IN THE INDUSTRIAL COURT OF APPEAL
OF SWAZILAND

JUDGMENT

Appeal Case No: 06/12

In the matter between

SWAZILAND HOTEL CATERING ALLIED WORKERS UNION	**1ST APPELLANT**
STAFF ASSOCIATION OF SWAZISPA HOLDINGS LTD	**2ND APPELLANT**

And

SWAZISPA HOLDINGS LTD	**RESPONDENT**

Neutral citation: *Swaziland Hotel Catering Allied Workers Union v Swazispa Holdings Ltd (06/12)* 2012 [SZICA] 3 (4th October 2012)

Coram: **RAMODIBEDI JP, OTA AJA AND ANNANDALE AJA**

Heard: **21st September 2012**

Delivered: **4th October 2012**

Summary: Section 33 *bis* (1)(a) and (b) of the Employment Act No. 5/1980. Interpretation thereof: A contemplated or proposed sale of majority shares in the Respondent company to a third party. Employees contending that this is a sale or take over of business in terms of Section 33 *bis* of the Employment Act thus requiring the employer to pay the benefits accruing and or due for payment to it's employees before the sale of shares is allowed: court *a quo* holding that Section 33 *bis* is not applicable:- Employees appealing to this Court: appeal dismissed with costs.

THE COURT

[1] We deem it expedient right from the outset, to put this case in perspective by detailing a brief resume of the parties herein, as well as the history of the acrimony that has dragged them to this court.

[2] The 1st Appellant 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. It is the recognised employee representative for all unionisable employees of the Respondent, Swazispa Holdings Ltd.

[3] The 2nd Appellant is the Staff Association of Swazispa Holdings Ltd. It is an Association duly registered in terms of Section 27 of the Industrial Relations Act No. 1/2000. It is the recognised

representative of all employees of the Respondent who fall under the definition of staff, excluding the executive management.

[4] The Respondent, Swazispa Holdings Ltd, is a Public Limited liability company, which operates the business of a hotel resort and casino and is listed on the Swaziland stock exchange. It is common cause that the shareholding in the Respondent is made up as follows:-

(1)	Sun International Ltd	-	50.6%
(2)	Tibiyo Taka Ngwane	-	39.7%
(3)	Sundry Shareholders	-	9.7%
			100%

[5] It is apposite for us to note at this juncture, that the hub upon which this appeal spins, is the construction of Section 33 *bis* (1)(b) of The Employment Act No. 5/1980 as amended, *vis a vis* the facts of this case. This interpretation has become our lot due to the acrimony which has developed between the Appellants and Respondent, which acrimony is rooted in the desire of the majority shareholder in the Respondent, Sun International Ltd, of selling its majority shareholding of 50.6% to an undisclosed third party. The employees of the Respondent see these moves of the majority shareholder of the Respondent, to sell its shares to a third party, as a sale or takeover of the Company's business, by the third party, thus invoking the provisions of Section 33 *bis* (1) (a) and (b) of the Employment Act, which requires the Respondent to pay its employees all the benefits accruing to and or due for payment to its employees before

such sale or take over. The Respondent disagrees with this stance of the Appellants, thus the acrimony.

[6] It was obviously in a bid to prevent this acrimony from degenerating into an impasse (which should be the concern of any deligent employer), that following the Memorandum of Agreement entered into by the parties on the 30th June 2011, the Respondent as Applicant, approached the court *a quo*, in a suit styled **Case No. 254/2011**, seeking *inter alia* for orders which included the following:-

''1. That the sale of shares intended by Applicant is not a sale of Business to another person or takeover of a business by another person as contemplated by Section 33 bis of the Employment Act.

2. Applicant is not obliged to pay out accrued benefits in the event of the intended sale of shares''.

[7] The court a quo in its judgment rendered on the 29th of June 2012, per **D. Mazibuko J** with **A. Nkambule and M. Mtetwa** concurring, upheld the case of the Respondent herein as Applicant and granted the foregoing orders sought.

[8] It is in apparent dissatisfaction of the orders of the court *a quo*, that the Respondents in that court, as 1st and 2nd Appellants herein, have approached this court by way of an appeal, seeking for our intervention premised on grounds of appeal which are detailed as follows:-

‘‘1. The court a quo erred in law in finding that the proposed sale of the majority shareholding in the Respondent did not constitute a take over of the business within the meaning of Section 33 bis (1) (b) of the Employment Act No 5 of 1980.

2. The court a quo erred in law in finding that the proposed sale of the majority of shares in the company would not guarantee a purchaser of the shares a majority of votes on the board of directors after such sale. In so finding the court a quo erred in accepting and assuming that the present structure of the board of directors would persist after such sale whereas as a matter of law it would not.

