



IN THE INDUSTRIAL COURT OF SWAZILAND
JUDGMENT

Case

No.254/2011

In the matter between:-

SWAZISPA HOLDINGS LTD

APPLICANT

And

SWAZILAND HOTEL CATERING ALLIED

WOKERS UNION

1st

RESPONDENT

STAFF ASSOCIATION OF SWAZISPA

2nd RESPONDENT

HOLDINGS LTD.

Neutral Citation: Swazispa Holdings Ltd v Swaziland Hotel Catering Allied Workers Union & Staff Association of Swazispa Holdings Ltd. (254/2011) [2012] SZIC 17 (29th June 2012)

CORAM: **D. MAZIBUKO J**
(Sitting, with A. Nkambule & M. Mtetwa
(members of the Court))

Heard :

Delivered : 29th June 2012

Summary: Labour Law: Sale of Shares by share holder to Third Party in a company that has employees with accrued terminal benefits. Requirements of section 33 bis (1) (a) and (b) of The Employment Act No. 5/1980 as amended. Sale of shares is not necessarily a sale of business or a takeover of business by another person.

1. The Applicant is Swazispa Holdings Ltd, a limited liability Company registered in Swaziland and trading as Royal Swazi Spa at Ezulwini town in Swaziland.
2. The first Respondent is Swaziland Hotel Catering and Allied Workers Union, a trade union duly registered in terms of section 27 of The Industrial Relations Act No. 1/2000. The first Respondent is the recognized employee - representative for all unionisable employees of the Applicant.
3. The second Respondent is Staff Association of Swazispa Holdings Ltd, an association duly registered in terms of section 27 of the Industrial Relations Act No.1/2000. The second Respondent is the recognized representative of all employees of

the Applicant who fall under the definition of staff, excluding executive management.

4. The Applicant is a public company that is listed in the Swaziland Stock Exchange. The shareholding in the Applicant is made up of the following;

(i) Sun International Ltd	50.6%
(ii) Tibiyo Taka Ngwane	39.9%
(iii) Sundry shareholders	9.7%
	<hr/>
	100%
	<hr/>

5. The Sun International Ltd (Sun International) is in the process of selling its shares in the Applicant (Swazispa Holdings Ltd). The identity of the purchaser and the terms of the sale have not been disclosed in the affidavits before Court. However, the identity of the purchaser and the details regarding the sale are not necessarily for the purpose of deciding this matter. The principle which is central to the dispute before Court is clearly stated in the affidavits. The sale transaction between the Sun International Ltd and the third party is underway. The Respondents have been made aware of this sale of shares.

6. A sharp dispute has arisen between the Applicant and the Respondents as a result of the aforementioned sale of shares. The dispute is based solely on the perception held by the Applicant's employees who are members of the Respondents, regarding the effect which the sale of shares has on their employment contracts.
7. The Respondents perceived the sale of shares by Sun International to a third party (purchaser) as negatively impacting on their employment contracts with their employer (Applicant). According to the Respondents the sale should be regulated by section 33 bis of The Employment Act No. 5/1980. Section 33 bis is an amendment to The Employment Act introduced by The Employment (Amendment) Act No.5 of 1997.
8. It is apposite at this stage to reproduce the relevant portion of section 33 bis as follows;

"Payment of all benefits before selling business.

33 bis (1) An employer shall not -

(a) sell his business to another person ; 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)

(3) ... ”

9. The Respondent argued that the sale of shares by Sun International to a third party falls squarely within the provisions of section 33 bis (1). As a result thereof the sale should be regulated in accordance with that section. Consequently, the Respondents demand payment of terminal benefits due by the employer (Applicant) to the employees as provided for in that section.

10. On the contrary, the Applicant has denied that it is liable to pay her employees terminal benefits arising from the aforementioned transaction. The Applicant further denied that the sale of shares between Sun International and the third party is a transaction that should be regulated under section 33 bis (1) of The Employment Act.

11. The dispute between the parties revolves around the interpretation of section 33 bis (1) and its application to the sale of shares. The sale agreement is not before Court. However, the relevant aspect of the sale agreement, which is the contentious issue before Court, appears clearly from the affidavits of the litigants. There is no doubt as to the subject matter of this application.

12. There are two (2) conditions or transactions that are mentioned in section 33 bis (1), which the occurrence of any one or both attract the liability on the employer to pay terminal benefits to its employees. The obligation to pay terminal benefits is mandatory upon the occurrence of any one or both of the conditions (transactions) aforementioned.

