

REPUBLIC OF SOUTH AFRICA
THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 1465/11

In the matter between:

CROSS BORDER SUPPLY CHAIN

SOLUTIONS (PTY) LTD

Applicant

and

CHARMAIN JORDAAN

Respondent

Heard on: 23 November 2011

Delivered on: 17 February 2012

Summary: Writ of Execution rescinded – default arbitration award not served on the applicant.

JUDGMENT

BOQWANA AJ

Introduction

[1] The applicant seeks an order rescinding a writ of execution issued by this Court on 12 April 2011 under case number GPRFDC12598. The application is unopposed.

[2] The writ of execution was issued pursuant to a default award made by the

National Bargaining Council for the Road Freight Industry ('the bargaining council') on 28 August 2010 against Svenfreight CC t/a Express Cargo ('Express Cargo').

[3] The applicant contends that the default award was against Express Cargo and not itself. It contends that the respondent was employed and dismissed by Express Cargo and not by the applicant and therefore it should not have been cited as an alternative debtor on the writ of execution.

[4] Express Cargo and the applicant had apparently been using the same premises having entered into a working agreement on 18 January 2010. In terms of this arrangement, Michael Kapp ('Kapp'), the owner of the applicant was responsible for the day to day management of Express Cargo. This, the applicant alleges was due to Mark Svenningsen ('Svenningsen') the owner of Express Cargo's travelling commitments and not being able to personally manage Express Cargo. The applicant alleges that the fax numbers remained separate. The fax numbers for Express Cargo was allegedly 011 397 3022, whilst the applicant's fax number was 086 602 4213.

[5] The relationship between the two companies however went beyond that. A decision was taken for the applicant to take over the customer base of Express Cargo on 01 May 2010.

[6] On 01 September 2010, the applicant and Express Cargo entered into a sale agreement with the applicant purchasing business assets, debtors' book and customer base concern excluding liabilities. Employees were to be retained by the seller and no employees would be transferred with the business assets. Effectively after the sale Express Cargo was non-operational.

[7] Ms Dippenaar, who appeared for the applicant conceded that the sale effectively amounted to a sale of a business as a going concern. Although she was at pains to try and convince the Court that the sale was not the one contemplated by section 197 of the Labour Relations Act¹ ('LRA'). She however had to concede that if the sale was a sale of the business as a going concern then employees would be

¹Act No 66 of 1995

transferred to the applicant, the new employer by operation of law, regardless of whether or not the sale agreement excluded them.

[8] On 31 May 2010, Express Cargo issued the respondent with a letter that her services were no longer required. The letter was signed by Kapp.

[9] The respondent took the Express Cargo to the bargaining council. In her referral form, she cited both Express Cargo and the applicant as the employer. Kapp and one Debra Cronje ('Cronje') attended conciliation. At conciliation, Kapp signed on behalf of the applicant and mentioned the applicant's name. Kappa also entered 011 397 3022 as the fax number. Effectively, Kapp acted as manager in both companies and would be aware of the activities both in Express Cargo and the applicant. The argument that the applicant was not aware of the arbitration proceedings because its specific fax number was not used is of no purpose in my view. As an overall manager of operations Kapp ought to have been aware of the activities and any documents received by Express Cargo.

[10] The arbitration hearing proceeded on 24 August 2010 in the absence of Express Cargo or the applicant. The notice of set down was faxed to 011 397 3022. A default award was accordingly made in favour of the respondent on 28 August 2010. The default award appears to have been faxed to 011 397 8158. It is not clear whose fax number that was as it does not seem to appear on any of the referral papers.

[11] The writ of execution was issued by this Court on 12 April 2011. It appears that this was done so pursuant to section 143(3) of the LRA which makes the arbitration award enforceable after being certified by the Director of the CCMA. Apart from this writ, no other documents such as the LRA Form 7.18 were attached to these proceedings. It can therefore not be verified whether the certification of the award was done and if so whether proper service to the applicant and/or Express Cargo was done. The fax number where the default award was seemingly served is not the one provided by the employer in the attendance register or mentioned in any of the referral forms. It is purely on this ground alone that I would grant the rescission of the writ of execution.

[12] I therefore make the following order:

1. The writ of execution issued on 12 April 2011 under case number GPRFBC12598 is rescinded;
2. There is no order as to costs.

BOQWANA AJ

ACTING JUDGE OF THE LABOUR COURT

APPEARANCES:

FOR THE APPLICANT: Ms A Dippenaar, Du Randt, Du Toit, Pelser
Attorneys, Rosebank

FOR RESPONDENT: NO APPEARANCE