



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE

Reportable

Case no: C212/2011

In the matter between:

CHRISTOPHER PETER VAN ZYL N.O.

First Applicant

DANIEL TERBLANCHE N.O.

Second Applicant

KEVIN TITUS N.O.

Third Applicant

(in their capacity as joint liquidators of Charles Potgieter Investments (Pty) Ltd which was placed in provisional liquidation on 5 October 2010)

and

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

MR DEREK AMERICA N.O.

Second Respondent

ANDRE VAN DER WESTHUIZEN

Third Respondent

Heard: 28 February 2012

Decided: 14 March 2012

Summary: Review – application of s 38 of Insolvency Act.

JUDGMENT

STEENKAMP, J

Introduction

- [1] This is an opposed application in terms of section 145 of the Labour Relations Act¹ (“the LRA”), for the reviewing and setting aside of the arbitration award (“the award”) issued by the second respondent (“the arbitrator”), under the auspices of the first respondent (“the CCMA”) under case number WECT 18018-10.
- [2] The first applicant, together with the second and third applicants, are duly appointed provisional liquidators of Charles Potgieter Investments (Pty) Ltd (“CPI”), the employer party in an unfair dismissal dispute referred by the employee, the third respondent, Mr André van der Westhuizen (“Van der Westhuizen”), who was employed by CPI at the time of his dismissal.

Background to the unfair dismissal dispute

- [3] CPI was placed under provisional liquidation by order of the Western Cape High Court on 5 October 2010 (“the provisional order”) and the applicants were appointed as joint provisional liquidators of CPI by the Master of the High Court with effect from 8 October 2010.

¹ Act 66 of 1995

[4] Although it is not part of the papers before me, Mr *Ellis* informed me from the bar that CPI was finally liquidated on 31 May 2012. Mr van der Westhuizen agreed that this was common cause and that I could take it into account. There is no evidence on the papers before me, or on the evidence that served before the arbitrator, whether it was a voluntary or compulsory liquidation.

[5] On 14 October 2010, the applicants wrote to “all known creditors”, including the employee, stating that:

‘We write to inform you that the above company was placed into liquidation by order of the High Court of South Africa (Western Cape High Court, Cape Town) on 5 October 2010. The return date has been set down for hearing on 1 December 2010...

In order to assist us with our investigations into the financial affairs of the above company it would be appreciated if you could complete the attached affidavit for proof of claim and return it to our offices as soon as possible.

Please note that no claims will be submitted to proof in the event that there is danger of a contribution being levied on creditors.²

[6] Section 38 of the Insolvency Act³ provides as follows:

‘38. Effect of sequestration on contract of service

- (1) The contracts of service of employees whose employer has been sequestrated are suspended with effect from the date of the granting of a sequestration order.
- (2) Without limiting subsection (1), during the period of suspension of a contract of service referred to in subsection (1)-

² Bold and underlining as in original.

³ Act 24 of 1936 (as amended).

- (a) an employee whose contract is suspended is not required to render services in terms of the contract and is not entitled to any remuneration in terms of the contract; and
 - (b) no employment benefit accrues to an employee in terms of the contract of service which is suspended.
- (3) An employee whose contract of service is suspended is entitled to unemployment benefits in terms of section 35 of the Unemployment Insurance Act, 1966 (Act 30 of 1966), from the date of such suspension, subject to the provisions of that Act.
- (4) A trustee appointed in terms of section 56, or a liquidator appointed in terms of section 375 of the Companies Act, 1973 (Act 61 of 1973), or a liquidator who, in terms of section 74 of the Close Corporations Act, 1984 (Act 69 of 1984), remains in office after the first meeting and a co-liquidator, if any, appointed by the Master may terminate the contracts of service of employees, subject to subsections (5) and (7).
- (5) A trustee may not terminate a contract of service unless the trustee has consulted with-
 - (a) any person with whom the insolvent employer was required to consult, immediately before the sequestration, in terms of a collective agreement defined in section 213 of the Labour Relations Act, 1995 (Act 66 of 1995);
 - (b)
 - (i) a workplace forum defined in section 213 of the Labour Relations Act, 1995; and
 - (ii) any registered trade union whose members are likely to be affected by the termination of the contract of service,

if there is no such collective agreement that existed immediately prior to the sequestration;