2.1 The court a quo erred in law in failing to find that the sale of the majority shareholding would by operation of law terminate any previous shareholders agreement or any such similar agreement in respect of the composition of the board of directors. The court a quo therefore erred in failing to find that the control of the company is in law vested in its shareholders and not in the board of directors.

3. The court a quo erred in law in finding and ordering that the intended sale of the majority of shares by Sun International Ltd to a third party is not a take over of the business and that the Applicant is not obliged to pay out accrued benefits to its employees’’.

[9] Now Section 33 *bis* (1)(a) and(b) of the Employment Act states as follows:-

(1) An employer shall not:-

(a) sell his business to another person: or

(b) allow a take over of his 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''.

[10] It is an obvious fact therefore, that an employer's obligation to pay accrued benefits to his employees would be invoked pursuant to the relevant statute on the occurrence of one of two events, namely *(1) where he sells his business to another person or (2) where he allows a take over of his business by another person.*

[11] In the impugned judgment, the court *a quo* after analyzing the separate legal personality of the Applicant/Respondent herein, found it as a fact, that the first condition which requires the sale of the business to another person for Section 33 *bis* to be activated, has no application in this case. The court a quo made this finding in paragraphs 16 and 17 of the assailed judgment as follows:-

''16. The authorities listed above have stated the legal principles 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 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''.

[12] We agree with the foregoing findings of the court a quo. This is because by acquiring the majority shares of the Respondent, the undisclosed third party merely becomes a majority shareholder and thus a member of the Respondent, with a legal personality distinct from the Respondent. It follows that no matter how well and completely connected to the Respondent the third party becomes by reason of its majority shareholding, this cannot translate to a sale of the business of the Respondent to the third party. Even if the third party held all the Respondent's shares, that fact would not, without more, translate to the sale of the Respondent's business to the third party or make the third party the owner of the Respondent's business. See **Grammophone and Typewriter Co Ltd v Stanley (1908) 2KB 89 CA**.

[13] We notice that the Appellants did not raise any grounds of appeal challenging the specific findings of that court that the proposed sale of shares by Sun International to an undisclosed third

party is not a sale of the Respondent's business. This state of affairs should have rendered any further discussion on this issue nugatory.

[14] However, it is our considered view, that the interpretation of Section 33 *bis* of our Employment Act must be taken in context and not in isolation. This is because the same thread runs through the two issues arising therefrom, namely, whether the sale of the business or take over of the business, both are underpinned by the doctrine of the corporate personality of a company.

[15] More to this is that this is a grey area, with scant judicial pronouncement in this jurisdiction . This fact came to the glare when we mounted a search for local jurisprudence to serve as precedent or useful guide to a just decision of this matter. It is therefore our view, that it will be tantamount to an abdication of our judicial responsibility to interpret and grow the laws of the Kingdom, if we refused in these circumstances, to add our voice in support of that of the court *a quo*, to lay this issue to eternal rest in the interest of the jurisprudence of the Kingdom and for posterity. That is why we found the need to expressly align ourselves with the findings of the court quo on the issue of the sale of the business as contained in Section 33 bis (1)(a). Having stated as above, we say no more on the matter.

[16] Now, we agree with the court *a quo* that the Respondent is a separate legal entity distinct from its members. This concept of a

company being a separate legal entity from its members, with perpetual succession and the ability to sue or be sued *eo nomine* (in its own name), has been part of the jurisprudence across national borders, since the locus classicus of **Slomon v Salomon and Co. Ltd (1897) AC 22 (HL).**

[17] In paragraph 30 of **Salomon (supra), Lord Halsburg** stated as follows:-

''Once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and--- the motives for those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are''.

[18] Further, in his concurring opinion in the case of **Salomon (supra) at 51 Lord McNaghten** said the following:-

''The company is at law a different person altogether from the subscribers to the memorandum, and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers''.

[19] The foregoing pronouncement of **Lord McNaghten** was adopted by the South African jurisprudence, which is of high persuasion in the Kingdom, in the case of **Dadoo Ltd and others v Krugersdrop**

Municipal Council 1920 AD 530 at **550-1**, where **Innes CJ** declared as follows:-

''A registered company is a legal person distinct from the members who compose it. In the words of ***Lord McNaghten (Salomon v Salomon and Co---)*** *'the company is at law a different person altogether from the subscribers to its memorandum, and though it may be that, after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or a trustee for them'. That result follows from the separate existence with which such corporations are by statute endowed, and the principle has been accepted in our practice. Nor is the position affected by the circumstance that a controlling interest in the concern may be held by a single member. This conception of the existence of a company as a separate entity distinct from its shareholders is not merely an artificial and technical thing. It is a matter of substance; property vested in the company is not and cannot be regarded as vested in all or any of its members''* (Emphasis added).

