IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. **615/2017**

In the matter between:

DUPS PROPERTIES (PTY) LTD	**Applicant**
And	
NCAMISO MANANA N. O.	**1st Respondent**
EXECUTIVE DIRECTOR OF CMAC	**2nd Respondent**
LUNGILE NHLANGETFWA	**3rd Respondent**

Neutral citation: ***Dups Properties (PTY) Ltd v Ncamiso Manana N. O. and Others (615/2017) [2018] SZHC 56 (*****27th March, 2018*****)***

Coram: **M. Dlamini J.**

Heard: **28th February, 2018**

Delivered: **4th April, 2018**

Review proceedings : ***Labour law – interpretation of section 33bis – its Purpose – to facilitate transactions – [U]nder common law, a new employer could not take over the contract of employment without the consent of the employee, the section provides that it could subject to an obligation to pay all benefits accruing from the defunct working relationship - to protect employees from losing their employment***

Summary:

The 3rd respondent was awarded the sum of E38,500.00 by the Conciliation Mediation and Arbitration Commission (CMAC) against appellant and de Sousa Group (Pty) Ltd jointly and severally. The appellant seeks for the review and setting aside of CMAC's awards on the basis that the Arbitrator mainly construed Section 33 *bis* incorrectly.

[1] **The Parties**

The Applicant (Dups) is a company duly registered in terms of the company laws of Swaziland. The 1st respondent is the Arbitrator (Arbitrator) at CMAC whose award is challenged under these proceedings. The 2nd respondent is at the helm of CMAC while 3rd respondent (Ms. Nhlengetfwa) reported a dispute at CMAC following a consent Industrial Court order that CMAC deliberate on the dispute to finality and the impunged award was made in her favour.

Evidence before the Arbitrator

Procedure Adopted

[2] Ms. Nhlengetfwa reported a dispute at CMAC. An unresolved dispute certificate was subsequently issued by the Conciliation Commission. Ms. Nhlengetfwa instituted legal proceedings at the Industrial Court where at the close of pleadings, the parties agreed to refer the matter to CMAC for arbitration.

[3] **Evidence**

Ms. Nhlengetfwa filed a statement of claim against Dups who was the 2nd respondent and de Souza Group (Pty) Ltd t/a Outrite Signs (de Souza) who was 1st respondent. She narrated:

> *"5. The Applicant was employed by the First Respondent on a two (2) year fixed contract of employment as a Sign Writer and Applicator on the 13th February 2013.*
>
> *6. The contract of employment between the Applicant and the First Respondent as aforestated subsisted up until the 30th June 2013 wherein the said contract of employment was wrongfully and prematurely terminated by the Respondents pursuant to assertions of a takeover of the First Respondent's business by the Second Respondent. This resulted in the dismissal of Applicant from the employment with First Respondent."*

*7. At the time of her dismissal, the Applicant was earning a monthly salary of **E1,750.00 (One Thousand Seven Hundred and Fifty Emalangeni)** from the First Respondent.*

8. The termination of the Applicant's contract of employment with First Respondent was substantively unfair in that.

8.1 It was contrary to the provisions of section 33 bis of the Employment Act 1980 as amended.

8.2 The fixed term contract of employment had not run its course.

8.3 There was no valid and legal basis for the termination of the contract of employment by the Respondents.

8.4 The alleged takeover of the Respondent's business was never proved in that the First Respondent continued with its business under the disguise of Second Respondent but on the same structures. Furthermore, the Respondents employed other employees into the Applicant's previous position.

9. The Applicant's dismissal was also procedurally unfair in that the Applicant was never consulted nor given a hearing prior to the unilateral termination of the fixed term of contract by the Respondents."

[4] Against Dups, Ms. Nhlengetfwa contended:

10. "By virtue of the Second Respondent's professed takeover of the business of the First Respondent, the Second Respondent acquired

the rights and further incurred the duties of the First Respondent, including in particular, the Applicant's fixed term contract of employment with First Respondent.

