



IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 485/2013

In the matter between:

STAWU

1ST APPLICANT

FRANK BARAS AND 33 OTHERS

2ND APPLICANT

and

UNITRANS SWAZILAND LIMITED

RESPONDENT

In Re:

STAWU

1ST APPLICANT

FRANK BARAS AND 33 OTHERS

2ND APPLICANT

and

UNITRANS SWAZILAND LIMITED

Neutral citation : Frank Baras and 33 Others v Unitrans Swaziland Limited (485/2013) [2013] SZIC 12/2018 (2018)

Coram : Nsibande J.P.
(Sitting with N.R. Manana and M.P. Dlamini
Nominated Members of the Court)

Date Heard : 02 February 2018

Date Delivered : 20 February 2018

JUDGEMENT

1. The Applicants are ex-employees of the Respondent. They have filed a claim with this Court for the determination of an unresolved dispute that they have with the Respondent. Nine of them however are at the stage of having their dispute with Respondent attended to at the Conciliation, Mediation and Arbitration Commission. Their combined claim against the Respondent amounts to E4 765 254.59 (Four Million Seven Hundred and Sixty Five Thousand Two Hundred and Fifty Four Emalangenzi Fifty Nine Cents).

2. Applicants allege that sometime in November 2017 they were made aware by Respondent's officials that the Respondent would cease to exist at the end of November 2017. They then, on 18th November 2017 saw in the local newspapers an article announcing the successful merger of Respondent and South Star Logistics resulting in a joint venture called Southern Star Logistics (PTY) Limited.

3. Driven by fear of missing out on their claim against the Respondent if the Respondent were to cease to exist the Applicants approached this Court on a Certificate of Urgency primarily seeking that- *“a rule nisi operative with immediate and interim effect, returnable on a date to be determined by the above Honourable Court, do hereby issue as follows:*

3.1 Directing and authorizing the Sheriff or her lawful deputy in the region wherein in the assets of the Respondent are found, to attach, make an inventory and place under his custody such property to be kept as security for the Applicants' claim against the Respondent currently pending determination by the above Honourable Court and

that matter pending before the Conciliation, Mediation and Arbitration Commission”.

4. The Applicants’ submit that the merger creates a new company all together and this means that the Respondent will cease to exist in Swaziland, or, if anything will exist only on paper, with no assets capable of satisfying any judgement of this Court. It was also said that the merger would render the Respondent an *peregrinus*.

5. The application was opposed by the Respondent which denied that it would cease to exist as a result of the merger. It was submitted that the Respondent would continue to hold its own assets both movable and immovable. The Respondent, it was submitted continues to hold an immovable property being a depot in Matsapha valued at E14 million (Fourteen Million Emalangi) which was more than sufficient to cover the claims of the Applicants in the event they were successful in the main action. The Respondent denied that it would dissipate its assets in order to avoid an adverse judgement and submitted that the merger does not in any way violate any of the rights of the Applicants. In particular, the Respondent emphasized that it

would continue to own trucks in its own name. Even though it denied that Applicants' claim amounted to E4 765 254 (Four Million Seven Hundred and Sixty-Five Thousand Two Hundred and Fifty Four Emalangi) because it had been reduced by the nine Applicants' claim that were no longer before this Court, Respondent undertook not to dispose of its assets pending finalisation of the Applicants' claim that is pending before this Court.

6. The Applicants' case is based the legal remedy of "arrest suspectus de fuga", the main objective of which is to attach a 'debtors' assets to found jurisdiction. However "a further object of such attachment is to furnish an asset on which execution can be levied to satisfy the judgement which may be given so that the Court's sentence will not be rendered nugatory or as it has been called, a brutum fulmen".
Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa 4th Edition at Page 85.

7. In **Welcome Mamba and 13 Others In Re: Welcome Mamba & 13 Others v Mainetti GTA Hangers Swaziland Industrial Court Case No. 383/2012** Dlamini J. having quoted Judge President Broome in

Getaz v Stephen 195 6 (4) SA 751 opined that “*whether a departure is with the intention of defeating a creditor’s claim can only be classified as such if it is undertaken with the sole purpose of evading or delaying payment. There must be an intention to leave, and not just leave but do so permanently, the area of the jurisdiction of the Court. Nothing short of such intention suffices*”.

8. In the present matter, it appears as though the Respondent intends to stay in existence in Swaziland with some assets in the form of trucks and immovable property remaining in its name despite the merger.

9. As in the **Welcome Mamba and 13 Others** case (supra) the Court is unable to overlook the fact that the current Applicants’ claim is substantial. Whether it will be successful is not for this Court to decide. What this Court will take into consideration is the fact that the Respondent’s merger with South Star Logistics has been approved and a new entity that has nothing to do with the Applicants’ claim has been formed. The Respondent will continue to exist but it has not been said exactly what it will do outside the merger. The Court takes into consideration the Respondent’s undertaking not to sell or dispatch

its assets pending finalisation of the Applicants' claim and finds such undertaking commendable. However it considers it just and equitable that Applicants' claim be more secured. In this regard the Court will not seek to unnecessarily encumber the Respondents assets which it may require for purposes of its daily business. In the exercise of the Court's equity jurisdiction, the Court considers it to be in the interests of justice that the Respondent be ordered to take up a bond in the amount of E4 765 254 (Four Million Seven Hundred and Sixty Five Thousand Two Hundred and Fifty Four Emalangeni) to more secure the claim of the Applicants'. The Court accordingly makes the following order:

- (a) The Respondent is ordered to take up a bond in the amount of E4 765 254 as security for the Applicants claim against it.**
- (b) There is no order as to costs.**

The Members agree.



S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For Applicants : Mr. S. Jele
(Robinson Bertram Attorneys)

For Respondent : Mr. S. Dlamini
(M. Sibandze Attorneys)