IN THE LABOUR COURT OF SOUTH AFRICA

Held in Durban

Case No: D87/97

In the matter between :

CC. Applicant

and

Respondent

JUDGEMENT

ZONDO J :

Introduction :-

[1] This is an application in which the applicant applies for the rescission of an order which was granted by my Brother, Mlambo J, on the 14th May 1998 in a matter in which the respondent in this application sought an order against the present applicant making a settlement agreement previously concluded at the CCMA between the parties an order of this Court in terms of sec 158(1)(c) of the Labour Relations Act, 1995 (**"the Act"**). Before dealing with the issues, it is convenient to first give the factual background to the matter. I give it here below.

Background:-

[2] Up to about February or so in 1997 the respondent, one Mr Ndaba and one David Robinson were employed by a close corporation called Protector CC at 32 Powell Road, Umngeni, in Durban. Protector CC conducted a security business. One Miss Logue was the sole member of Protector CC. Mr Robinson had been employed by Protector CC from 1990 as a manager. In 1994 Logue left for London and asked Mr Robinson to manage the business in her absence.

[3] During 1995 and 1996 Robinson visited London on several occasions to see Logue with regard to the business of Protector CC. It transpired that, in going to London, Logue was fleeing from the Receiver of Revenue who was conducting certain investigations against Protector CC. When Robinson realised that Logue had no intention of returning to South Africa to resolve the matter relating to the Receiver's investigations, Robinson and Mr Ndaba, decided to resign from Protector CC and to start a security business.

[4] Robinson and Ndaba formed a close corporation which they called Tekweni Security CC, the applicant in this application. Like Protector CC, the applicant was to conduct a security business. Robinson and Ndaba became the two members of the applicant. They approached clients of Protector CC and asked them to transfer the contracts which they had with Protector CC to the applicant **"in order to maintain continuity in their services"-** obviously because Protector CC would

stop operating as its only member was overseas with no intention of returning and its manager had resigned. According to Robinson, the applicant started trading in March 1997. It did so from the premises of Protector CC which Robinson says he purchased from Logue.

[5] Robinson and Ndaba then called a meeting of all the staff of Protector CC and gave them forms to sign in order to resign from Protector CC. They also gave the staff of Protector CC forms to apply for employment with the applicant. There seems to be a dispute between the parties whether the employees were invited to join the applicant or whether they were simply told that, from then onwards, they were operating under the applicant and no longer under Protector CC. That dispute is of no consequence as it is common cause that the employees were given the forms I have referred to above.

[6] It would appear that most employees of Protector CC signed the resignation forms to resign from Protector CC as well as the job application forms to apply for employment with the applicant. However, there is a dispute between the parties on whether the respondent did sign the resignation forms as well as the job application forms. It would appear from the papers that, according to the applicant, by the time the present dispute arose the respondent had not signed the necessary resignation forms to resign from Protector CC nor had she signed the job application forms to apply for employment with the applicant. The respondent says, although she refused to sign

the resignation forms to resign from Protector CC, she did sign the job application forms to apply for employment with the applicant.

[7] The respondent says her stance was that she could not understand why it was necessary for her to resign from a **"non-existing company"**- that is Protector CC. The applicant says the respondent's stance was that she was not prepared to resign from Protector CC unless she was paid a retrenchment package. Again the discrepancy in the two versions is not material for purposes of this judgement.

[8] The applicant says the respondent was never employed by the applicant. However, it says, the respondent worked only until the 20th March 1997. It further says the respondent was informed that she could not be employed by the applicant while she was employed by Protector CC. According to the applicant the respondent's attitude was that she was not interested in employment by the applicant. The respondent has denied this allegation. The applicant says, in the light of all this, it advised the respondent to stop working. This, the applicant says, was on the 20th March 1997. The respondent says the date on which she was dismissed was the 1st of April 1997. The date when the respondent was told to leave is not of much significance in this matter.