13. The first condition (transaction) to attract the employers' liability to pay benefits requires the employer to sell his business to another person. Can the sale of shares by Sun International to a third party be interpreted to mean that the Applicant (employer) has sold its business to another? Should this question be answered in the affirmative the liability of the employer

(Applicant) toward its employees for payment of terminal benefits is immediately activated.

14. The Applicant as a legal entity enjoys legal personality apart from its members. This principle is entrenched in our company law and is stated by the learned authors as follows;

“Upon formation, a company, as a separate entity, acquires the capacity to have its own rights and duties. It acquires legal personality and exists apart from its members.”

This important company law principle is exemplified in the leading case of Salomon v Salomon & Co.[1897]AC 22.”

(Underlining is added)

H S CILLIERS et al; Entrepreneurial Law 2nd edition (Butterworths) 1998, ISBN 0 409 01976 3 at page 69.

15. After analyzing the facts in the Salomon v Salomon case, the learned authors extracted the following useful principle;

“The House of Lords held that from its inception, a company was legally separate from its members.”

(Underlining is added)

H.S. CILLIERS et al (supra) at page 70.

**See also; CILLIERS AND BENADE: Company Law
4th edition, (Butterworths) 1982, ISBN 0 409
01935 6 at page 10**

16. The authorities listed above have stated the legal principle in clear terms that the Applicant as a Company exists independently of its members. The activities of the Applicant are independent from those of its members and vice versa. The sale of shares by the Sun International to a third party, does not amount to a sale of business by the Applicant to another. The question therefore which appears in paragraph 13 above is answered in the negative.

17. The Applicant is not a party to the sale agreement between Sun International and the third party. The Applicant has not sold its business. The first condition (transaction) therefore as stated in section 33 bis (1) (a) does not apply in this case.

18. The second condition (transaction) requires that the employer (Applicant) should *allow a take over of the business by another person*. The phrase *takes over of the business* means the business of the employer (Applicant) and not the business of the member (shareholder). The second question before Court therefore is whether the employer (Applicant) has allowed a take over of its business by another in the sale of shares by the Sun International to a third party ?
19. The Respondent argued that the Sun International is a majority shareholder in the Applicant since it has 50.6 % (fifty point six per cent) shares.
- Should Sun International proceed to sell its shares to the third party, that third party will hold a majority shareholding in the Applicant, namely 50.6% (fifty point six percent).
20. The Respondent stated further that it is usually the case that the entity or person who has the majority shares in a particular company also has the majority votes. That entity ordinarily has control of who gets appointed to the board of directors. The control of a company lies with the board. The board has the power to formulate policies and gives business

direction to the company. That means that he who has the majority votes has the control of the company.

21. The argument goes further, that the aforesaid sale of shares allows a third party to have a majority shareholding and therefore the majority votes in the Applicant. In effect the Applicant has allowed a take over of its business by another as envisaged by section 33 bis (1) (b).
22. It is helpful at this stage to reproduce the evidence of the Respondent on this point as follows;

“7.3 It is common cause that, control of a company is usually in the person or entity that holds the majority shares in that particular company. The person or company that holds the majority shares has majority votes, thus having control on who gets appointed to the board of directors, in whose board of directors an individual company’s control vests.

7.4 It is my humble submission that, the entity that will acquire the shares that are earmarked to be disposed

will have control over who gets appointed to the board of directors, as it will be having the majority of votes. It is common cause that the board of directors is the ones [one] responsible for formulating policies and giving business direction of Swazispa Holdings Limited.

7.5 It is my humble submission that Swazispa Holdings Limited by agreeing to have another person or entity assuming the majority shares and votes; it has allowed a take over, thus making Section 33 bis applicable.”

(Underlining is added)

(Record page 24)

23. In defining the phrase *take over*, the Respondents have referred the Court to a passage in the judgment of his Lordship Diemont JA which reads as follows;

“ The conventional meaning of ‘take over’ is the acquisition by one company of sufficient shares in another company to give the purchaser control of that company”

(Underling added)

**SPINNAKER INVESTMENTS (PTY) LTD V TONGAAT
GROUP LTD 1982 (1) SA 65** at page 71 (A).

24 The Respondents have further referred the Court to a passage in the work of the learned author R C Beuthin which reads as follows;

“Control of a company is extremely valuable, because it is the key by which the controllers can unlock the door to the company’s assets and deal with them as they desire. However, it is increasingly realized that this control is in a sense a company asset, and that all members are entitled to share in any advantage which it may give.”