[20] Finally, this doctrine as propounded in **Salomon (supra),** has been adopted by our local jurisprudence in a plethora of cases, one of which is the case of **T.T Global Investment (Pty) Ltd v Swaziland Revenue Authority Civil Case No. 65/2012,** at paragraph 63, where **MCB Maphalala J** (as he then was), made the following remarks:-

*‘‘(63)It is trite law that a company upon its formation acquires legal personality and it exists apart from its members. As a separate entity, it acquires the capacity to have its own rights and duties---. The mere fact that a member holds all the shares in a company or the majority thereof does not make the company the agent of the member; and no member is legally entitled to act or represent the company except those appointed as representatives in accordance with the Articles of Association can (sic) bind the company see ‘‘***Corporate Law by Cilliers and Benade**, **3rd edition**, **Published by Butterworths in Durban in 2000 at pages 5-10, S v De Jager 1965 (2) SA 616 [A] at 625; Salomon v Salomon and Co. Ltd (1897) AC 22’’** (emphasis added).

[21] It is thus beyond disputation that the concept of the corporate personality of a company, which is of antiquated and universal application, has been adhered to and expatiated in a myriad of circumstances.. One such circumstance is that a company’s business space or property belongs to it and not to its shareholders i.e its members, or its creditors, however vast their stake in the company.

[22] Now, with the foregoing doctrine of separate corporate personality at the back of our minds, we now proceed to the enquiry before this Court, which when the grounds of appeal and the facts of this case are taken together, acuminates in one issue to wit *‘‘Whether the proposed sale of the majority shares of Sun International to the third party is a take over of the business of the Respondent as contemplated by*

Section 33 bis (1) (b) of the Employment Act?''. We note at once that **Advocate Flynn** for the Appellant concentrated his entire submission on this aspect of the case.

[23] A proper determination of the above poser entails an understanding of the meaning of the phrase ''*takeover of business''* as contemplated by the Act.

[24] Unfortunately, neither the Employment Act nor the Companies Act has availed us of a definition of this phrase. Since the meaning of the phrase is not easily descernable from the literal words of the statute, it is thus imperative that we gather the meaning from the perspective of the intent of those that made it. Put in very plain language, the meaning of this phrase in these circumstances can only be gleaned from a purposive interpretation of same, premised on the intention of Parliament in enacting the Act. This is because the universal trend across jurisdictions is that if the words of a statute are clear and cover the situation at hand, are reasonably workable and do not produce a futility, then there is no need to go any further. The statute will be construed strictly upon its literal meaning. However, if the words are unclear, ambiguous, doubtful, absurd, runs counter to the objects of the statute or produce a futility, the judges do not stop at the words of the statute. They look for the purpose or intention of the legislature from the language of the statute. They call for help in every direction open to them. They look at the statute as a whole, the social conditions which gave rise to it and the mischief which it was passed to remedy. They look at the

‘‘*factual matrix*’’. They use every legislative end. By this means, they clear up many things which would be unclear, ambiguous, doubtful or absurd.

[25] This is the approach which **Lord Diplock** acknowledged as the purposive interpretation of statutes in the case of **Carter v Brodbeer (1975) 3 ALL ER 158 at 161**. This approach was also recognised by **Viscount Dilhorne** in the House of Lords, who pointed out that this has been the method of construction since the seventeenth century at the time of Coke. His educative dictum is to be found in the case of **Stock v Frank Jones (Tripton) Ltd (1978) I WLR 231 at 234**, as follows:-

‘‘*It is now fashionable to talk of a purposive construction of a statute, but it has been recognised since the 17th century that it is the task of the judiciary in interpreting an Act to seek to interpret it ‘according to the intent of them that made it’* **(Coke 4 inst 330)’’.**

[26] **Lord Denning** had blazed the trail of purposive construction in the court of Appeal three decades earlier, in the case of **Seaford Court Estates Ltd v Asher (1949) 2 KB 481** when he said at **498-499**:

‘‘*Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from ambiguity--.. A judge-- must not alter the material of which it is woven, but he can and*

should iron out the creases. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give ''force and life'' to the intention of the legislature''.