[9] Subsequent to being instructed to stop working, the respondent referred a dismissal dispute to the Commission for Conciliation,

Mediation and Arbitration (**"the CCMA"**). Her complaint was that she had been dismissed unfairly by the applicant. The applicant's stance was that it had never employed the respondent because, on its version, she had not signed a job application form to apply for employment with it.

[10] A settlement agreement was concluded between the applicant and the respondent in full and final settlement of the unfair dismissal dispute which the respondent had referred to the CCMA. It is that agreement which the respondent asked this Court to make its order.

[11] The terms of the settlement agreement were the following :-

"1 Without any admission of any liability, Tekwini Security Services will perform the following for the employee :

(a) they will secure all outstanding monies and documents due to the employee by Protector CC;

(b) she will be given the equivalent of 2 months salary.

(c) she will be given first preference for employment with Tekwini CC. for a position for which she is qualified.

2.1 This being in full and final settlement of the said dispute.

2.2 No variation of this agreement will be legal and binding unless reduced to writing".

[12] In an attempt to discharge its obligations in terms of the settlement

agreement, the applicant subsequently paid the respondent an amount of R1057,26 and gave her all the documents in its possession due Protector CC including an unemployment Insurance Fund card. The amount of R1057,26 was a salary for March 1997 including double pay for Sunday work and leave pay. The respondent was also paid R896,48 being her month's salary for April 1997. This was done in May 1997. In June 1997 the CCMA wrote to the applicant saying the amount of R1057,26 could not be regarded as part of the settlement agreement because it was money due to the employee anyway. The CCMA said there was, therefore, still a month's salary that the respondent was entitled to in terms of the settlement agreement. The applicant says she immediately telephoned the CCMA about their letter and faxed through proof of compliance with the settlement agreement.

[13] The applicant says after sending to the CCMA what it says was proof of compliance with the settlement agreement, it heard nothing further about the matter until on or about the 17th June 1997. That is the date on which it received a copy of the respondent's application to make the settlement agreement an order of this Court. In terms of the Notice of Motion of that application at 12h00 on the same day an application would be made to this Court to have the settlement agreement made an order of Court, and, if the applicant wished to oppose the application, it had to notify its intention to oppose by the 13th June 1997 - four days earlier which was obviously impossible to do. The applicant received

the Notice of Motion at about 10h41.

[14] The applicant says it was due to the late notification that it could not attend Court. However, Robinson says, soon after receiving the Notice of Motion, he telephoned the Labour Court and spoke to Natasha who, after hearing the whole explanation, asked him to fax through to the Labour Court proof of payment. Robinson faxed through documents showing payment of R2643,51. Thereafter he heard nothing further about the matter until he received a copy of the judgement of this Court on the 19th June 1998 from the respondent's attorneys.

[15] As soon as the applicant had received the judgement, it instructed its attorneys to investigate the matter. The applicant says it has no recollection of receiving the notice of set down. Robinson says if he had, he would have taken the necessary steps to deal with the matter.

[16] It is common cause that Mlambo J's judgement was given in the absence of the applicant. The explanation for the applicant's absence in Court on that day is that it received short notice, in the first place, but, secondly that, after Robinson had explained to Natasha in the Labour Court (who asked him to fax through proof of payment) what had happened, and had heard nothing further, he thought that the matter had been laid to rest. It seems clear that the matter did not proceed on the 17th June. This is not surprising if one has regard to the short notice that the applicant had been given. About a year lapsed

before the matter was heard - a very long time.

[17] The matter came before Mlambo J on the 14th May 1998 as an unopposed matter. Mlambo J gave judgement in favour of the respondent. In par 8 of that judgement, Mlambo J made the following order :-

"[1] The agreement of settlement dated 2 May 1997 is made an order of this Court in terms of section 158(1)(c) [of Act 66 of 1995].

[2] The respondent is ordered to comply with this agreement of settlement as follows :-

[(a)] to employ the applicant with retrospective effect to 1 July 1997 in any of the positions in which Nokuthula Ngidi and Nokulunga Mdabe, that is of patrol security guards (sic), were employed.

(b) the respondent is also ordered to secure all outstanding monies and documents as set out in the agreement of settlement and to be handed over to the applicant within 10 days of her reporting for work.

