Section 33 bis of the Employment Act 1980** the Applicant is obliged to pay the Respondent's claim.

7] **Section 33 bis**

The Second and Third Respondents argued that the provisions of **Section 33 bis** should be interpreted to include payment of terminal benefits and compensation to employees who have been unfairly dismissed.

Section 33 bis of the Employment Act reads thus.

33 bis 1 "An employer shall not -

a) sell his business to another persons; or

b) allow a take over of the business by another person unless he first pays all the benefits accruing and/or due for payment to the employees at the time of such sale or take over.

[2] 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 each employee that all benefits accruing at the termination of his previous employment shall be paid by him within 30 days and by mutual agreement agreed in writing and approved by the Commissioner of Labour, subsection 1 shall not apply.

[3] An employer who fails to comply with subsection [1] shall, upon conviction, be liable to a fine not exceeding six thousand Emalangeni or to imprisonment not exceeding two years or both. "

8] Second and Third Respondents argue that the court should interpret this section to

include those employees dismissed prior to the sale or a take over of a business by another person. That the intention of the legislature was that even such dismissed employees ought to be protected by the provisions of the Act and that the Act should be regarded as a whole. The intention of the legislature in passing the Employment Act, the court was told, was that employees be treated with fairness because to do otherwise would be unfair and unjust whereas a legislature does not intend such consequence.

9] Although the courts are entitled, in interpreting statutes, to consider the equitable position, this entitlement can not avail against a clear statutory provision (see **Principles of Legal Interpretation, Statutes, Contracts and Wills - E.A. Kellaway**)

10] The provisions of **Section 33 bis** are clear. The section seeks to ensure the payment of all benefits due to employees before the sale or take over of a business, by ensuring that the seller either pays terminal benefits to the employees at the time of the sale or the purchaser undertakes to do so, in writing within thirty (30) days. This section cannot, by any stretch of the imagination be interpreted to include payment of awards made by courts in respect of unfair dismissal claims. In this matter the Respondents' had been dismissed some five to seven years prior to the sale of the business and could not have been employees at the time of the sale of the business. Compensation for unfair dismissal can not be classified as terminal benefits.

11] The Second and Third Respondents position does not fall within the contemplation of **Section 33 bis** and the defence raised by these respondents is definitely misconceived.

12] **SALE AGREEMENT**

The Respondents argued that in terms of clause 18:2:3 of the agreement of sale the Applicant took over the liability for the actions of Cape Contractors (Pty) Limited and should therefore not complain about the writ of execution the Respondents have issued. Clause 18:2:3 reads:

"anything done before the transfer by or in relation to the seller including (but without limitation) the dismissal of an employee or the commission of an unfair labour practice, or an act of unfair discrimination prior to the Effective Date, will be considered to have been done by or in relation to the Purchaser;"

13] While on a reading of clause 18:2:3 of the sale agreement some liability may attach to the Applicant (and the Court makes no specific finding in this regard), the question is whether this would entitle the Respondents who have a judgement and have issued a writ of execution against Cape Contractors (Pty) Limited to attach the property of a third party? The answer is no. Cape Contractors (Pty) Limited is the person against whom the writ of execution has been issued. The property liable to attachment must therefore belong to it not to the third party.

(See the **CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA - HERBESTEIN & VAN WINSEN PAGES 756 -765**)

14] For this reason the Second and Third Respondents' defence can not stand and the application must succeed. The Court makes the following order;

14.1 The attachment of the Applicant's property carried out by the Fourth Respondent pursuant to a writ of execution issued against Cape Contractors (Pty) Limited is here by set aside.

14.2 The Fourth Respondent is directed to forthwith, release from attachment all the goods attached pursuant to the said writ of execution.

15] **THE COUNTER APPLICATION**

The Respondents filed a counter application seeking to substitute the name of Cape Contractors (Pty) Limited with that of Waco Africa Limited for the reason that Waco Africa Limited had, in terms of clauses 18.2.3 of the sale agreement assumed the liability of Cape Contractors (Pty) Limited towards the Respondents.

16] The Applicant had raised issue with the fact that the founding affidavit of the counter application was deposed to by the Second and Third Respondents' attorney and that the said attorney had no authority to bring the counter application.

17] In the matter of **Parsons Transport (Pty) Limited and Florah Dube and Daniel Mantimakhulu (I.C.) Case No. 57/2001**, Nkonyane AJ (as he then was) quoted with approval Ebersohn J. (**in J.K. Maseko and Company (Pty) Limited v Lungile Dlamini and others (H.C.) Case No. 3629/05** (unreported) who held that:

"Ifind that the legal position in Swaziland is the same as in South Africa as set

out by Oglivy Thompson J.A. in the Meerhist matter and that is, ordinarily, a deponent to an affidavit does not need anybody's authority to depose to the affidavit, but where a deponent on behalf of an artificial body initiates any legal proceedings or makes an affidavit on behalf of the artificial body and where his authority is challenged, it is incumbent upon the deponent to prove his authority by producing the appropriately worded resolution empowering him. "

18] The Court finds that the affidavit filed and deposed to by Mr. Hlophe regarding the counter application was proper and that the failure of the Second and Third Respondents to file confirmatory affidavits did not constitute an irregularity.

19] With regard to the counter application, the court views it as ill-conceived. While in terms of the sale agreement, particularly clauses 18.2.3, the Applicant appears to assume liability for some of Cape Contractors (Pty) Limited's actions, that is not enough to allow for a substitution of Cape Contracts (Pty) Limited with the Applicant without giving the Applicant an opportunity to be heard on the merits of the matter.

20] If the Second and Third Respondents are of the view that the sale agreement confers upon them some rights against the Applicant, they will have to bring an application, on notice to the Applicant setting out how such liability arises and enabling the Applicant to respond to such application. If the court were to allow the counter application, it would mean that the finding of liability would have been made against the Applicant without giving it the opportunity to fully address the issues. The counter application is therefore dismissed.

21] There will be no order as to costs.

The members agree.

S. NSIBANDE

ACTING JUDGE