[27] **Lord Denning** added more to the foregoing in the case of **Nothman v Barret London Borough Council (1978) I WLR 220** at 228 in the following words:-

*''The literal method is now completely out of date. It has been replaced by the approach which **Lord Diplock** described as the ''purposive approach''---. In all cases now in the interpretation of statutes we adopt a construction as will 'promote the general legislative purpose' underlying the provision. It is no longer necessary for the judges to wring their hands and say: ''There is nothing we can do about it.'' Whenever the strict interpretation of statutes gives rise to an absurd or unjust situation, the judges can and should use their good sense to remedy it by reading in, if necessary so as to do what parliament would have done, had they had the situation in mind''.*

[28] It remains for us to state here, that the application of the foregoing principles by courts in the Kingdom has rendered them sacroscant. The cases are legion. They include but are not limited to the following: **Nedbank Swaziland Ltd v Dlamini and 5 Others, Case**

No. 556/2012, Standard Bank Limited v Busisiwe Motsa N.O and 11 others, Case No. 240/2011, Phumsile Myeza and Others vs The Director of Public Prosecutions and Another Case No. 728/2009.

What then is the legislative intent in enacting Section 33 *bis* of the Employment Act?

[29] Happily, the court *a quo* had in adopting a purposive approach to the construction of that statute, determined and exhaustively demonstrated the legislative intent, in paragraphs 28 to 35 of the assailed decision, as follows:-

'' 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 the employees which have accrued in the course of the 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 allowing a take over of their business by another person. In some cases that another (sic) 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 work place 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 for 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.

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''

[30] We respectfully align ourselves with the above exposition by the court *a quo*. We have no wish to add or subtract from same. The legislative intent was thus to prevent fraudulent activities from being perpetrated by employers against their employees by allowing a sale or take over of their business, thus depriving the employees of their terminal benefits. We notice, and as rightly contended by **Advocate**

Van Zyl, for the Respondent that the Appellants did not raise any grounds of appeal challenging the specific findings of the court *a quo,* that the take over contemplated by Section 33 *bis*, is one that *''is capable of transferring the ownership and control of the business and its assets from the employer to another person''*. The Appellants are therefore bound by these findings. In the circumstances, we do not think that **Advocate Flynn** could validly proceed to argue *au contraire,* in the way and manner he proceeded to do in this appeal, in pursuit of the literal interpretation of Section 33 *bis*. We will come to the absurdity and unworkability of the literal approach propounded by **Advocate Flynn** in a moment .

[31] It is therefore our considered view in the light of the foregoing, that the take over envisaged by the Act is one that indeed and in reality is capable of transferring the ownership, control and management of the company's business to another person, thus effectively creating a new owner side by side with the old one and therefore have the potential of adversely affecting the employees.

[32] In coming to the above conclusions, we have had to determine the meaning of the word *''business''* within the context of the Act in contradistinction to the *''shares or shareholding''* of a company, *vis a vis* the doctrine of separate corporate liability. We will now proceed to demonstrate how we arrived at our conclusions.

[33] Now, the word business is defined in Section 2 of the Act as follows:- *'' business'' includes any <u>trade, undertaking</u> or*

establishment'' A business in this context is alive, it is an activity, a going concern. The statute could not have been referring to a dead business. It was referring to an economic enterprise that is existing and is operational. See **General Motors SA v Besta Auto and Another 1982 (2) SA 653 (SE), National Industrial Council for the Iron, Steel Engineering, Metallurgical Industry v Photocircuit SA (Pty) Ltd and Others (1993) 4ILJ 898 (c) at pages 886- 889**. It is therefore important that in construing the meaning of the word business within the context of the Act, we must construe it from the tangent of the business of the employer as a going concern. What then is the meaning of business as a going concern.

[34] Fortunately for us, **Advocate Van Zyl** has referred us to the South African case of **National Education Health and Allied Workers Union V University of Cape Town, Supercare Cleaning (Pty) Ltd, Metro Cleaning Services cc, Turfneck cc and Eco Environment (Pty) Ltd (2001) 12 (11) SALLR 13 (LAC). 2002 (23) ILJ, 306 (LAC).** In that case the South African courts interpreted the phrase ''*a going concern*'' as it appears in Section 197 of the Industrial Relation Act, of that country, as amended.

[35] The South African statute provides as follows:-

''(1) In this section and in Section 197A-

(a) ''business'' includes the whole or a 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.

(2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6):-

(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer,

(b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;

(c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination is considered to have been done by or in relation to the new employer, and,

(d) the transfer does not interrupt an employee’s continuity of employment, and an employee’s contract of employment continues with the new employer as if with the old employer’’.

