



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Reportable

Case no: PA3/20

In the matter between:

THEMBISILE RUSELO

Appellant

and

SUTHERLAND TRANSPORT

First Respondent

TRUSTEES FOR THE TIME BEING OF

SUTHERLAND EMPLOYMENT TRUST

Second Respondent

DAVID STEPHANUS VAN DER WESTHUIZEN N.O.

Third Respondent

IRENE MARIE VAN DER WESTHUIZEN N.O.

Fourth Respondent

Heard: 11 November 2021

Delivered: Deemed to be the date on which the judgment is first emailed to the parties 18 January 2022.

Coram: Waglay JP, Coppin JA et Kubushi AJA

JUDGMENT

COPPIN JA

- [1] This is an appeal against the order of the Labour Court (Lallie J), dismissing an application by the appellant to make into a court order an arbitration award, which had been granted in his favour by an arbitrator, acting under the

auspices of the National Bargaining Council for the Road Freight and Logistics Industry(NBCRFLI) (“the bargaining council”), against “Sutherland Transport”. Leave to appeal was granted on petition to this court.

- [2] In his application the appellant had sought an order in the following terms: “1. Directing that the arbitration award issued in the matter [of] *Thembisile R Ruselo v Sutherland Transport* dated 10 June 2016 under case number PERFBC 37810 be made an order of court in terms of section 158 (1)(c) of the Labour Relations Act; 2. Directing that the citation of the First Respondent shall be corrected in terms of Rule 22 of the Labour Court Rules [to]: THE TRUSTEES FOR THE TIME BEING N.O. OF THE SUTHERLAND EMPLOYMENT TRUST, alternatively, substituting the First Respondent with the Second Respondent’s citation: THE TRUSTEES FOR THE TIME BEING OF THE SUTHERLAND EMPLOYMENT TRUST; and/or 3. Directing that, in terms of Rule 22 of the Labour Court Rules, the Third Respondent, David Stephanus Van Der Westhuizen N.O. a trustee of SUTHERLAND EMPLOYMENT TRUST, and the Fourth Respondent, Irene Marie Van Der Westhuizen, a trustee of SUTHERLAND EMPLOYMENT TRUST be joined as Third and Fourth Respondent herein, and/or that the First Respondent is to be substituted with their respective citations; 4. Directing that the Respondents who opposes the relief sought by the Applicant to be ordered to pay the costs of this application; 5. Granting the Applicant further and/or alternative relief.”
- [3] The court *a quo* dismissed the application, which was opposed by the trustees (for the time being) of the Sutherland Employment Trust (“the trust”), effectively, on the basis that the appellant, according to the court *a quo*, did not cite the employer, that is the trust, in the Bargaining Council so that the trust, could have become a party to those proceedings, and be afforded an opportunity to oppose the appellant’s claims in that forum. In that regard the court *a quo*, essentially, accepted and decided the application on the version proffered by the trustees of the trust, namely, that it did not participate in the proceedings in that forum.
- [4] The court *a quo* found, essentially, that even though the award was subsequently varied by the Bargaining Council to reflect the trust as the

employer, the variation was ineffective, and that its joinder and that of its trustees could not succeed after the award had been made, nor could the application to make the award an order of court. According to the court *a quo*, since the award related to an entity “Sutherland Transport”, which was non-existent, there were no legal grounds for making the award an order of court in the absence of a respondent against whom such an order could be enforced.

- [5] The issue for decision in this appeal is thus, ultimately and essentially, whether the relief sought by the appellant was competent, and whether he ought to have been granted alternative relief in order to render the award effective against the trustees (for the time being) of the Sutherland Employment Trust, in their capacity as such.

Common cause facts

- [6] The following facts under this heading are either common cause or are not disputed.
- [7] The appellant was employed as a driver by an entity (the trust), when he was dismissed on 8 October 2015 for alleged misconduct following a disciplinary hearing.
- [8] The appellant referred an unfair dismissal dispute to the bargaining council in which he cited “Sutherland Transport” as the employer. All the necessary and relevant notices in the proceedings in that forum were served on the employer party, as cited, at 28 Kurland Road, Perserverance, Port Elizabeth (now Gqeberha), which is the (business) address shared by the trust and the trustees.
- [9] At no stage before or during those proceedings which culminated in the issue of the award did those appearing for and representing the employer party in that forum contend or allege that the true employer, namely, the trust was not before, or not properly before that forum.