R C BEUTHIN : BASIC COMPANY LAW, at pages 217.

(Respondents’ Counsel did not provide full citation of this book)

25. According to the Respondents the words ‘take over’ are used in section 33 bis (1) (b) in the manner defined by his Lordship

Diemont JA in the **SPINNAKER V TONGAAT** case. The sale entitles the third party to exercise control over the Applicant as well as the business of the Applicant. A 'take-over' of the business of the Applicant has therefore taken place. As a result the second condition (transaction) requiring payment of terminal benefits which is contained in section 33 bis (1) (b) has occurred. Consequently the Respondents demand payment of the benefits due to the employees.

26. The Applicant has a different interpretation of section 33 bis (1) (a) and (b).

The Applicant avers that it operates the business of a hotel resort and casino. Therefore a sale of business will occur once the Applicant has sold its hotel resort and casino to another person.

Also a take over of its business will occur once the control of the hotel resort and casino is transferred from the Applicant as employer and owner to another person.

27. The Applicant argued that even if the sale of shares between the Sun International and the third party was executed, the hotel resort and the casino will remain the business of the Applicant (Swazispa Holdings Ltd). The Applicant will remain

- the employer of the Respondents' members. The accrued benefits of the Respondents' members will remain secured in the Applicant's control.
28. It may be helpful to look at the purpose for which section 33 bis was enacted. There is no doubt that this section was introduced to protect the rights and benefits due to employees which have accrued in the course of employment.
29. An employee who is in the service of a particular employer acquires certain rights and benefits, by operation of law, which increase in economic value over the years of service. These benefits include payment for severance allowance and additional notice, and are payable upon termination of service. Some employment contracts may also include payment for long service, among the benefits payable on termination.
30. Unscrupulous and dishonest employers often evade their liability to pay due terminal benefits either by selling their business or allow a take over of their business by another person. In some cases that another person could be a new

employer. In other cases he could be a total stranger who has no interest in taking over as new employer.

31. The sale or take over of business would enable the liable - employer to secretly disappear from the workplace without discharging its liability to pay the employees. A new employer or owner who has either purchased or taken over the business would enter the workplace and successfully deny liability for payment of the employee-benefits which have accrued prior to his arrival.

32. The end result would be that, the employees will be left with an academic right or Court Order for payment of benefits which cannot be enforced. The liable-employer would have disappeared from the workplace without leaving attachable assets behind. The business and its assets by then would no longer be subject to attachment to satisfy the debt for terminal benefits. Ownership, possession and control of the business and its assets would have passed to the new owner by virtue of the sale or take over of the business as envisaged in section 33 bis.

The legislature had to take the necessary steps to protect employees from being cheated out of their terminal benefits.

33. The sale or take over which is contemplated in section 33 bis (1) (a) and (b) must be such that it is capable of transferring ownership and control of the business and its assets from the employer to another person. In other words, the sale or take over must be such that it is capable of frustrating the employees in recovering benefits that have accrued to them over the years spent in the service of their employer. This was the legal loophole which the legislature had to close.
34. When drafting section 33 bis (1) (a) and (b) the legislature was alive to the fact that ownership and control of a business can pass from an owner to another person either by sale or other lawful means which the legislature has referred to as take over of business. An example of a lawful take over of business would include a donation.
35. A business owner who is also an employer may, during his lifetime, donate his business to another person. That other person (also known as the donee), will upon acceptance of the donation take over the possession and control of the business and its assets as new owner.
- The employer (donor) will thereafter vacate his office as previous owner and employer and be replaced by the new

owner (donee). The employer will thereby successfully evade payment of terminal benefits using the mechanism of a take over of business.

36. An important requirement in section 33 bis (1) (b) is that the employer must allow a take over of his business by another person. That means that the employer must consent to a take over by another person. In other words the employer must be in a position to veto or restrain a proposal to have his business taken over by another person.

37 The question before Court is, does the sale of shares between Sun International and the third party amount to a take over of the business of the Applicant by that third party ? If the answer is in the affirmative the next question is, did the Applicant as employer allow that take over ? If the second question is also answered in the affirmative then the sale of shares should be regulated by section 33 bis (1) (b).

38. The Respondents have stated the following in clause 7.3 of their answering affidavit, which quotation appears in detail in paragraph 22 above;

“It is common cause that, control of a company is usually in the person or entity that holds the majority shares in that particular company.”

(Underlining added).

(Record page 24).