[36] Now, the application of the case of **National Education Health and Allied Workers Union (supra),** which dealt with the above legislation, to this case, is one that was canvassed with much furore and palpable anxiety, before us. While the Respondent's counsel **Advocate Van Zyl,** holds the view that the South African legislation and case law are tailor made for this case, **Advocate Flynn** for his part contended replicando, that that case has no application, because it was premised on foreign law which dealt with transfer of business and not take over of business as prescribed by Section 33 *bis.*

[37] After a very careful scrutiny of that case and the statute upon which it is premised, we respectfully beg to differ from **Advocate Flynn** on his posture. This is because we are of the opinion that the case is relevant here, even though it applied to a provision that is not of the same wording as Section 33 *bis* of our Act. However, in substance they are similar, in that they dealt with the same subject matter and have the same object, which is to prevent unscrupulous employers from defrauding their employees by a change of ownership of their business, either by way of sale, take over or transfer to another person. This decision also interpreted the meaning of the phrase *''business as a going concern''* which is the task at hand. In any event we feel that there is a thin line between the words ''transfer'' used in the South African statute and ''take over'' appearing in our Act. It is thus our considered view that this decision affords useful guidelines for determining whether in the peculiar circumstances of this case, a take over of business can be said to have taken place.

[38] Now, the South African Court defined business as a going concern in paragraph 64, of that decision as follows:-

‘‘(64) Furthermore, I am of the view that the question whether in a particular case a business has been transferred as a ‘‘going concern’’ is a matter for objective determination. This does not mean that the intention of the parties are irrelevant but it does mean that the say so of the parties cannot be conclusive. In my view there are a number of factors that are relevant in determining whether or not a business has been transferred as a going concern. These may include what will happen to the goodwill of the business, the stock in trade, the premises of the business, contracts with clients or customers, the workforce, the assets of the business, whether there has been an interruption of the operation of the business and, if so, the duration thereof, whether same or similar activities are confirmed after the transfer or not and others. I do not think that the absence of anyone of these will on its own mean that the transfer of the business has not been one as a going concern. I would align myself with the approach adopted by the European court of Justice when, in paras 11, 12 and 13 of its judgment in the Spijkers case, it said:

(11) ---It appears from the general structure of directive 77/187 and the wording of Article 1 (1) that the directive aims to ensure the continuity of existing employment relationships in the framework of an economic entity, irrespective of a change of owner. It follows that the decisive criterion for establishing the existence of

a transfer within the meaning of the directive is whether the entity in question retain it's identity.

(12) Consequently, it cannot be said that there is a transfer of an enterprise business or part of business on the sole ground that its assets have been sold. On the contrary, in a case like the present, it is necessary to determine whether what has been sold is an economic entity which is still in existence, and this will be apparent from the fact that its operation is actually being continued or has been taken over by the new employer with the same economic or similar activities.

(13) To decide whether these conditions are fulfilled it is necessary to take account of all the factual circumstances of the transaction in question, including the type of undertaking or business in question, the transfer or otherwise of tangible assets such as buildings and stocks, the value of intangible assets at the date of transfer, whether the majority of the staff are taken over by the new employer, the transfer or otherwise of the circle of customers and the degree of similarity between activities before and after and the duration of any interruption in those activities . It should be made clear, however, that each of these factors is only part of the overall assessment which is required and therefore they cannot be examined independently of each other'' **(emphasis added).**

[39] The foregoing case was upheld by **the Constitutional Court. The Constitutional Court decision is cited as, (2002) 13 (2) SALLR 1**

(CC): (2003) 24 ILJ 95 (CC). In paragraph 56 of that decision, the court stated as follows:-

‘‘56 The phrase ‘‘going concern’’ is not defined in the LRA. It must therefore be given its ordinary meaning unless the context indicates otherwise. What must be transferred must be a business in operation so that the business remains the same but in different hands. Whether that has occurred is a matter of fact which must be determined objectively in the light of the circumstances of each transaction. In deciding whether a business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction. A number of factors will be relevant to the question whether a transfer of business as a going concern has occurred, such as the transfer or otherwise of assets, both tangible or intangible, whether or not workers are taken over by the new employer, whether customers are transferred and whether or not the same business has been carried on by the new employer. What must be stressed is that this list of factors is not exhaustive, and that none of them is decisive individually. They must all be considered in the overall assessment and therefore should not be considered in isolation’’. (underlining ours)

[40] The take home message from the foregoing is that the business of an operational company includes its shares, or assets, liabilities which includes the employee contracts, customers, stock, goodwill, trademarks, debtors, creditors, buying, selling etc. It also includes the day to day running which translates to time, energy and

resources in carrying on the business. That is why the term *''business''* is defined in **Bouvier's Law Dictionary** as:

''That which occupies the time, attention and labour of men for the purpose of livelihood or profit, but it is not necessary that it should be the sole occupation or employment''.