- [10] Following an unsuccessful conciliation the matter was referred to arbitration where the appellant represented himself and where the employer party, which still did not object to its citation as “Sutherland Transport”, was represented by a Human Resources Administrator in its business, including that of the trust, namely, Mrs Marionette Marais (“Mrs Marais”). The appellant gave evidence and three witnesses were called to testify on behalf of the employer party, namely, Mr Deon Van der Merwe (“Mr Van der Merwe”), an attorney who was also linked to and involved in the human resources functions of the business, including that of the trust, and who also presided at the appellant’s disciplinary hearing, Mr I Booysen, who worked for the employer party’s business, including that of the trust, as a controller, and Mrs Celeste Van der Walt.
- [11] At the conclusion of the arbitration proceedings, in the written award dated 10 June 2016, the arbitrator who presided at the hearing, Mr LER Koorts, held as follows in favour of the appellant: “41. I find that the dismissal of the Applicant was unfair; 42. The Respondent, Sutherland Transport is ordered to reinstate the Applicant, Mr T.R. Ruselo in his previous position as driver at the same remuneration and terms and conditions of employment that presently prevails for the position of a driver. 43. The reinstatement is made retrospectively from 1 February 2016. The Applicant must report for duty on Monday, 20 June 2016 at the normal starting time. 44. The Respondent must in addition pay the amount of R 37 200 – 20 to the Applicant within fourteen (14) days of the date of this award which is payment as a result of his reinstatement for the period of 1 February 2016 to 19 June 2016 (4.6 months calculated as follows: R8087 (basic salary) x 4.6 months = R 37 200 – 20).”
- [12] The appellant only got the award from the Bargaining Council on 21 June 2016 whereupon he reported for duty. The employer party refused to comply with the award. The appellant was told by Mrs Marais, the Human Resources Manager, who represented the employer party at the arbitration, that he was not welcome there; that he would not be reinstated and that the appellant should approach the Bargaining Council for further assistance since he saw fit to lodge a dispute with it.

- [13] The appellant approached the Legal Aid office in Gqeberha for assistance. An application in terms of section 158 (1)(c) of the LRA was launched in order to make the award an order of court. In response, and for the first time, in an email to the appellant's legal representative, the representatives of the employer party intimated that the employer was the trust, and contended that it was not obliged to comply with the award as the trust had not been cited.
- [14] This caused the appellant, acting on the advice he got from the Legal Aid office, to abandon the application and, instead, pursue an application in the Bargaining Council to vary the award made by Mr Koorts so as to reflect the employer as the trust. That application was opposed by the trust, which, seemingly, was represented by the same Mr Deon van der Merwe, who presided at the disciplinary hearing and who testified on behalf of the employer party at the arbitration before Mr Koorts. The matter was dealt with by another Commissioner, Mr Samuel Baron, on the papers that had been submitted by the parties.
- [15] In a variation ruling dated 5 August 2016, after having analysed the evidence and the arguments presented by the parties, Mr Baron ruled as follows: "36. The award under case number PERFBC 37810 is hereby varied to reflect that the Respondent is Sutherland Employment Trust and in all instances in the award where it states Sutherland Transport are varied to state Sutherland Employment Trust." In arriving at that conclusion Mr Baron was satisfied that the employer party that was before the Bargaining Council all along was in fact the trust.
- [16] The trust still did not comply with the award as varied, instead, the variation ruling was taken on review, seemingly by the trustees (for the time being) of the trust, Mr and Mrs van der Westhuizen, who, respectively, are the third and fourth respondents in this appeal, and, seemingly, represented by Mr Van der Merwe, as attorney. The main ground relied upon was that the variation had been made by a Commissioner other than Mr Koorts, and that he had no jurisdiction to make such a ruling because he had not been authorised to do so by the Director of the Commission for Conciliation, Mediation and Arbitration (CCMA). The Labour Court found accordingly, set aside the ruling

of Mr Baron and referred the matter back to the Bargaining Council for re-determination before a different panellist.