- (c) a registered trade union representing employees whose contracts of service were suspended in terms of subsection (1) and who are likely to be affected by the termination of the contract of service, if there is no such workplace forum; or
 - (d) the employees whose contracts of service were suspended in terms of subsection (1) and who are likely to be affected by the termination of the contract of service or their representatives nominated for that purpose, if there is no such trade union.
- (6) The consultation referred to in subsection (5) must be aimed at reaching consensus on appropriate measures to save or rescue the whole or part of the business of the insolvent employer-
 - (a) by the sale of the whole or part of the business of the insolvent employer; or
 - (b) by a transfer as contemplated in section 197A of the Labour Relations Act, 1995; or
 - (c) by a scheme or compromise referred to in section 311 of the Companies Act, 1973; or
 - (d) in any other manner.
- (7) If any party referred to in subsection (5) wishes to make proposals concerning any matter contemplated in subsection (6), that party must submit written proposals to the trustee or liquidator within 21 days of the appointment of the trustee in terms of section 56, or the appointment of the liquidator in terms of section 375 of the Companies Act, 1973, or the

appointment of a co-liquidator in terms of section 74 of the Close Corporations Act, 1984, or if a co-liquidator is not appointed, the date of the conclusion of the first meeting, unless the trustee or liquidator and an employee agree otherwise.

- (8) A creditor of the insolvent employer may, with the consent of the trustee, participate in any consultation contemplated in this section.
- (9) Unless the trustee or liquidator and an employee have agreed on continued employment of the employee in view of measures contemplated in subsection (6), all suspended contracts of service shall terminate 45 days after-
 - (a) the date of the appointment of a trustee in terms of section 56; or
 - (b) the date of the appointment of a liquidator in terms of section 375 of the Companies Act, 1973; or
 - (c) the date of the appointment of a co-liquidator in terms of section 74 of the Close Corporations Act, 1984, or if a co-liquidator is not appointed, the date of the conclusion of the first meeting.
- (10) An employee whose contract of service has been-
 - (a) suspended in terms of subsection (1); or
 - (b) terminated in terms of subsection (4) or (9),

is entitled to claim compensation from the insolvent estate of his or her former employer for loss suffered by reason of the suspension or termination of a contract of service prior to its expiration.

- (11) An employee whose contract of service terminates or has been terminated in terms of this section is entitled to claim severance benefits from the estate of the insolvent employer in accordance with section 41 of the Basic Conditions of Employment Act, 1997 (Act 75 of 1997)."

- [7] It is common cause that no consultation in terms of s 38(5) took place. Neither was the employee paid any severance pay, nor did the employer advise its employees of the application for liquidation, as it was compelled to do in terms of s 197B of the LRA. I will return to those aspects later. Neither did the letter of 14 October 2010 refer to any suspension of the employment contract; in fact, the employee carried on working.
- [8] The applicants say that, on 10 November 2010, Van der Westhuizen, along with the other employees of CPI, were informed of the provisional order and the fact that their contracts of employment had therefore been suspended in terms of section 38 of the Insolvency Act with effect from 5 October 2010. He disputes that in his answering papers; and no such evidence was led at the arbitration. The liquidators and the employer elected not to attend the arbitration proceedings. The applicants did not file any replying papers. In terms of the well-known rule set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*:⁴

'[W]here in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order ... may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.'

On the basis of the affidavits before me and the evidence led at arbitration, I must accept that Van der Westhuizen was not informed that his contract was suspended on 10 November 2010. On the contrary, the CEO and sole

⁴ 1984 (3) SA 623 (A) at 634 H-I.

shareholder of CPI, Charles Potgieter, told the employee on that day that he would be dismissed on 12 November 2010.

- [9] Van der Westhuizen referred an unfair dismissal dispute to the CCMA on 12 December 2010. In the referral form, he stated:

‘I was given notice on 10 November 2010 to finish my last shift on Friday 12 November 2010 due to retrenchment liquidation. The company was never liquidated.’

It is common cause that, at that stage, only a provisional liquidation order had been granted; and that the company was only finally liquidated on 31 May 2011.

The arbitration proceedings

- [10] Neither Potgieter nor the liquidators attended the arbitration to dispute any of these averments. On 12 January 2011, after receiving the notice of set down for the arbitration, the first applicant sent an email to the CCMA case manager who had been assigned the dispute, Fundiswa Matsha, in which he stated, *inter alia*, that as CPI was in provisional liquidation, all contracts of employment, including that of Van der Westhuizen had been suspended in terms of the provisions of the Companies Act⁵ together with the Insolvency Act; and that van der Westhuizen should rather be contacting the applicants in order to submit a claim to prove any arrear salaries or other payments due to him by CPI. He went on to say:

‘Given the foregoing we do not intend to be present or represented at any hearings in this matter given what is recorded above.’

⁵ Act 61 of 1973. At the time of dismissal, the provisions of the old Companies Act dealing with Insolvency, and not those of Act 71 of 2008, applied to proceedings dealing with s 38 of the Insolvency Act.