[3] There are no costs in this application".

I now turn to consider the rescission application itself.

The rescission application

[18] It is true that, in a rescission application, an applicant is not required to show that its defence in the main case will definetly be upheld nor is it required to show that its defence has reasonable prospects of being

sustained. However, I also do not think that a Court should grant a rescission without conducting an assessment of some kind of the prospects of such defence being sustained in the main case. I think a Court should conduct such an assessment and, in doing so, the Court should bear in mind that it is for the Court dealing with the main matter to decide the merits of such a defence. For that reason, even if the court hearing the rescission application is of the prima facie opinion that such a defence does not have reasonable prospects of being sustained in the main case, it should not necessarily lean towards denying the defendant the opportunity to defend the main case because the Court dealing with the main case may well take a different view.

[19] However, the above does not mean that, even if the Court hearing the rescission application is satisfied that the defence which the defendant seeks an opportunity of placing before the court in the main case has no prospects whatsoever, it should still grant the defendant the opportunity to defend the main case on the basis of such a defence. In my view, in that event, the Court should not grant the rescission application because it would only serve to unduly delay the bringing to an end of the dispute between the parties in circumstances where the same judgement that was arrived at in the absence of the defendant will be arrived at in its presence - but after a time consuming and costly litigation process which could be avoided.

[20] In this case the application which was heard by Mlambo J in the applicant's absence was an application to make a settlement agreement an order of Court. The settlement agreement was one which the applicant had voluntarily concluded with the respondent. If the order that Mlambo J made did no more than simply give such an agreement the status of an order of Court, it would have been interesting to know on what basis the applicant could have had a complaint about that, because, if it intended to comply with the agreement, it ought not to matter that the agreement has been made an order of Court. However, the applicant's complaint is not only that it had complied with the agreement but, also, that the order made by Mlambo J went beyond making the settlement agreement an order of Court.

[21] There are two obligations in respect of which the question arises whether the applicant had or had not complied with the settlement agreement. The first one is whether the amount of R1057,26 was or was not part of the payment of two month's salary contemplated in the settlement agreement. The second is whether the applicant did or did not discharge its obligations towards the respondent when it employed another employee or two other employees. I deal first with the amount of R1057,26.

[22] The applicant says R1057,26 was a months' salary for the respondent including double pay for Sunday work. However, the applicant says the respondent never signed an application for employment with the

applicant which is what other employees did and that, in the light thereof, the respondent was never in the employ of the applicant and, therefore, it could not be said that the amount of R1057,26 is an amount that was due to the respondent in any event. Therefore, says the applicant, that, was part of the two months' salary that the applicant had undertaken to pay in terms of the settlement agreement. As should be clear from what I say below, there is no merit in this contention.

[23] Quite clearly the respondent worked for the benefit of the applicant in March 1997 and did so at the request of or at the instance of, the applicant. She has provided a payslip for March 1997 issued by the applicant indicating the salary that the applicant, not Protector CC, paid her for March 1997. The applicant seems to have operated on the mistaken belief that, if the respondent did not sign the application form for employment, there could be no employment relationship between itself and the respondent. That is, of course, erroneous. A contract of employment can be verbal and can be express or implied. In this case the applicant itself says Protector CC had ceased trading. So how could the respondent have been doing work for Protector CC?

[24] Apart from what I have said above which showed that the respondent was working for the applicant and was being paid a salary by the applicant, there are the provisions of sec 197(2)(a) of the Labour Relations Act, 1995 (**"the Act"**) which are also relevant. Sec 197(2)

(a) must be read together with sec 197(1)(a). Sec 197(1)(a) and sec 197(2)(a) read thus :-

"(1) A contract of employment may not be transferred from one employer (referred to as 'the old employer') to another employer (referred to as 'the new employer') without the *employee's* consent, unless-

***(a)* the whole or any part of a business, trade or undertaking is transferred by the old employer as a going concern; or**

(2) *(a)* If a business, trade or undertaking is transferred in the circumstances referred to in subsection (1) *(a)*, unless otherwise agreed, all the rights and obligations between the old employer and each *employee* at the time of the transfer continue in force as if they were rights and obligations between the new employer and each *employee* and, anything done before the transfer by or in relation to the old employer will be considered to have been done by or in relation to the new employer".