- [17] When the matter had to be dealt with again Mr Koorts “recused” himself, and it was attended to by another Commissioner, Mr Bulelani Busakwe. Mr Van der Merwe, the attorney who gave evidence on behalf of the employer party at the original arbitration, represented the trust and took a similar point to the one taken in the first review, arguing, in essence, that the Commissioner had no jurisdiction to vary the award as he not been authorised by the Director of the CCMA to deal with it.
- [18] Mr Busakwe, the Commissioner, in a well-reasoned variation award dated 7 November 2017, rejected that argument, finding, in essence, that a panellist of the Bargaining Council other than the one who made the original award may in the absence or due to the incapacity of that panellist, vary, or correct an error in an award, or ruling, as contemplated in section 144 of the LRA and that no additional authorisation from the Director of the CCMA was required to do so, since those powers had already been delegated to the Bargaining Councils. The Bargaining Council could authorise a panellist to deal with a matter previously dealt with by another panellist where circumstances require the appointment of another panellist. Mr Busakwe referred, *inter alia*, to the provisions relating to the powers of accreditation published in the Government Gazette.
- [19] In conclusion, Mr Busakwe made the following ruling: “40. The Respondent’s contention that I do not have the authority to deal with this matter and/or that I was not appointed in compliance with section 144 of the LRA is dismissed. 41. The arbitration award of Martin Koorts in this matter dated 10 June 2016 is hereby varied, specifically any reference to Sutherland Transport/Employer/Respondent is with reference to Sutherland Employment Trust.” Mr Busakwe too was convinced that the employer party that had been before the Bargaining council since inception, was, in fact, the trust.
- [20] Instead of compliance with the award following the second variation ruling, the trustees for the time being of the Sutherland Employment Trust, presumably

emboldened by their success in the previous review application, chose yet again to take it on review on behalf of the trust, on effectively the same grounds that it relied on in the previous review.

- [21] Understandably frustrated with, what appears to be technicalities utilised by the party whom he perceived to be his employer to avoid compliance with the award made by Mr Koorts, the appellant brought the application which is the subject of this appeal. The appellant states the following in that regard: “Therefore, instead of opposing the review, and instead of relying on the variation ruling during this present application for purposes of having the award made an order of court (which in any case again reflecting the incorrect varied citation which was requested by me in my variation application) I elect to approach the Court directly via the present section 158(1)(c) process and in respect of Rule 22(5). This process will ensure that the matter is dealt with speedily and give clarity and finality to both parties.”
- [22] Significantly, the appellant further states under oath in his application: “The matter is not *lis pendens* and/or *res judicata*. I withdraw all other applications serving before this Court. The variation ruling (even if not formally set aside, to which I in any case hereby consent to having reviewed and set aside and also in terms of a rule 17 consent under case no PR 257/17), also does not impact negatively on the court’s powers herein, since it still fails to reflect the correct legal citation as requested in this present application. It accordingly does not concern the same cause of action.”
- [23] Unpacked, in essence, the appellant contends in the application, *inter alia*, that, the variation ruling (i.e. of Mr Busakwe) reflecting the name of the employer as “Sutherland Employment Trust” was, in any event, not correct, because the trustees (for the time being) of the trust had to be cited and on that basis conceded to the review application that had been brought in respect of that ruling.

Discussion

- [24] Section 158(1)(c) of the LRA pertains to the power (discretion) of the Labour Court to make “any arbitration award or any settlement agreement an order of

court.” And Rule 22 of the Labour Court Rules deals with the joinder of parties, interventions as applicant or respondent, amendments of citation and the substitution of parties in proceedings in the Labour Court. Rule 22(5) provides: “if in any proceedings it becomes necessary to substitute a person for an existing party, any party to such proceedings may, on application and on notice to every other party, applied to the court for an order substituting their party for an existing party in the court may make such order, including an order as to costs, or give such directions as the further procedure in the proceedings as it deems fit.”

- [25] Besides seeking to make the award an order of court, what the appellant sought to do was to correct the citation of the employer party in the award. Seemingly, in the appellant’s perception, the Bargaining Council has repeatedly failed to do so. The difficulty confronting the appellant was to show that the Labour Court has the power to amend the citation of the party in an award of the Bargaining Council in the circumstances of this case, in particular where the award was not before it for review in terms of the LRA. Patently, section 158 (1)(c) and Rule 22 do not give the Labour Court the power to do so. The “proceedings” referred to in Rule 22 are proceedings in the Labour Court and not proceedings in the CCMA or a bargaining council.
- [26] On the other hand, it is clear that a Commissioner of the Bargaining Council, properly seized with the matter could, if there was an error in the citation of a party in an award, such as a misnomer, correct that error. Rule 27 of the Rules for the Conduct of Proceedings before the CCMA¹ specifically provides: “If a party to any proceedings has been incorrectly or defectively cited, the Commission may of its own accord, by consent of the parties or on application and on notice to the parties concerned, correct the error or defect.”
- [27] The application therefore appears misconceived insofar as it requires the Labour Court to do what it does not have the power to do. But the question in this matter is whether there was indeed an error in the citation of the employer party in the award of Mr Koorts that requires correction. If there was no error, and the employer party was merely cited by its trade name, instead of how a

¹ As Published in GG38572 under GNR.223 dated 17 March 2015.

trust ought strictly, conventionally, to be cited, the question, instead, is what the legal ramifications of such as citation are, more particularly, whether the award would, nevertheless, be enforceable against the trust, through its trustees for the time being, and its assets. The Bargaining Council itself does not have the power to make a declaration in that regard, but the Labour Court does. Section 158(1)(a)(iv) of the LRA provides that the Labour Court may make an appropriate order, including a declaratory order. In this matter, the appellant did not specifically ask for a declaratory order, but sought “further and/or alternative relief” to the relief he specifically and in detail articulated.

