



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

NOT REPORTABLE

Case no: C672/2016

In the matter between:

MLAWULI SHADRACK KOHLISO

Applicant

and

SECUFORCE SECURITY SERVICES

First Respondent

COMWEZI SECURITY SERVICES

Second Respondent

Heard: 9 May 2017

Delivered: 11 October 2017

JUDGMENT

RABKIN-NAICKER J

- [1] Mr Mlawuli Shadrack Kohliso (Kohliso) seeks to enforce an award against the second respondent under case number WE 15028-06. His application is unopposed.
- [2] Kohliso was employed by the first respondent from the 17 July 2003. In around April 2004 he was promoted to the position of Area Manager. In 2006 there was a strike in the security sector and he avers he was forced to stay at home. On his return towards the end of 2006 he was charged in a disciplinary hearing and dismissed.
- [3] His union (Duwuso) referred a dispute to the CCMA and an arbitration hearing was held. He was awarded back-pay of R10 494-00 and reinstatement in an Award dated 26 December 2006. The first respondent took the said Award on review and the review was dismissed on 1 September 2009.
- [4] In November 2009, a writ of execution was issued by the labour court and Kohliso was advised that the first respondent had been liquidated and that before this occurred, there had been a transfer of the business in terms of section 197. Unable to enforce his award against the first respondent, he approached the CCMA again to join the second respondent in the execution proceedings, but the CCMA found it did not have jurisdiction to do so. It stated in an *in limine* ruling that his remedy was to approach the Labour Court.
- [5] The *in limine* ruling reflects that a representative of the second respondent did attend that hearing and denied a transfer had taken place. Kohliso was determined to find more evidence of the transfer to bring to this Court. The second respondent has not seen fit to oppose this application.
- [6] Annexed to his affidavit is a memorandum dated 10 March 2009 which reads as follows:

“TO: ALL SECURITY OFFICERS DATE 10 MARCH 2009

RE: CCMA AGREEMENT

In terms of a Memorandum of Agreement entered into between DUSWO on behalf of their members, who are currently employed by Secuforce Security Services CC,

and Comwezi Security Services Pty (Pty) Ltd., concluded under the auspices of the CCMA, you are advised that:

1. All employees currently employed by Secuforce will become employees of Comwezi Security Services (Pty) Ltd. (Comwezi) with effect from 1 March 2009 and will transfer in terms of Section 197 (A) of the Labour Relations Act, Act 66 of 1995 as amended.
2. Comwezi will accept responsibility for outstanding leave and bonuses for these employees for the period 1 March 2008 to 28 February 2009.
3. Comwezi undertakes to pay salaries for the employees concerned for February 2009 on 28 February 2009.
4. All employees will be subject to all of Comwezi's policies and procedures.
5. All the terms related to Section 197(a) including years of service will be applicable to the Agreement

Should you have any further queries in this regard, please do not hesitate to contact the Branch Manager M R. Chetty at 021-5115109."

- [7] The CCMA agreement dated 2 March 2009, signed by the CEO of the second respondent, Duwuso obo members employed by Secuforce Security Services and a CCMA Commissioner, is also annexed to the papers. It records that the agreement is in terms of section 197A of the LRA and that all the terms of that provision "will be applicable to this agreement". The agreement also states that: "The current disputes between Duwuso and Secuforce at the CCMA have no bearing on or any other link to this agreement. Duwuso will pursue those cases against Secuforce and Comwezi would not be cited to as a party to them." As of March 2009, the dispute between the union on behalf of applicant and first respondent was not a current dispute at the CCMA.

- [8] Kohliso also includes a copy of the liquidation papers relating to first respondent, in his application. These reveal that the first respondent was placed in final liquidation on the 19 June 2009, a rule nisi having been issued on the 22 May 2009 by the High Court of the Western Cape.

[9] From the above, the following factual position emerges: At the date of the agreement in terms of section 197A, on the 2 March 2009, Kholiso had an arbitration Award in his favour against the first respondent. The application to review the award by the old employer was dismissed some six months after the transfer of the contracts of employment. Further, prior to the provisional liquidation of the first respondent, that Award was binding on the first respondent. Section 197 (5) of the LRA (which is also applicable to Section 197A transfers of contracts of employment) provides that:

“(5) (a) For the purposes of this subsection, the collective agreements and arbitration awards referred to in paragraph (b) are agreements and awards that bound the old employer in respect of the employees to be transferred, immediately before the date of transfer.

(b) Unless otherwise agreed in terms of subsection (6), the new employer is bound by-

(i) any arbitration award made in terms of this Act, the common law or any other law;

(ii) any collective agreement binding in terms of section 23; and

(iii) any collective agreement binding in terms of section 32 unless a commissioner acting in terms of section 62 decides otherwise.”

[10] Section 197A provides that:

“197A Transfer of contract of employment in circumstances of insolvency

(1) This section applies to a transfer of a business-

(a) if the old employer is insolvent; or

(b) if a scheme of arrangement or compromise is being entered into to avoid winding-up or sequestration for reasons of insolvency.

(2) Despite the Insolvency Act, 1936 (Act 24 of 1936), if a transfer of a business takes place in the circumstances contemplated in subsection (1), unless otherwise agreed in terms of section 197 (6)-

- (a) the new employer is automatically substituted in the place of the old employer in all contracts of employment in existence immediately before the old employer's provisional winding-up or sequestration;
- (b) all the rights and obligations between the old employer and each employee at the time of the transfer remain rights and obligations between the old employer and each employee;
- (c) anything done before the transfer by the old employer in respect of each employee is considered to have been done by the old employer;
- (d) the transfer does not interrupt the employee's continuity of employment and the employee's contract of employment continues with the new employer as if with the old employer.

(3) Section 197 (3), (4), (5) and (10) applies to a transfer in terms of this section and any reference to an agreement in that section must be read as a reference to an agreement contemplated in section 197 (6).

(4) Section 197 (5) applies to a collective agreement or arbitration binding on the employer immediately before the employer's provisional winding-up or sequestration.

(5) Section 197 (7), (8) and (9) does not apply to a transfer in accordance with this section.” (*emphasis mine*)

[12] The Labour Appeal Court has held in relation to section 197(5) that:

‘The wording of the section is clear, an arbitration award that can bind the old employer immediately before the date of transfer in respect of the employees to be transferred binds the new employer.’¹

¹ High Rustenburg Estate (Pty) Ltd v Nehawu obo Cornelius & Others (2017) 38 ILJ 1758 (LAC) at para 19

[13] The arbitration award in this matter was binding on the first respondent immediately before the transfer of its employees to second respondent. The Memorandum of Agreement between the union representing the employees and the second respondent explicitly states that all the provisions for section 197A are applicable to it. In all the circumstances therefore, the applicant is entitled to the relief that he seeks. I make the following order:

Order

1. In terms of section 197 read with 197A of the Labour Relations Act, Comwezi Security Services is bound by the Arbitration Award under case number WE 15028-06;
2. A warrant of execution issued in terms of such Award may be issued against Comwezi Security Services.

H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: In person