[41] Similary, the case of **Rolls v Miller (1984) 27 Ch.D 71 (CA) at p 88**, says the following:

''almost anything which is an occupation, as distinguished from a pleasure-anything which is an occupation or duty which acquires attention is a business''.

[42] The foregoing definition was replicated somewhat by the court in the case of **Smith v Anderson 15 Ch.D 258**, in the following terms:-

''Anything which occupies the time and attention of a man for the purpose of profit---''.

[43] The word business therefore transcends beyond the company's assets which includes its shareholding to include all the other factors detailed *ante.* The list as we have demonstrated above, is however not exhaustive.

[44] Since we have determined that the term business as used in the statute is an all'encompassing word, we therefore reiterate our stance, that

the take over of business envisaged by Section 33 *bis* is one that will take control of the entire business of resort and casino owned by the Respondent, which includes its assets/shares, liabilities employees, contracts, debtors, creditors, day to day running *et al*, and vest it in another person, thereby creating a new employer side by side with the old one.

[45] **Advocate Flynn**, while conceding that the established facts of this case are that the Respondent retains the liabilities, creditors, debtors, employee contracts, name, ownership and day to day running of the business etc, however contends that the mere fact that the purchase of the majority shares of the company will give the third party, as majority shareholder, control of the board of directors and thus control of the company, is a take over of the Respondents business. This proposition is clearly inconceivable. It is not supported by Section 33 *bis.* This is because it tends to suggest that the take over of business, as contemplated by the Act, is an activity which takes over part of the business of the Company. This interpretation runs counter to the express wording of Section 33 *bis* which talks about the take over of business as a whole and not a part of it. If it was the intention of the legislature that the take over of a part of a business for example, its shares or other parts of its assets – like movable and immovable properties, would translate to a take over of the business, they would have said so in clear and unambiguous words. In that circumstance, the appropriate wordings of the statute would be any employer who ‘‘*allows a take over of any part of its business*’’ This is however not such a case.

[46] The business of the company in reality vests in the company which is a separate legal entity from its shareholders or members. Becoming a shareholder in a company simply means that the person who purchases the shares, becomes a registered shareholder of the shares and acquires all the beneficial rights. See **Rudolf Bock v Siyembili Motors Swaziland (Pty) Ltd (Industrial Court of Swaziland) Case No. 366/2003, Brodie and Another v Secretary for Inland Revenue 1974 (4) SA 704 (A).**

[47] Further, the literal approach is also one that is unreasonable, unworkable, absurd and runs counter to the good intention of the legislature in enacting the statute. This is because if this literal interpretation is allowed, it will create an unjust situation where employers will be forced to comply with the statute in every instance of sale of majority shareholding, irrespective of the intention of the sale. Such a situation will render the employment force timorous, depriving them of their right of free trade, thus stultifying the entire convenience of commercial enterprise of the Kingdom. It also would dissuade any investor from purchasing shares in a local company. The legislature could not have intended such a result.

[48] It is by reason of the totality of the foregoing, that we agree with the court *a quo*, that the factual matrix of this case puts it squarely outside the contemplation of Section 33 *bis* (1)(b)of the Act. We will now proceed to demonstrate why we say so.

[49] In the first place no sale of the majority shares has taken place. The majority shareholder has merely indicated an intention to sell the majority shares to a third party. The parties are at the intention stage of their transaction. The position would have been different if this sale proposal was accompanied by a take over statement issued by the company, declaring the proposed sale of its majority shares a take over of its business, which of course includes its assets, liabilities, creditors, debtors, contractual relations with the Appellants, to mention but a few. It follows that, the question of Respondent allowing a takeover has not arisen. This is because in the absence of a take over statement, the shares have to be sold first, thus making the third party a member of the company, before the question of take over of ownership control and management of the business of Respondent arises. This is due to the fact that, a sale of shares is effectively a transfer of shares from a member of a company to another person. The law demands, that for the transferee of the shares to become a shareholder or member of the company, a proper instrument of transfer has to be delivered to the company. *''A proper instrument of transfer''* has been held to mean a written instrument *''such as will attract stamp duty under the relevant fiscal legislation''* see **in Re Paradise Motor Co Ltd (1968) 2 ALL ER 625 (CA).**

[50] Similarly, Section 28 of the **Companies Act** states the following:-

''On the application of the transferor of any share or interest in a company, the company shall enter in its register of members the name

of the transferee in the same manner and subject to the same conditions as if the application for the entry were made by the transferee and subject also to the law for the time being in force relating to stamp duty or duty upon estates of deceased persons''.

