IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: J 1089/07

In the matter between:

EDGARS CONSOLIDATED STORES LTD	**Applicant**
and	
SOUTH AFRICAN COMMERCIAL AND CATERING AND ALLIED WORKERS UNION	**1st Respondent**
JACKY MFUSI	**2nd Respondent**
JOHANNES FREDERICK KLOPPER N.O.	**3rd Respondent**
WILLY LEGOABE SERITI N.O.	**4rd Respondent**
JOHN LOUIS CARTER FOURIE	**5th Respondent**
KAREN KEEVY N.O.	**6th Respondent**

JUDGMENT

LAGRANGE, AJ

Introduction

1. The applicant (‘Edcon’) seeks an order declaring an arbitration award in favour of the second respondent unenforceable against it, and setting aside a writ of execution issued by the registrar on 4 March 2008.

2. The application was opposed by the first respondent (‘SACCAWU’) but for reasons which are not apparent it did not attend court on the day the application was heard and accordingly the matter proceeded on a default basis.

Background

3. The second respondent was employed by CNA Limited (“CNA”), which dismissed her on 25 April 2001.

4. Subsequently, the second respondent referred an unfair dismissal dispute to the CCMA. The presiding commissioner handed down an arbitration award on 20 December 2001, in which he found the dismissal was substantively unfair and ordered CNA to reinstate the second respondent and pay compensation in the amount of R 35 588-00.

5. In February 2002, CNA launched a review application to set aside the award.

6. On 27 July 2002, CNA was placed in provisional liquidation.

7. On 21 October 2002, in the course of CNA’s liquidation, the applicant acquired the business of CNA as a going concern following the conclusion of a sale of business agreement between itself and the joint liquidators of CNA.

8. Edcon sought leave to intervene in the review application which CNA had launched, but withdrew this application before the matter was heard on 30 November 2005. The review application was dismissed.

9. In June 2006, SACCAWU launched a joinder application in the CCMA, with the real object of substituting Edcon for CNA as the employer party in the arbitration award.

10. Edcon claims it opposed the joinder application, but a CCMA commissioner issued a ruling effectively substituting Edcon as the respondent party on 12 February 2007, on an unopposed basis. Edcon has not sought to rescind or review this ruling.

11. On 3 March 2008, SACCAWU subsequently obtained a writ of execution from the registrar of the Labour Court. Edcon obtained a stay of the writ of execution pending the outcome of this application.

The enforceability of the award

12. Edcon contends that, on a proper interpretation of section 197A(4) of the Labour Relations Act, 66 of 1995 ('the LRA'), the provisions of section 197(5)(b)(i) of the same Act do not apply and accordingly, it is not bound by the arbitration award made in favour of the second respondent.

13. Sections 197(5)(a) and 197(5)(b)(i) read as follows:

> "(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; …"

(emphasis added)

14. Section 197A applies to transfers of businesses or undertakings under conditions of insolvency. Sub-section 197A(4) of the LRA reads:

> "(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."
>
> (emphasis added)

15. Edcon does not contend that an arbitration award in favour of a former employee of the old employer cannot be binding on the new employer to whom the business is transferred in conditions of insolvency. The only argument advanced by Edcon in support of its claim that the award is unenforceable, is that an arbitration award of more than seven months' vintage issued against CNA (the old employer) occurred too long ago to be brought within the ambit of section 197(4) and hence section 197(5) cannot operate to preserve the enforceability of the award against it, as the new employer.

16. The crux of Edcon's argument is that the word "immediately", as considered in a number of other legislative contexts has been interpreted to mean 'as soon as reasonably possible' or 'within a reasonable time' in the circumstances of each case. The court was referred to the definition of 'immediately' in *Claasen's Dictionary of Legal Words and Phrases (2ed)* as an authoritative summary of these cases. Relying on the this authority, Edcon submits that the word 'immediately', as contemplated in section 197A(4), cannot be construed as meaning a period of more than seven months and instead contemplates, at best, a contemporaneous sequence of events.

17. The New Shorter Oxford English Dictionary[1] defines the adverb 'immediately' as:

> "A. *adverb.* **1** Without intermediary agency; in direct connection or relation; so as to affect directly. **LME**. **2** With no person, thing, or distance intervening, next (before or after); closely. **LME**. **3** Without delay, at once, instantly." (p)resent or nearest in time, most urgent, occurring or taking effect without delay".