11. *Notwithstanding the Second Respondent's takeover of the First Respondent's business affairs, the Second Respondent wrongfully and unlawfully failed to honor the Applicant's fixed term contract of employment. Conversely Second Respondent wrongfully and unfairly endorsed the termination of the Applicant's services before the Applicant's contract of employment could win its full course. Furthermore, Applicant was never consulted and or given a hearing prior to the termination of her contract of employments."*

[5] Ms. Nhlengetfwa then concluded:

14. "*Wherefore Applicant claims against the First and Second Respondents jointly and/or severally, the one paying the other to be absolved, compensation for unfair dismissal as follows:*

14.1 Salaries for the remainder of 21 months initial
Contract of employment at rate of E1, 750.00 per month:E36,750.00

14.2 Notice pay" *E 1,750.00*

TOTAL COMPENSATION ***E38, 500.00***

***Viva voce* evidence**

Ms. Lungile Nhlengetfwa

[6] Ms. Nhlengetfwa adduced evidence in her own case. She testified that Dups was her employer. De Souza was a subsidiary of Dups as it shared the same director. She had been initially employed by de Souza. Dups purchased de Souza and she was retained as an employee. De Souza employed him under a one year contract running from 1st February 2012. At the end of that contract, she concluded a two year contract of employment with de Souza. It is this two year contract which was later terminated by Dups through a correspondence which was handed to the Arbitrator without objection. I shall refer to the content of the correspondence later in this judgement. Suffices for now to emphasise that during the course of the two year contract between Ms. Nhlengetfwa and de Souza, Dups took over the business of de Souza, presumably by means of a sale agreement between de Souza and Dups. Dups paid Ms. Nhlengetfwa the sum of E367.18 in lieu of leave pay. Nhlengetfwa demanded payment for the rest of the duration of the two year contract following that she worked under it for a period of three months.

Dups

[7] Dups confirmed that it took over de Souza through a purchase. It wrote the letter which was submitted as annexure C. It then paid Ms. Nhlengetfwa a sum of E367.18. Ms. de Souza who gave evidence on behalf of Dups pointed out that following de Souza's financial constraints, it was resolved that Dups purchase de Souza but without its financial obligations. Dups however, paid Ms. Nhlengetfwa all her dues. She confirmed that Dups authored annexure C following that de Souza had shut down. She confirmed inviting Ms. Nhlengetfwa to apply for new employment under Dups.

[8] Although Ms. de Souza testified that there was a further cheque paid to Ms. Nhlengetfwa other than the sum of E367.18 in respect of leave pay, nothing much turned on this as she could not testify on dates and the amount of cheque. She did not say what the said cheque was for except that it was part of her terminal benefits. Under cross-examination, it was revealed that the evidence of further payment was not pleaded anywhere as it was adduced for the first time by Ms. de Souza during trial.

Adjudication

Common Cause

[9] It is common cause that Ms. Nhlengetfwa concluded a contract of employment for a further period of two years with de Souza. It is common cause that the contract did not run its full course. There was a takeover by Dups of de Souza. From the evidence of Ms. de Souza, it is common cause that Ms. Nhlengetfwa received part of her terminal benefits, *viz*., the sum of E367.18 as leave pay. It is undisputed that a letter of termination following the two year contract was authored by Dups.

[10] **Issue:**

Did the learned Arbitrator apply his mind when he held that Dups was obliged to pay the terminal benefits of Ms. Nhlengetfwa?

[11] **Law**

The bone of contention vested upon section 33*bis* of the Employment Act No 5 of 1980 as amended (the Act). The section reads:

> *"(1) An employer shall not -*
>
> *(a) sell his business to another person; or*
>
> *(b) allow a takeover of the business by another person,*
>
> *Unless he first pays all the benefits accruing or due for payment to the employees at the time of such sale or take over."*
>
> *(2) Notwithstanding subsection (1) if the person who is buying the business or taking it over, makes a written guarantee which is understood by and acceptable to each employee that all benefits accruing at the termination of his previous employment shall be paid by him within 30 days and by mutual agreement agreed in writing and approved by the Commissioner of Labour, subsection (1) shall not apply."*
>
> *(3) An employer who fails to comply with subsection (1) shall, upon conviction, be liable to a fine not exceeding six thousand emalangeni or to imprisonment not exceeding two years or both."*

[12] **Arguments**

It was contended on behalf of Dups that in terms of section 33*bis*, it is the duty of the employer and *in casu*, de Souza, to pay the terminal benefits of Ms. Nhlengetfwa. Ms. Nhlengetfwa was therefore barking at the wrong

tree by instituting legal proceedings against Dups following that the two year contract was concluded with de Souza and not Dups. This notion by Dups was conveyed to Ms. Nhlengetfwa during cross examination at arbitration. A better part of the cross-examination focused on pointing out that there was no contractual relationship between Dups and Ms. Nhlengetfwa.