[25] Sec 197 has its origins in the Transfer of Undertakings (Protection of Employment) Regulations, 1981 of the UK which were themselves promulgated in order to give effect to the EEC Council Directive 77/187 - the Business Transfers Directive. The purpose of the EEC directive as well as that of the UK Regulations has been said to be the

protection of employees' rights in the event of a transfer of a business or undertaking. (**Dr Sophie Redmond Stitching v Barlot & Others [1992] IRLR 366**). Although the wording of the directive is not identical to that of the UK Regulations nor to that of sec 197 of our LRA, it is crystal clear that sec 197 has the same purpose as well. In those circumstances it is helpful to have regard to cases dealing with the UK Regulations as well as cases decided by the European Court of Justice dealing with matters of interpretation and application of the EEC Council Directive.

[26] In this matter the applicant was, quite clearly, formed for the purpose of taking over the business of Protector CC. In **Porter and Nananyakara v Queen's Medical Centre (Nottingham University Hospital) [1993] IRLR 486** the High Court held that a change in the provider of a service may bring about a transfer of business. In **Dr Sophie Redmond Stiching v Bartol and Others [1992] IRLR 366** the European Court of Justice held that there was a transfer where, in the context of contractual relations, there is a change in the legal or natural person responsible for carrying on the business and who incurs the obligation of the employer towards employees of the undertaking. It also held that the fact that the relevant decision is taken unilaterally by the public authority rather than by agreement did not mean that there could be no transfer in those circumstances. The Court has also held that a transfer of business may occur where the owner of a business who had leased premises, decided to change the lessee. (See

also **Ny Molle Kro 287/86 [1989] IRLR 37 ECJ; Daddy's Dance Hall 324/86 [1988] IRLR 315 ECJ).**

[27] In **Dr Sophie Redmond Stiching** the European Court of Justice referred to **Spykers v Gebroeders Benedik Abattoir CV [1986] CMLR 296** where the court had set out the circumstances which may qualify as a transfer and said three points must be noted in that regard. Two of these deserve mention. The first point was that the decisive "criterion for establishing whether there was a transfer within the meaning of the Directive is whether the business in question retains its identity as would be indicated, in particular, by the fact that its operation was actually continued or resumed. The second point was that in order to determine whether those conditions are fulfilled, it is necessary to consider all the factual circumstances characterising the transaction in question. Such circumstances may include the type of undertaking concerned, whether the business' tangible assets are also transferred, whether or not the majority of the employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer as well as the period during which those activities are interrupted. All those factors are not decisive in themselves but are only guiding factors.

[28] In this matter the manager of Protector CC saw an opportunity for business when he realised that Logue had no intention of returning to

South Africa for fear of the consequences of the investigations of the Receiver of Revenue. He and Mr Ndaba then formed the applicant, approached existing clients of Protector CC and persuaded them to transfer the business contracts they had with Protector CC and purchased from Protector CC the premises which Protector CC had operated the business from, took over the whole workforce and continued the same business which Protector CC had been operating and did so from the same premises. In my view there can be no doubt whatsoever that there was a transfer of business from Protector CC to the applicant. The fact that there is no evidence that it was done pursuant to an agreement between Logue and the members of the applicant close - corporation does not preclude this being a transfer of business.