- [28] The appellant has contended throughout, since this issue of the trust’s citation was first raised, that “Sutherland Transport” was the tradename of his employer, the trust. In affidavits submitted in proceedings at the Bargaining Council, for example, in an application by the appellant for condonation there was effectively an admission on oath by Mrs Marais, the Human Resources person, who represented the employer party at the arbitration hearing before Mr Koorts, that even though the employer party was the trust, “Sutherland Transport” was its tradename.
- [29] In terms of Rule 14 of the High Court Rules, it is permissible to cite a firm, partnership or association by its tradename. Even though that Rule does not specifically refer to a trust, the High Court has since held, in essence, that the provisions of Rule 14 also apply to a trust which conducts its business under a tradename, or a name other than that by which it is otherwise known². Business trusts do use tradenames, or names other than their own, and it is often difficult for an ordinary person to know or ascertain whether he or she was dealing with a trust, a corporate body, or a private individual³. Rule 20 of the Labour Court Rules is the equivalent of Rule 14 of the High Court.
- [30] The purpose of Rule 14 of the High Court, and, by extension, Rule 20 of the Labour court, is, *inter alia*, to simplify and streamline the citation of litigants and in particular to obviate technical defences taken in regard to the citation of

² See: *Cupido v Kings Lodge Hotel* 1999 (4) SA 257 (E) at 265B-H.

³ See *Cupido* (above) at 264C/D-D/E and I.

the litigating parties. While it is correct to cite a trust in the name of its trustees for the time being, at least in the context of Rules 14 (and 20), there is no reason why a business trust which has conducted business under another, particular name, or tradename, cannot effectively be cited by that name and be liable in terms of a judgment issued in that name.

- [31] Simply using the trust's name and not, at least expressly, citing the actual trustees of the trust, is also not fatal, since it is accepted that reference to the trust in litigation may be understood as a reference to the trustees for the time being of the trust, whomever they might be⁴.
- [32] While there is no specific rule applicable to proceedings in the CCMA or Bargaining Councils similar to Rule 14 (High Court), and Rule 20 (Labour Court) there is no reason why the position in those forums should be any different. Proceedings there are required to be simple, streamlined and not complicated by legal formality and procedure. Further, it is more likely that an employee, even if assisted by a Union, may be more familiar with the name generally used by his employer, rather than with the technical name, or true nature of the employer entity.
- [33] Although there is nothing wrong with an employee citing an employer according to strict legal convention, to make that the norm and to expect the kind of technical precision in the citation of employer parties in proceedings in the CCMA, or in Bargaining Councils, which is not even required in High Court litigation, would seriously undermine the legislated nature and purpose of proceedings in those forums. Therefore, the citation of an employer in proceedings in those forums by its tradename, or a name, or names it also uses for its business, is not incorrect or fatal. The employer would be bound by an award made in that name.
- [34] In this application, which is the subject of this appeal, the appellant has again made specific averments that his employer, the trust, utilised the trade name "Sutherland Transport" and that his employer actively participated in the

⁴ See, *inter alia*, *Hyde Construction CC v Deucher Family Trust and Another* 2015 (5) SA 388 (WCC) para 47.

arbitration and sought to justify his dismissal. Mr David Van Der Westhuizen, who deposed to the main opposing affidavit on behalf of the trust and the only other trustee, namely his wife, Mrs Irene Marie Van Der Westhuizen, denies those averments and, seemingly, contends that it was only the name of another, separate, business entity, “Sutherland Transport (Pty) Ltd”, but also, *inter alia*, that “Sutherland Transport” is “to the best of [his] knowledge”, a non-existent entity.