[13] Ms. Nhlengetfwa, however, was adamant that Dups was liable to pay because it terminated the two year contract and further paid part of the benefits flowing from the contract of employment, *albeit* by de Souza. The Court was referred to annexure "C," a letter of termination in this regard. The Court was urged to consider annexure "C" as did the Arbitrator, as the undertaking by the new employer to pay the terminal benefits thereby falling under Section 33*bis* (2).

[14] Learned Counsel for Dups put up resistance on annexure "C" as an undertaking by Dups. He submitted that a reading of ss (2) points out that the undertaking must be approved by the Commissioner of Labour. In the case at hand, the Commissioner of Labour did not do so. Annexure C was merely a letter to Nhlengetfwa without any legal force against Dups. The mere fact that Dups paid the sum of E367.18 in lieu of leave does not transfer legal obligation from de Souza to Dups. The only legal remedy available in the circumstance where a former employer has failed to pay its employees is in terms of Section 33*bis* (3) which amount to a criminal charge. The employee has no claim against the new employer in the absence of a written guarantee approved by the Commissioner, the submission proceeded on behalf of Dups.

Review

Interpretation of Section 33 *bis*

[15] The purpose of inserting Section 33*bis* in the Act is outlined in the Act itself. It reads as its preamble:

> "*An Act to consolidate the law in relation to employment and to introduce new provisions designed to improve the status of employees in Swaziland"* (underlined, my emphasis)

[16] Obvious, section 33*bis* is a new provision, intended as per the preamble quoted above, "*to improve the status of employees in Swaziland."* I must point out from the onset that this section corresponds with section 197 of the Labour Relations Act No. 66 of 1995 as amended of South Africa. Although it is not *pari materia* in its wording, it is in its purpose and effect**. Paul Benjamin**[1] wrote that the section serves a double purpose as it, "*facilitates the transactions while at the same time protecting the workers from unfair job losses*." Firstly, whereas under common law, a new employer could not take over the contract of employment without the consent of the employee, the section provides that it could subject to an obligation to pay all benefits accruing from the defunct working relationship. Secondly, and this purpose was well articulated by **Zondo PJ**[2] as follows:

> *"[T]o protect employees employment and other rights whenever there is a change of the identity of the employer in a business or undertaking*."

[1] Adjunct Professor of Law, Univeristy of Cape Town and Director of Cheadle Thompson & Haysom Inc. Attorneys in his article, "A matter of ongoing concern: Judicial interpretation and misinterpretation of section 197 of the Labour Relations Act."

[2] Para 68 in National Education Health and Allied Workers Union v University of Cape Town and Others (CA12/00) [2002] ZALAC 4 (7 February 2002)

[17] The learned Justice had pointed out earlier:

> "*The business transferee could only take over the workforce if he wanted to. If he did not want to take over the workforce, he had no obligation to take it over. Now s197 visits the business transferee with liability for all kinds of action done by the previous employer prior to the transfer of the business."*[3] (Underlined, my emphasis)

[18] From the above, the courts are bound to interpret the Act to give effect to its purpose as defined in the preamble. Any interpretation contrary to the spirit of the Act stands to be dismissed. I have highlighted the spirit of the Act in the preceding paragraphs which is *inter alia* to protect employees from losing their employment. What remains is for me to apply it to the case at hand.

[19] In the present case, it is common cause that there was a takeover or sale of the business by de Souza to Dups. There was in the process transfer of not only the business but the employee, Ms. Nhlengetfwa. It cannot, therefore, in the circumstance, be held, as the Court was so persuaded, that where the Commissioner of Labour was not involved in the approval of the guarantee, such guarantee fails to meet its conditions and must be held to be of no force. The approval of the Commissioner of labour is a formality designed to ensure that the terms of the guarantee protect and benefit the employee before approval as per the spirit of Section 33*bis* and the Act.