- [11] The arbitration was heard on 1 February 2011. The arbitrator issued the award on 11 February 2011, though it was apparently only delivered to the applicants on 16 February 2011.
- [12] The arbitrator found on the uncontested evidence before him that the employee had been dismissed on 12 November 2010; that his dismissal was both procedurally and substantively unfair; and he awarded Van der Westhuizen seven months' salary as compensation.
- [13] Van der Westhuizen testified to the effect that, although Mr Charles Potgieter called him in to his office on 10 November 2010 and advised him that CPI was under liquidation and his services were to be terminated on 12 November 2010, he subsequently discovered that CPI was in provisional liquidation, and that the final liquidation application was to be heard on 1 December 2010. In the award, the arbitrator mentions that no evidence was placed before him to show that CPI had been finally liquidated and that the only evidence on record was the provisional order of 5 October 2010.
- [14] The arbitrator thus accepted the uncontested evidence that Potgieter dismissed the employee with effect from 12 November 2010; and that the dismissal was not for a fair reason and the employer had not followed a fair procedure.

Review grounds: the legal framework

- [15] Mr *Ellis* argued that, due to the fact that CPI was under provisional liquidation at this time, all of its employment contracts had been suspended by operation of law in terms of the Insolvency Act. It was thus not only the applicants' case that CPI did not dismiss van der Westhuizen at this time (or at any point subsequent thereto), but that CPI simply could not dismiss him, or any of its other employees at this time, due to the effect of section 38 of the Insolvency Act.

- [16] Once a company is in provisional liquidation, Mr *Ellis* says, the Insolvency Act provides that the only way an employee's contract of service may be terminated is in terms of section 38(4) or section 38(9) thereof. But on the uncontested facts of this case, the employer terminated the contract of employment; even if it had been suspended, it is not clear from the provisions of s 38 of the Insolvency Act an employer is, as a matter of law, unable to do so (albeit unfairly) before a liquidator or trustee does so. And the uncontested evidence is that Mr van der Westhuizen continued working, and was paid, until Potgieter dismissed him on 10 November (with effect from 12 November) 2010. It is also uncontested that he did so without the peremptory provisions of s 38(5) of the Insolvency Act having been followed.
- [17] Section 38 of the Insolvency Act was substituted *in toto* by virtue of the Insolvency Amendment Act⁶ with effect from 1 January 2003 in order to provide more protection to employees.
- [18] Mr *Ellis* referred to the *dictum* of Conradie J in *SA Agricultural Plantation and Allied Workers Union v H L Hall and Sons (Group Services) Ltd and Others*,⁷ in which he stated that 'the reach of the Labour Relations Act 1995 halts once insolvency enters the picture'⁸. But that judgment was delivered before the 2002 amendments to the Insolvency Act that were designed to offer employees protection after provisional liquidation; and in any event, Zondo J considered that *dictum* to be *obiter* in *Ndimma and Others v Waverley Blankets Ltd*.⁹
- [19] In terms of the amended section 38(4), the liquidator, in this case the applicants jointly, may terminate a contract of employment, but then only after they had engaged in a consultation process with employees in terms of section 38(5) of the Insolvency Act. That process is similar but not identical to the process envisaged in section 189(3) of the LRA, in terms of a dismissal

⁶ Act 33 of 2002.

⁷ (1999) 20 *ILJ* 399 (LC).

⁸ *Id* at para 22.

due to a company's operational requirements. But in this case, it is common cause that no such consultation process took place. In oral argument, Mr *Ellis* sought to persuade me that the consultation process is not peremptory. I do not agree. The provisions of s 38(5) of the Insolvency Act are clear:

“A trustee may not¹⁰ terminate a contract of service unless the trustee has consulted with-

the employees whose contracts of service were suspended in terms of subsection (1) and who are likely to be affected by the termination of the contract of service or their representatives nominated for that purpose, if there is no such trade union.”

[20] Insofar as any interpretation of this clear language is needed, the authors in a helpful article in the *Industrial Law Journal* state it clearly:¹¹

‘This discretion may not be exercised unless the trustee has entered into consultations with one or more employee parties specifically referred to in section 38(5) and before a time-limit has elapsed that gives the affected parties the opportunity to respond.’

[21] In terms of section 38(9), contracts of service which are suspended due to the provisional liquidation of a company automatically terminate, by operation of law, 45 days after the appointment of the liquidator finally appointed as such, unless the parties have agreed otherwise after the consultation process prescribed by ss 38(5) and (6).

[22] In this case, the liquidators did not enter into such a consultation process with the employee; and, at the time of his dismissal by Potgieter, the 45 days contemplated by s 38(9) had not expired.