- [35] It is now trite that in application proceedings where final relief is being sought the so-called *Plascon Evans* rule is applicable⁵. It effectively means that a genuine dispute of fact on the affidavits is to be decided on the version of the respondent, unless that version does not create a real or genuine dispute of fact, or is so far-fetched or so clearly untenable that the court would be justified to reject it on the papers. In such instances, the court must include the fact, as alleged by the applicant, with the other relevant facts it takes into account in deciding whether or not to grant the final relief.
- [36] The version of the trustees of the trust deposed to by Mr Van Der Westhuizen, denying that the trust was also known by the tradename “Sutherland Transport”, and the version that they, that is the trust and trustees, were not aware of and did not participate in the arbitration, are indeed so patently improbable, far-fetched, and clearly untenable that a court would be justified in rejecting that version on the papers.
- [37] It is patently clear that the employer of the appellant is utilising technicalities, albeit rather crudely, in order to avoid complying with the award granted in the appellant’s favour. It is playing something in the nature of a “cat and mouse” game and has been successful thus far, although it should not have been.
- [38] It cannot be denied that Mrs Marais and Mr Van der Merwe were at all material times actively involved in the human resources functions of, *inter alia*, the trust and that they on behalf of the appellant’s employer instituted and actively participated in the disciplinary proceedings resulting in the appellant’s dismissal; that Mr Van der Merwe chaired the disciplinary hearing and

⁵ See, *inter alia*, *Fry’s Metals (Pty) Ltd v NUMSA & others* [2003] 2 BLLR 140 (LAC) para 37.

proposed and/or imposed the sanction of dismissal; that even though the employer was cited as “Sutherland Transport” at no stage in the arbitration proceedings before Mr Koorts was the citation objected to; Mrs Marais represented the employer throughout those proceedings and Mr Van der Merwe was a witness; Mrs Marias deposed to an affidavit in proceedings in the Bargaining Council where she averred, *inter alia*, that the appellant’s employer was “Sutherland Transport”, and that she was employed as its Human Resources Manager.- Mrs Marias has also admitted that “Sutherland Transport” was a trading name.

[39] In addition, even though Mr Van der Westhuizen contends that the trust (i.e. the employer) did not participate in the proceedings before the Bargaining Council culminating in the award, neither he nor the other trustee, or Mrs Marias, or Mr Van der Merwe (an attorney) contend that their opposition to the appellant’s unfair dismissal referral and their participation therein was unauthorised, a mere frolic of their own, or at the behest of a non-existent entity. In fact, there is no explanation at all for the participation of, *inter alia*, Mrs Marais and Mr Van der Merwe in the proceedings in the Bargaining Council that culminated in the issue of the award by Mr Koorts.

[40] Even though the Labour Court could not correct the award, it did not have to, because on the facts, properly determined as assessed, there was nothing to correct. In addition to making the award an order of court by virtue of its power to grant the alternative relief, it merely had to declare that the award was binding on the trust, through its trustees for the time being, and that the court order was enforceable against them in their capacities as such and executable against the assets of the trust.

[41] The Labour Court erred in the exercise of its discretion and failed to properly assess the conflicting versions on the central issue, and to take into account the correct facts, having properly determined them.

[42] The unconscionable utilisation by the employer (that is the trust, and more particularly the trustees of the trust, cited respectively as the third and fourth respondents in the application, which is the subject of this appeal, and in the

appeal itself) of questionable technicalities and tactics to avoid its legal obligations, is clearly deserving of censure, at least in terms of the costs.

[43] In the result, the following order is made:

43.1 The appeal is upheld;

43.2 The order of the Labour Court dismissing the application is set aside and substituted with the following order:

- “1. The arbitration award issued in the matter of Thembesile R Ruselo v Sutherland Transport, dated 10 June 2016, under case no. PERFBC 37810 (“the award”) is made an order of court in terms of section 158(1)(c) of the Labour Relations Act, 66 of 1995;
2. It is declared: (a) that at all material times, culminating in the making of the award the name “Sutherland Transport” was utilised by the first respondent; (b) that the award, and by extension this court order is binding on and enforceable and executable against the Sutherland Employment Trust and its assets, and its trustees for the time being, namely David Stephanus Van Der Westhuizen N.O, and Irene Marie Van Der Westhuizen N.O, in their capacity as such;
3. The Sutherland Employment Trust, represented by its trustees for the time being, David Stephanus Van Der Westhuizen N.O, and Irene Marie Van Der Westhuizen N.O, are to comply with the terms of the award, now a court order, forthwith;
4. The Sutherland Employment Trust, represented by its trustees for the time being, David Stephanus Van Der Westhuizen N.O, and Irene Marie Van Der Westhuizen N.O, is to pay the costs of the application.”

43.3 The Sutherland Employment Trust, represented by its trustees for the time being, David Stephanus Van Der Westhuizen N.O, and Irene Marie Van Der Westhuizen N.O, is to pay the costs of the appeal.

P Coppin

Judge of the Labour Appeal Court

Waglay JP and Kubushi AJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANT:

Mrs E Van Staden of Legal Aid South
Africa (Gqeberha) (prev. Port
Elizabeth)

FOR THE THIRD RESPONDENT:

Mr T Potgieter of T D Potgieter Attorneys