Annexure C

[3] See para 67 n[2]

[20] What is annexure C? Could it be considered as any undertaking by Dups to pay the benefit of Ms. Nhlengetfwa in terms of section 33(2) *bis*. Annexure C reads:

"DUPS PROPERTIES

P.O. Box 333
Manzini
Swaziland

Tel: +268 5052962
Fax: +268 5056178

Lungile Nhlengetfwa
P.O. Box 114
Manzini

21st May 2013

Dear Madam

RE: TAKE OVER OF DESOUSA GROUP (PTY) LTD BY DUPS PROPERTIES (PTY) LTD

Reference is made to the above.

Kindly be informed that Desousa Group (Pty) Ltd has been taken over by Dups Properties (Pty) Ltd. Therefore your employment contract with Desousa Group is hereby terminated. You may reapply for employment to Dups Properties, should you choose.

Concerning paid leave, you are entitled to accrued leave from 1st January 2013 to 31st May 201…, are hereby given notice, commencing 1st June 2013 to 30th June 2013. You may reapply before 31st …… 2013, should you choose to do so.

Your severance pay will be paid out to you accordingly.

Therefore your last day of employment shall be 30th May 2013.

We wish you the best in your future endeavors."

Yours faithfully,

Mrs. Nelisiwe DeSousa
Chief Executive Officer"

[21] From the above, it is worth noting that:

- This correspondence was authored by Dups as clearly appears on the letter head and as confirmed in evidence by Ms. de Souza.
- Dups advised Ms. Nhlengetfwa of the takeover.

- Dups undertook to pay accrued leave from 1st January 2013 (date of two year contract commenced) to 31st May 201(?)

- Dups further gave notice of termination of the two year contract i.e a one month notice commencing 1st June 2013 to June 2013.

- Dups further invited Ms. Nhlengetfwa to "reapply" before 31st …2013 if she was so inclined.

- Dups further undertook to pay Ms. Nhlengetfwa her severance allowance (in terms of section 34). (Brackets, my own)

[22] I am much alive to Dups cross-examination where it attempted to state that whatever undertaking was made, it was not so authored in Annexure C above that Dups would discharge the stated obligations. Annexure C merely pointed out that Ms. Nhlengetfwa would be paid without mentioning who would do so.

[23] Further from the evidence of Ms. de Souza, it appears to me that Dups was not disputing its obligation to pay Ms. Nhlengetfwa *per se*. It is only that Dups was under the mistaken impression that Ms. Nhlengetfwa had been paid all that was due to her. This is clearly evident in the following:

> *"RC Mrs. De Sousa, applicant has come to claim that she was never paid her dues when the takeover was done. What can you say about that?*
>
> *RW1 All her dues were paid.*
>
> *RC Can you explain that to the Commissioner?*
>
> *RW1 The last payment that we had was paid by cheque. And the outstanding amount was in lieu of leave days which she had not taken.*
>
> *RC To the best of your knowledge how much was the amount that was paid in lieu of leave days?*
>
> *RW1 It was E367.18.*
>
> *RC Now Mrs. De Sousa to the best of your knowledge was there any relationship and can you explain if such does exist between the applicant and the Second Respondent?*
>
> *RW1 Dups Properties is part of Dups Holdings. Dups Properties was where she had applied for a job.*
>
> *ARB How does Dups Holdings come into play because here we are talking about De Sousa Group?*

RW1 De Sousa Group was no longer functioning. It had been closed down.

[24] On who authored annexure C, Ms. de Sousa stated under oath:

"RC Can you turn to page 14? Do you recognize the document at page 14? I'm referring to Annexure C.

RW1 Yes I do.

RC Can you tell the Commission who authored that document?

RW1 It's Dups Properties

RC Can you tell the Commission why Dups wrote that document?

RW1 Dups Properties was the one that had incurred the cost of the purchase of the company.

ARB Which company?

RW1 De Souza Group."

[25] On the question of when exactly annexure C was authored or rather why Dups authored annexure C instead of de Souza Group, Ms. de Souza answered Dups Counsel:

"De Sousa Group was no longer functioning. It had been closed down".