[51] The general procedure with regard to the transfer and transmission of shares is usually regulated by the Articles of Association of the company. The Articles usually require a written instrument of transfer executed by both the transferor and the transferee. In practice a transfer of shares takes place as follows:- the transferor completes and signs the transfer form and hands the share certificate with the transfer form to the transferee: the transferee also signs the form and sends it with the share certificate to the company. Before registration, the transfer is incomplete and the transferee does not acquire the status of a member or shareholder. See **Cilliers *et al* Company Law Butterworths (2nd edition) at pages 152 and 153.**

[52] *In casu,* we repeat that no shares have been sold. Therefore, the third party is yet to scale the hurdle of becoming a member or shareholder in Respondent. It is only after the third party becomes a member of the Respondent, that it will become clear from his activities, which must be allowed or consented to by the Respondent, in terms of Section 33 *bis*, that he intends to take over the company.

[53] There is no doubt that when the third party eventually purchases the majority shares that it will amount to a take over bid but not a take

over. We say this because the effect of the purchase of the majority shares is that it gives the third party more control of the company through its board of directors. However, the company continues to exist as a separate legal entity distinct from its members, with control over its day to day activities or business. That is why **Innes CJ** noted in **Dadoo Ltd (supra)** that the corporate personality of a company is not affected or changed by *''the circumstances that a controlling interest in the concern may be held by a single member''* and in **TT Global Investments(supra) MCB Maphalala J** followed up with the remarks that *''The mere fact that a member holds all the shares in a company or the majority thereof does not make the company the agent of the member—''.*

[54] Then there is the case of **Long v Prism Holdings Ltd and another Labour Court (JA 39/10) 2012 231 ILJ pages 142 and 2115** where the court stated as follows:-

''--- the acquisition, the sale of shares in an employer company to another company ---two companies remain separate entities--- sale of shares not a transfer of business as a going concern---.

It is clear from the above exposition of the law that a company should always be viewed as a separate legal entity existing apart from its shareholders. The fact that one is a shareholder in a company does not necessarily grant the shareholder direct control of the company in the sense of running the day to day activities of the company. Holding shares in a company only entitles the shareholder

to determine who should be appointed as directors of a company through whom the shareholder can exercise control over the company. The fact that a shareholder acquires all the shares in a company does give the shareholder more control on the company through the board of directors but the company continues to exist as a separate legal entity distinct from its shareholders. In simple terms the acquisition of all the shares in a company does not terminate the existence of a company as a separate legal entity which can act and be sued in its own name''

[55] There is therefore clearly a distinction between a sale of the majority shares and the take over itself. Our view on this issue is buttressed by the fact that it is not in every instance that the purchaser of the majority shares of a company wishes to take over the business. A typical example is in this case where Sun International Ltd, which holds the majority shares in dispute, did not own or exercise control and management over the Respondent or take over its business. The proposed take over in the peculiar circumstances of this case, where as we have noted that there is no take over statement accompanying the proposal to sell, may only occur where after the sale, the third party demonstrates a clear intention accompanied by actions, to take over, and his actions are allowed by the Respondent. That is when the provisions of Section 33 *bis* (1) (b), will kick in, requiring the Respondent to pay accrued benefits to its employees. This is not however such a case.

[56] Furthermore, Sun International which is a separate legal entity distinct from the Respondent, held the majority shares in issue. There is no evidence to show, as we have already held, that by its majority shareholding in the Respondent, Sun International was also possessed of the ownership, control and management, of the Respondent's business, which ownership control and management Sun International will pass over to the third party by the mere sale of its shares. It follows that the contention that the third party will take over the business of the Respondent by mere purchase of Sun International's majority shares, is clearly misconceived.

[57] More to the foregoing, is that the court *a quo* found as a fact that though Sun International had the majority shareholding in the Respondent company, it did not own or exercise control over the Respondent or its business. The court held that Tibiyo Taka Ngwane group had more directors on the Respondent's board than Sun International Ltd. That the ratio is seven to six (7:6) in favour of Tibiyo Taka Ngwane group (see paragraph 43 of the assailed judgment). The court *a quo* further found that the Appellants have assumed erroneously, that since Sun International has the majority shares in the Respondent's share capital, it will automatically exercise and enjoy majority votes in the Respondent's board of directors. The court a quo concluded as follows in paragraph 48 of the assailed decision:-

‘‘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’’.