⁹ (1999) 20 *ILJ* 1563 (LC) para 27.

¹⁰ My underlining.

¹¹ A Boraie and S van Eck, “The New Insolvency and Labour Legislative Package: How Successful was the Integration?” (2003) 24 *ILJ* 1840 at 1848.

[23] As Zondo J stated in *Waverley Blankets*:¹²

‘If the legal position was that the granting of a provisional liquidation order did not have the effect of terminating the contracts of employment of the applicants in this case but, maybe, instead only suspended the same, subject to interim arrangements that provisional liquidators could make with the employees if so authorized, with a view to such contracts only terminating if the provisional order was confirmed or the suspension was uplifted by operation of law upon the discharge of the order, then the problem in this matter would not have arisen.’

[24] The legal position after the 2002 amendments to s 38 is exactly as Zondo J hypothetically described it. The contract of employment was not terminated, but only suspended, upon provisional liquidation. And as the late Mr Justice *Meskin* and his co-authors state:¹³

‘The contracts of service may ... be terminated by the trustee (or liquidator) by giving notice to such effect in terms of section 38(4) but any such termination may only ensue after the appointment of the trustee (or liquidator) finally appointed as such and after consultation with the persons envisaged by section 38(5).’

[25] The arbitrator himself comments in the award that the only evidence which was properly before him was that at the time of Van der Westhuizen’s dismissal, CPI was in provisional liquidation.

[26] The applicants submitted that the CCMA at no stage had the requisite jurisdiction to arbitrate a dismissal dispute in the first place, as no dismissal had taken place. It should be clear from the above discussion that I do not agree.

¹² *Supra* para 46.

¹³ *Meskin et al, Insolvency Law and its operation in winding-up*, (LexisNexis 1990, Service Issue 37, November 2011) para 5.21.10.2.

[27] There is a further consideration. In *NULAW v Barnard NO and Another*,¹⁴ Davis JA considered the application of s 38 of the Insolvency Act as it stood before the 2002 amendments that introduced the element of compulsory consultation with employees. Before the amendments, s 38 simply provided that:

‘The sequestration of the estate of an employer shall terminate the contract of service to him and his employees but any employee whose contract of service has been so terminated shall be entitled to claim compensation from the insolvent estate of his former employer or any loss which he may have suffered by the termination of his contract of service prior to its expiration.’

[28] But even under that regime, the court held that a voluntary winding-up is still an act by the employer, and thus a dismissal. In this case, neither the employer nor the liquidator led any evidence before the arbitrator to explain whether it was a voluntary or compulsory liquidation. In *NULAW*, Davis JA went on to refer to the amendments to s 38 (at that stage in Bill form), that were designed to “... cause contracts of employment to be suspended on the insolvency of an employer and for a detailed process of consultation to take place in an attempt to reach consensus on the appropriate measures to save or rescue the whole or part of the business of the insolvent employer.”

[29] In this case, no such consultation process took place. The employer did not comply with s 197B of the LRA, and the applicants did not comply with s 38(5) of the Insolvency Act. The employee was not in a position to explore the possibility of a transfer of employment in terms of s 197A of the LRA, despite his evidence that the Charles Potgieter Group comprised a number of legal entities to which his contract of employment could possibly have been transferred. Instead, Potgieter dismissed him before the expiry of the 45 days provided for in s 38(9) of the Insolvency Act and without any consultation process in terms of ss 38(5) and (6) of that Act.

¹⁴ [2001] 9 BLLR 1002 (LAC).

Specific grounds of review

[30] The applicants submitted that the award is reviewable on the following grounds:

30.1 the arbitrator committed misconduct in that he misconstrued the legal effect that an order of provisional liquidation has on the employment of employees employed in the company placed under provisional liquidation;

30.2 the arbitrator committed misconduct in that he incorrectly found that CPI dismissed, or could even have dismissed, Van der Westhuizen; and

30.3 the arbitrator failed to consider the provisions of section 38 of the Insolvency Act, despite having been informed by Van der Westhuizen during the arbitration that CPI was in provisional liquidation.

[31] In my view, the applicants have failed to establish any of these grounds. The arbitrator properly took into account the uncontested evidence before him and, based on that evidence, came to the reasonable conclusion that Potgieter dismissed the employee.

Conclusion

[35] The application for review is dismissed. As Mr van der Westhuizen represented himself, I make no order as to costs.

Anton Steenkamp

JUDGE OF THE LABOUR COURT

Appearances:

For the applicants: Edwin Ellis of Edward Nathan Sonnenbergs.

Third Respondent: André van der Westhuizen (in person).