[26] This testimony is supported by the date which appears in annexure C. Annexure C reflects that it was authored on 21 May 2013. It gave Ms. Nhlengetfwa a one month notice of termination, above payment of severance allowance. Clearly by so writing Dups acknowledged that there was transfer of Ms. Nhlengetfwa as an employee from de Souza to Dups. By undertaking to pay her severance allowance, Dups was acknowledging that Ms. Nhlengetfwa had worked for over a year (as she did under the one

year contract) and was in her second year contract (as annexure B, i.e. the contract of two years reads as reference: *"confirmation of employment*"). She was indeed by law entitled to severance pay.

[27] The date, i.e. 21st May 2013 as the date upon which Annexure C was authored, together with the one month notice supports the evidence by both Ms. Nhlengetfwa and Ms. de Souza that when annexure C was written, Ms. Nhlengetfwa was already under the employment of Dups. It is not clear why Dups is resisting payment as annexure C clearly demonstrates a takeover of not only the business but Ms. Nhlengetfwa as well.

[28] It is my considered view from the afore going, that the learned Arbitrator applied his mind when he held that annexure C was an undertaking by Dups in terms of ss (3). His conclusion in this regard must stand.

[29] Counsel on behalf of Dups pointed out that a further demonstration that the honourable Arbitrator failed to apply his mind on the matter is evident by the award calling upon both Dups and de Souza to pay Ms. Nhlengetfwa jointly and severally. The Arbitrator failed to appreciate that the evidence presented was that de Souza was defunct and therefore could not pay Ms. Nhlengetfwa.

[30] I must point out that the case of Ms. Nhlengetfwa was well established in the pleading and supported by the *viva voce* evidence. It was her evidence both on paper and *viva voce* that de Souza, her first employer did not advise her of the takeover or sale. She merely received a correspondence from Dups advising her of the takeover. Nothing from the face of the business itself indicated a takeover as the business continued to operate in the same premises with the same Chief Executive Officer being Ms. de Souza. Ms.

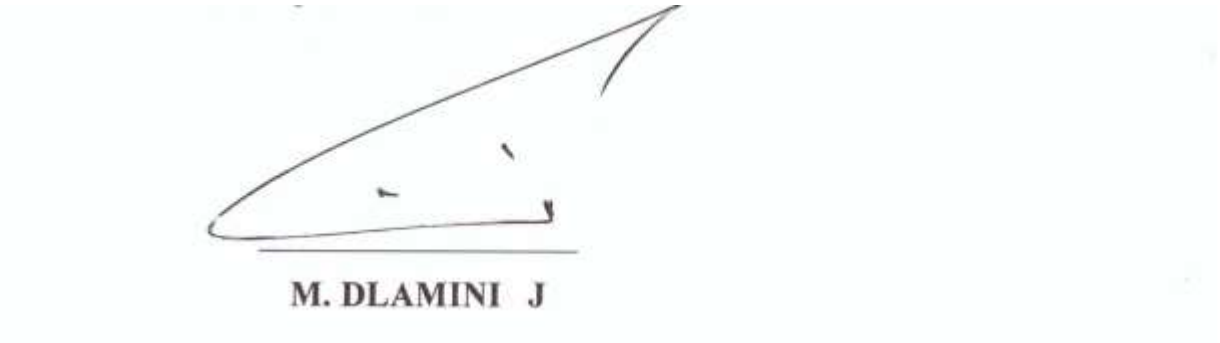
de Sousa confirmed in her evidence that she was the Chief Executive Officer of both companies. Under these circumstances therefore an astute litigant in the likes of Ms. Nhlengetfwa would claim her terminal benefit from both companies following that she could not be certain of the takeover or sale of de Souza by Dups.

[31] Similarly in the circumstance, the honourable Arbitrator was correct in his award by calling upon both Dups and de Souza to pay the terminal benefits. At any rate the words, *"jointly and severally"* means that once Dups has paid the amount awarded, Ms. Nhlengetfwa cannot then claim against de Souza. In effect, no prejudice is to be suffered by Dups by such an award.

[32] In the final analysis the award by the honourable Arbitrator cannot be assailed. He fully applied his mind to the matter and correctly analysed the issues before him.

[33] I therefore enter the following orders:

1. Applicant's review application is hereby dismissed.
2. Applicant is ordered to pay costs of suit.



M. DLAMINI J

Plaintiff	:	**S. G. Simelane of Zonke Magagula & Co.**
Defendant	:	**L. Manyatsi of Manyatsi & Associates**