[58] The Appellants failed to attack any of the specific findings made by the court a quo on this issue. Since the Appellants did not raise any grounds of appeal challenging the specific decision of the court a quo, that Sun International did not have the majority votes in the Respondents board and so could not pass same onto the third party, these findings remain valid and binding. See **Army Commander and Another v Bongani Shabangu Appeal Case No. 42/2011.**

[59] As this case lies, in the light of the totality of the foregoing, the Respondent can only be said to allow a take over of its business if after the sale the new majority shareholder demonstrates a clear intention to do so and this is sanctioned or allowed by the Respondent. That is when it will be necessary to revisit the established majority of votes on the board of directors and the issue of the shareholders agreement raised in paragraphs 2 and 2.1 of the grounds of appeal, will come to the fore. That of course will in turn necessitate an amendment of the Memorandum and Articles of Association of the Respondent, which are the instruments that control the internal operations of the company, in a bid to give the third party the requisite ownership management and control of Respondent’s business.

[60] This intention to take over and consent thereto by the company, were clearly expressed by the parties in the case of **Rudolf Bock v Siyembili Motors Swd (Pty) Ltd, Industrial Court Case No. 366/2003** (unreprorted), which was also referred to by the court *a quo* in paragraphs 53 to 56 of the impugned judgment. In that case **Lonhro Motors** which was the employer of the Applicant **Rudolf Bock,** 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 shareholding had changed but the business was still owned by **Lonhro.** Also that **Lonhro** retained all assets and that the employee contracts were still with **Lonhro**. The court relied on various words and phrases contained in several memoranda written to the employees by one of the directors which included the following:- **(a) the company had changed ownership (b) a take over had taken place (c) there is a previous employer (d) there is a new owner (e) there has been a management buy out (f) there has been a sale of the company (Lonhro**). Based on this evidence the court found that a take over had taken place and ownership changed from **Lonhro Motors to Siyembili Motors,** thus invoking Section 33 *bis* of the Employment Act.

[61] We notice that **Advocate Van zyl** expressed reservations about the correctness of the findings of the court in **Lonhro Motors (supra).**

This reservation is premised on the contention that the company retained part of it's business in that case, therefore the court ought to have held to the contravy. Since the decision in **Lonhro Motors (supra)** is not the subject matter of this appeal, we deem it unnecessary for us to comment on it.

[62] In summary, it is this evidence of intention accompanied by clear acts to takeover that is absent. The majority shares have not been sold. Their sale is a mere speculation. We cannot be certain of that. That is why the Appellants themselves refer to the sale as a proposed sale. There is no evidence that after the sale the third party will assume ownership, management and control of the Respondent's business. Rather, the established evidence is that Respondent will remain the employer and retain ownership and control of its business and assets. The contention that the sale of the majority shares will automatically vest the control and management of Respondent's business in the third party therefore lies in the realm of speculation.

[63] It appears to us in these circumstances that the objection raised by the Appellants at this stage is clearly premature. The parties are still at the intention of sale stage. All the issues raised are speculative as rightly held by the court *a quo*. The court cannot engage in prophesy.

[64] On the question of costs, Appellants' proposal is that each party should bear its own cost. This they say is because this litigation was based on the Memorandum of Agreement entered by the parties, which permitted any one of them to approach the court to

obtain a judicial pronouncement on the interpretation of Section 33 *bis*. The Respondent for its own part contends that costs should include certified costs of counsel. Such costs should follow the outcome of the appeal. This, the Respondent says is so because the Memorandum of Agreement, ended with the litigation before the court *a quo*. We agree with the Respondent. When the Respondent approached the court *a quo* and obtained an interpretation of Section 33 *bis*, the Memorandum of Agreement between the parties terminated. The Appellants were therefore entirely on their own, when in dissatisfaction of the interpretation given by the court *a quo* they approached this court seeking for its intervention. They are therefore bound to pay the costs of litigation before this court.

[65] In the light of the totality of the foregoing, we uphold the orders of the court *a quo* rendered on the 29th June 2012, which are as follows:-

''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 of 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 Respondent (Swazispa Holdings Ltd) is not obliged to pay out accrued benefits to its employees as a result of the sale of shares.''

[66] In the result, the appeal is hereby dismissed with costs, which costs shall include certified costs of counsel.

DELIVERED IN OPEN COURT IN MBABANE ON THIS
4th DAY OF OCTOBER 2012

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M. M. RAMODIBEDI
JUDGE PREDISIDENT

--
E. A. OTA
ACTING JUSTICE OF APPEAL

--
J. P. ANNANDALE
ACTING JUSTICE OF APPEAL

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