[29] I am unable to fault the approach of the European Court of Justice as revealed above on when a transfer of a business can be said to have

occurred. I am mindful of the fact that the provisions of the instruments being interpreted are not identical. However, that notwithstanding, I am satisfied that the same approach is appropriate for sec 197 of our Act. In those circumstances and, applying that approach, I conclude that a transfer of business occurred in this case. Such business was transferred from Protector CC to the applicant. That being the case, it goes without saying therefore, that in terms of sec 197(2)(a) of the Act the contract of employment which existed

between the respondent and Protector CC was transferred to the applicant. It was therefore unnecessary for the respondent to have signed a resignation letter in respect of her employment with Protector CC nor was it necessary for her to have applied for employment with the applicant before the applicant could be said to have employed her. Accordingly, during March 1997 the respondent was employed by the applicant and the amount of R1057,26 was her due and lawful salary for that month and could not be part of two months' payment contemplated in the settlement agreement. The applicant still owed the respondent a month's salary at the time of her application before Mlambo J and was therefore in breach of the settlement agreement. The respondent was, therefore, on that ground alone, justified in bringing the application to make the settlement agreement an order of this Court.

[30] In the light of the above, it would serve no useful purpose for the Court to rescind the first sentence of the order of Mlambo J in par 8 of his judgement. The question that still remains is whether or not it would serve any purpose to rescind the order contained in the second sentence of par 8 of Mlambo J's judgement. In terms of that part of the order, the applicant was ordered to employ the respondent with retrospective effect to 1 July 1997 in any one of two positions. The one position was where one Nokuthula Ngidi is said to have been employed. The second is where Nokulunga Mdabe was employed. From par 7 of Mlambo J's judgement it transpires that the reason why

Mlambo J made this order is that he concluded that the applicant had flagrantly breached the settlement agreement in that it had failed to give the respondent preference of employment.

[31] In so far as the applicant seeks an opportunity to show that no order should be made against it to employ the respondent in any of the two positions, the applicant had to show that it had a defence to put forward in respect of this order.

[32] In the founding affidavit the applicant refers to its attempt to give effect to part of the settlement agreement when a certain vacancy arose and says it sent a letter to the respondent by registered mail and also tried to telephone her but when she did come to the applicant in response, someone else had been appointed. The applicant does not say who the person was whom it appointed to that position. Accordingly I do not know whether it was anyone of the two ladies mentioned in Mlambo J's order. In its replying affidavit the applicant has sought to make out a case in relation to the second part of Mlambo J's order which it had not put up in the founding affidavit. It is not entitled to do so. If I ignore the case which the applicant attempted to make out in its reply, I would decline to rescind that part of Mlambo J's order which relates to the employment of the respondent. The basis for that approach would be that, as the applicant only deals with one position that was filled while the order refers to two position, it means that there is a position which could have been filled by the re-

employment of the respondent in respect of which the applicant has not shown that it has a bona fide defence that it would pursue in the main case if it was given an opportunity. If, however, I take into account also what the applicant says for the first time in its replying affidavit which it should have said in the founding affidavit in relation to the filling of the positions, then I would conclude that the applicant has a bona fide defence which it pursue if it is afforded an opportunity to defend the main action. I have come to the conclusion that I should consider what the applicant says in its replying affidavit about the positions which were filled even though it should in fact have been included in the founding affidavit. My reason for adopting this approach is that the respondent had two options to deal with this situation. The one is that the respondent could have applied to have that material struck out from the replying affidavit on the basis that it is material which should have been included in the founding affidavit. The second is that the respondent could have sought leave to file a further affidavit to deal with those matters in the reply which should have been included in the founding affidavit. It chose neither and had the matter argued on the papers as they stand.

[33] Adopting the above approach I conclude that that part of Mlambo J's order which requires the applicant to re-employ the respondent should be rescinded because the applicant has made out a proper case for rescission of that order. Accordingly the order I make is the following :-

(a) The applicant's application for the rescission of that part of Mlambo J's order which made the settlement agreement an order of this Court is hereby dismissed.

(b) That part of Mlambo J's order which required the applicant to re-employ the respondent is hereby rescinded and the applicant is granted leave to oppose the respondent's application to make that part an order of the Court and, in this regard, the applicant must file its opposing affidavit to that application within seven calender days from the date of this order.

(c) There is to be no order as to costs.

R. M. M. ZONDO
Judge in the Labour Court of South Africa

rgument :4 February 1999
dgement :12 March 1999
pplicant :Mr Maeso
by : Shepston &Wylie
espondent :Mr I. B. G. Ngcobo
by : I. B. G. Ngcobo & Partners