The Respondents have stated in their affidavit what they believe is a correct principle, but fell short of demonstrating how that principle is applicable to the facts of the case before Court. The Respondents have not cited authority in support of the principle which they have proposed.

39. The Applicants have stated in the replying affidavit that in the particular circumstances of the case before Court the above quoted proposal does not apply. According to the Applicant, their board has thirteen (13) directors which are distributed in the following manner;

39.1 the Sun International appoints six (6) directors.

- 39.2 the Tibiyo Taka Ngwane group appoints the remaining seven (7) directors.
40. The decisions of the Applicant's board are made by consensus. Where necessary the matter is decided by a vote. All the directors have one (1) equal vote each. That means that the Tibiyo Taka Ngwane group controls about fifty four percent (54%) of the directors in the Applicant's board. The Sun International Ltd controls the remaining forty six percent (46%). According to the Applicant, they enjoy a majority in the board and therefore exercise a bigger voting power.
41. The Respondents did not challenge this crucial evidence presented by the Applicant regarding the appointment and the voting power of the Applicant's board of directors as stated in paragraphs 39 and 40 above. By operation of law, the Respondents are taken to have admitted this particular item of evidence. The Court will accordingly deal with this evidence as factually correct.
42. Though this particular evidence appears for the first time in the replying affidavit, it is relevant and was filed in response to the Respondents' defence as contained in the answering affidavit. Had the Respondents desired to challenge the contents

of the replying affidavit, they could and should have applied for leave to file a supplementary affidavit. There was ample time for the Respondents to apply for leave to file.

The replying affidavit was filed with the Court and served on the Respondents' attorney on the 14th September 2011. The matter was argued on the 8th February 2012. The conclusion is inescapable therefore that time was available for the Respondents to apply for leave to file a supplementary affidavit. The absence of a supplementary affidavit from the Respondents leads the Court to an inference that the contents of the Applicant's replying affidavit are not in dispute.

43. According to the Respondents, the control of a company is usually in the person or entity that holds the majority shares in that company. With that statement the Respondents indirectly admit that there are cases where the person or entity who holds the majority shares in a particular company does not necessarily control that company. Each company has its internal arrangement as to who has control of the company. These issues are regulated in the memorandum and articles of association, and the shareholders agreement, provided the latter exists. The evidence indicates that the Tibiyo Taka Ngwane group has more directors on the Applicant's board than Sun

International Ltd. The ratio is seven to six (7:6) in favour of Tibiyo Taka Ngwane group.

44. The evidence before Court is that Sun International Ltd has the majority shares in the share capital of the Applicant (Swazispa Holdings Ltd.) namely 50.6 % (fifty point six percent). There is no evidence however that Sun International exercised control of the Applicant either by virtue of being a majority shareholder or otherwise. Despite being a majority shareholder Sun International Ltd did not exercise control of the Applicant or its business.

45. The evidence of the Respondents reads as follows on this point;

“The person or company that holds the majority shares has majority votes, thus having control on who gets appointed to the board of directors, in whose board of directors an individual company’s control vests”.

(Underlining added)

(Record page 24)

46. The Respondents' aforementioned statement is not factually correct. The Respondents have clearly misunderstood the composition and voting power of the Applicant's board. The Respondents have assumed, erroneously, that since Sun International has the majority shares in the Applicant's share capital it will automatically exercise and enjoy majority votes in the Applicant's board of directors. A majority shares in a company does not guarantee a majority votes in the board of that company.
47. The Respondents have further assumed, erroneously, that the sale of shares will enable Sun International to transfer to the third party the majority shares together with the (presumed) corresponding majority votes. However the evidence clearly indicates that, that assumption is incorrect.
48. The correct position is that Sun International did not exercise majority votes in the Applicant's board despite having majority shares. It follows therefore that Sun International cannot pass on

to the third party the alleged majority votes. A seller cannot pass on to the purchaser a right or benefit which it did not have.

49. The evidence of the Respondents further reads as follows;

“7.5 It is my humble submission that Swazispa Holdings Limited by agreeing to have another person or entity assuming the majority shares and votes, it has allowed a take over, thus making Section 33 bis applicable.”

(Underlining added)

(Record page 24)

It is clear to the Court that the perception of a take over in the Respondents' mind is based on the erroneous assumption aforementioned. The conclusion that the Respondents have drawn is accordingly flawed since it is not supported by the evidence. The evidence indicates clearly that the sale of shares

will not result in a transfer of the majority votes to the third party (purchaser). The question of a take over therefore does not arise.