18. Similarly, Black's Law Dictionary[2] provides the following definition of 'immediate'.

> "**immediate.** 1. Occuring without delay; instant <an immediate acceptance>. 2 Not separated by other persons or things. <her immediate neighbour> 3. Having a direct impact; without an intervening agency < the immediate cause of the accident>"

19. Useful though the interpretation of the word 'immediately' as summarised in Claasen's Dictionary is, the cases cited there largely concern time limits within which certain things had to be done. In this instance, the word 'immediately' is part of the prepositional phrase 'immediately before'. The phrase is used in sections 197 and 197A refers to a point in time at which a certain state of affairs exists, rather than to a deadline by which certain action must be taken. The prepositional phrase 'immediately before' occurs in four separate provisions of sections 197 and 197A. Two instances of the phrase are to be found in the sections 197(5) and 197A(4), as set out above. Two more appear in sections 197(2) and 197A(2), namely:

> "197(2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)-

[1] Vol 1, 6th edition, 2007
[2] BA Garner (ed), 8th ed, 2004

(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer; …

197A(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; …"

(emphasis added)

20. In analysing the phrase 'immediately before' it is useful to consider the way an equivalent phrase 'immediately preceding' was interpreted in the case of ***Ackerman v Cape Law Society*** **1933 CPD 171**. In that case, the court was contemplating the meaning of that phrase in section 2(c) of Act 30 of 1892, which governed the admission of attorneys. The provision required an applicant for admission as an attorney to produce proof that for a period of three years 'immediately preceding' the date of his admission or enrolment as an attorney of the Orange Free State, Provincial Division he had been articled to serve or had served as a clerk to an enrolled attorney in the Division. In the case before it the applicant had only been admitted three years after completing his articles. The court decided to condone the delay between the conclusion of the applicant's articles and his admission because he had continued to work for the attorney had served articles with up to the time of his admission and the delay was attributable to him only passing his exams three years after completing his articles. The court decided that a 'liberal interpretation' ought to be given to the phrase 'immediately preceding' as had been done in the case of *Ex parte Middleton*. In that case a full bench of the CPD looked at the purpose of the provision and decided that the phrase was inserted in the section to ensure that clerks should not

take up some other work after serving their articles and then, having forgotten what they had learnt, revert back to the law and then be admitted as attorneys.

21. For present purposes, what is relevant about these cases is that the ordinary meaning of the phrase 'immediately preceding' was understood to refer to a three year period of articles which ended very shortly before the candidate's admission, even though the courts ultimately adopted a far more relaxed interpretation of the phrase taking into account the purpose of the provision. Although the phrase 'immediately preceding' is used to describe the point in time at which a person completed articles relative to their application for admission, I believe the interpretation of the ordinary meaning of that phrase provides a better guide to what is meant by 'immediately before' as it is used in the provisions of sections 197 and 197A of the LRA.

22. In this sense, I would agree with the applicant that the phrase 'immediately before' contemplates two virtually contemporaneous occurrences. The two 'occurrences' that are under consideration in section 197A(4) concern firstly the existence of a binding arbitration award and secondly, the act of placing the employer in provisional sequestration. It is important to note that the section does not refer to an arbitration award being *issued* immediately before the employer's provisional sequestration, but rather refers to an arbitration award which is *binding* on the old employer immediately before the sequestration. In other words, it describes a state of affairs in which an employer that is currently bound by an arbitration award, is placed in provisional liquidation. For this reason, I think the applicant is incorrect when it argues that the event which must be compared with the occurrence of the transfer, is the issuing of the award. Rather, the question is whether or not an arbitration award is still binding on the old employer on the eve of the transfer.

23. In order for an award to bind an employer it need not have been issued recently: it is sufficient that it simply has not yet prescribed. Because of the various actions of the parties since the award was handed down, prescription would have been interrupted in this matter and, understandably, was not raised as an issue by the applicant. The

award in question here, had been issued less than eight months prior to CNA's provisional liquidation, and therefore section 197A(4) applied to the award because it was still binding on that date. Consequently, by virtue of the operation of 197(5) the award became binding on Edcon when the business of CNA was transferred to it. For this reason the award is enforceable against the applicant.

Order

24. In the circumstances,

24.1. the application to declare the award issued by second respondent on 20th December 2001 unenforceable against the applicant is dismissed;

24.2. the application to set aside the writ of execution issued by the Registrar of the Labour Court on 4 March 2008 is dismissed, and

24.3. no order is made as to costs.

ROBERT LAGRANGE
ACTING JUDGE OF THE LABOUR COURT

Date of hearing : 25 February 2010
Date of judgment: 18 May 2010

Appearances:

For the applicant: Mr M Van As
Instructed by Deneys Reitz Inc.