50. The Court finds that the sale of shares by Sun International to a third party does not amount to a sale of the business of the Applicant to that third party.

The Applicant has not sold its business to any person. Even if Sun International were to sell and transfer its shares to the third party, that transaction will not affect the Applicant's right to ownership, possession and control of its business and assets. The aforementioned sale of shares therefore does not amount to a sale of business of the employer within the meaning of section 33 bis (1) (a).

51. Furthermore, the aforementioned sale and transfer of shares will not remove the Applicant as employer of the Respondents' members and replace her with the third party. The Applicant remains employer and retains its ownership and control of its business. A take over of business has not taken place either within the meaning of section 33 bis (1) (b) or any other meaning that has been suggested by the Respondents.

52. The principle that the Respondents seek to extract from the matter of **SPINNAKER V TONGAAT** as amplified in paragraph 23 above, does not apply in this case. The third party will not be able to exercise control of the Applicant should the proposed sale be executed. Therefore a 'take over', within the meaning of the **SPINNAKER V TONGAAT** matter does not apply in this case.
53. The Court was further referred to the matter of **RUDOLF BOCK V SIYEMBILI MOTORS SWD (PTY) LTD**, Industrial Court case No. 366/2003 (unreported). The Applicant Mr Bock had been an employee of Lonhro Motors Swaziland Ltd t/a Leites Motors (herinafter referred to as Lonhro). After some time Lonhro Motors announced a management buy out. A new board of directors including some new and previous directors took over and operated the business which Lonhro previously operated. The name of the company was changed to SIYEMBILI MOTORS LTD t/a Leites Motors. The employees were told that only the share holding had changed but the business was still owned by Lonhro. Further, that Lonhro retained all assets and that the employee-contracts were still with the same company (Lonhro).

54. The Court per his Lordship Nderi Nduma JP came to the conclusion that the transaction fell within the provision of section 33 bis (1) (a) and (b). The Court relied on the evidence which was contained in various memoranda which had been written to the employees by one of the directors in the new board.

The Court was persuaded by the words and phrases which had been used by the said director including the following;

- (1) the company had changed ownership,
- (2) a take over had taken place,
- (3) there is a previous employer,
- (4) there is a new owner,
- (5) there has been a management buy-out,
- (6) there has been a sale of the company (Lonhro).

55. The terminology that was used by the director in communicating with the employees gave the Court an impression that Lonhro Motors Swaziland Ltd had sold its business to Siyembili Motors Swd (Pty) Ltd the Court therefore came to the conclusion that Lonhro Motors Ltd was a previous

employer and that Siyembili Motors Ltd was a new owner and employer. The Court was persuaded to look beyond the say – so of the contracting parties and considered evidential material that was available to it. The Court was convinced that a change of ownership had taken place as a result of the take over of business between Lonhro Motors and Siyembili Motors. It was the finding of the Court that the business was then in the hands of a new owner Siyembili Motors Ltd.

56. The matter of **RUDOLF BOCK VS SIYEMBILI MOTORS** is distinguishable from the case before this Court on a number of features, including the following;

- (1) there is no change of ownership of the business of the employer,
- (2) there is no change of the employer, the Applicant (Swazispa Holdings Ltd) remains the employer,
- (3) there is no sale or take over of business,
- (4) the control of the business remains in the hands of the employer (Swazispa Holdings),
- (5) there is no sale of company to new owners.

As a result of the foregoing the Court is not persuaded to follow the reasoning and decision in the Bock v Siyembili Case.

57. The Court is further persuaded that the Applicant has made out a case for the relief sought. The Applicant therefore succeeds in this application. The Respondents were justified in insisting on a Court ruling on the transaction that took place between Sun International and the third party. As a result, the Respondents will not be mulcted in costs following an unsuccessful opposition hereto..

58. A final order is hereby granted in the following terms;

1. The intended sale of shares between Sun International Ltd and a third party is not a sale of business to another person or a take over business by another person within the meaning of section 33 bis (1) (a) and (b) of The Employment Act 5/1980 as amended.
2. The Applicant (Swazispa Holdings Ltd) is not obliged to pay out accrued benefits to its employees as a result of the sale of shares.
3. Each party will pay its costs.

The members agree.

D. MAZIBUKO

INDUSTRIAL COURT- JUDGE.

For Applicant : Adv. B. Van Zyle with Attorney M. Sibandze

For 1st & 2nd Respondents: Adv. P. Flynn with Attorney V. Z. Dlamini