

SOUTH AFRICA / JUDGMENT

# Innovative Staffing Solutions (PTY) Ltd v Minister of Employment and Labour and Others (J668/22) [2022] ZALCJHB 204 (3 August 2022) [2022] ZALCJHB 204

## COURT

Labour Court Johannesburg

## BEFORE

Nkutha-Nkontwana

## CASE / FILE NUMBER

J668/22

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## Source record

IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: J668/22

In

the matter between:

INNOVATIVE  
STAFFING SOLUTIONS (PTY) LTD  
Applicant  
and  
MINISTER  
OF EMPLOYMENT AND LABOUR  
First Respondent  
NATIONAL  
BARGAINING COUNCIL FOR THE ROAD  
FREIGHT  
AND LOGISTICS INDUSTRY (NBCRFLI)  
Second Respondent  
ROAD  
FREIGHT ASSOCIATION (RFA)  
Third Respondent  
NATIONAL  
EMPLOYERS' ASSOCIATION  
OF  
SOUTH AFRICA

(NEASA)  
Fourth Respondent  
CONSOLIDATED  
EMPLOYERS ORGANISATION (CEO)  
Fifth Respondent  
SOUTH  
AFRICAN TRANSPORT AND ALLIED  
WORKERS  
UNION (SATAWU)  
Sixth Respondent  
MOTOR  
TRANSPORT WORKERS  
UNION  
OF SOUTH AFRICA (MTWU)  
Seventh Respondent  
PROFESSIONAL  
TRANSPORT AND ALLIED  
WORKERS  
UNION (PTAWU)  
Eighth Respondent  
TRANSPORT  
AND ALLIED  
WORKERS  
UNION (TAWU)  
Ninth Respondent

Heard: 14 July 2022

Delivered: 3 August 2022  
(This judgment was  
handed down electronically by circulation to the parties' legal  
representatives by email, publication on the  
Labour Court's  
website and released to SAFLII. The date and time for hand-down is  
deemed to be 10h00 on 3 August 2022.)

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## JUDGMENT

NKUTHA-NKONTWANA, J

- [1] In this application, the applicant (ISS) seeks an interim interdictory relief set out in Part A against the second respondent (NBCRFLI) pending the final determination of the application for a review and declaratory relief under Part B. In Part A, ISS seeks an order interdicting the NBCRFLI from enforcing or amending its Main Collective Agreement (Main Agreement) pending the final determination of the review application in Part B which relates to the first respondent's (Minister) decision to extend the Main Agreement to non-parties.

[2] The NBCRFLI is the only respondent opposing the application. It also takes four points in limine: first, that the matter is not urgent; second and third, that ISS lacks locus standi; and fourth, ISS is not approaching justice with clean hands. I deem it expedient to quickly deal with these points in limine.

[3] I am satisfied that the matter is urgent and have dealt with it as such. Also, NBCRFLI's objection to ISS locus standi is fallacious as ISS has demonstrated that it has a direct and substantial interest in the subject matter of the impugned decision

to the extent of the Main Agreement.[1] Lastly, I do not have to concern myself with the aspersions cast on the integrity of ISS and Mr. Rudolph Mare (Mr. Mare), the sole director of ISS and the deponent to the founding affidavit, because of the contempt proceedings against them. I shall return to this issue; save to state that the contempt proceedings are being opposed.

[4] Turning to the merits, the parties have been before this Court on several instances and obtained various orders, some of which mirror the one sought in these proceedings. The genesis of those disputes is

the impugned arbitration award that was issued on 2 March 2021 where the commissioner held that:

'[96] When applying these guidelines to the current case, it was common cause that the client provided the trucks to the employees to drive. The employees were given instructions as to which routes to drive and where to deliver the goods, from the client. The drivers too form an integral part of the client's business, which was the transportation of goods for reward or hire. The SLA provided for the provision of employees "to perform any administrative and/or operational duties that the client requires". ISS is obliged to discipline staff and recruit new staff if and when required...

....

[98] Based on the above submissions, it is clear that ISS was not a service provider to their clients but that they provided employees to clients to render services to the client. These employees were also remunerated by ISS, which makes them a TES.

103] In passing, I also wish to refer to section 198(4D) of the LRA that provides the following:

"(4D) The issue of whether an employee of a temporary employment service is covered by the bargaining council agreement or sectoral determination, must be determined by reference to the sector and area in which the client is engaged."

[104] Based on my findings above, to the effect that ISS fall within the definition of a TES and place employees to render services at clients, who fall within the registered scope of the Applicant Bargaining Council, they are required to register with the Applicant Bargaining Council those employees who are placed at clients who fall within the scope of the NBCRFLI.[2]

- [5] ISS disputes that it is a temporary employment service (TES) and has duly availed itself to every recourse at its disposal in order to avoid compliance with the arbitration award on demarcation and the court orders that compel it to register as a member of NBCRFLI and comply with the Main Agreement. Notably, the review application under case number JR510/21 pertaining to the demarcation award was unsuccessful. Likewise, the leave to appeal and subsequent petition were unsuccessful. That matter is currently pending before the Constitutional Court.
- [6] On 24 November 2021, in one of the matters between the parties under case number J1380/21, this Court, per Mahosi J, ordered, inter alia, that ISS should comply with the Main Agreement pending the review application under case number JR510/21. It would seem that ISS is yet to comply with the demarcation award despite the order of 24 November 2021 and its subsequent failure to stay that order. As a result, NBCRFLI has instituted the contempt proceedings under case number J697/22 against ISS and Mr. Mare which is yet to be decided.
- [7] NBCRFLI contends that the relief sought in these proceedings is impermissible as the obligations imposed by the order of 24 November 2021 remain in place until the pronouncement on the review application by the Constitutional Court and the demarcation award is set aside. I agree. The extension of the Main Agreement by the Minister is of no consequence to ISS as the order of 24 November 2021 enjoins it to comply with the Main Agreement. ISS must come to terms with the fact that, while the order of 24 November 2021 persists, it is bound by the Main Agreement as a TES, not a non-party.
- [8] It is then obvious that the mere fact that ISS has established a prima facie right to approach this Court to review the Minister's decision is not the only decisive factor. ISS still had to show that

irreparable harm would result if the right is not protected by the interim interdict.[3] ISS, clearly did not live up to this call as there is no impending or imminent irreparable harm threatening its right to review the extension of the Main Agreement. The impugned decision has already been taken and implemented and there is no persuasive reason

proffered for granting a preservation order pending the final determination of the Part B application.[4]

- [9] When it comes to the balance of convenience, I am not convinced that it favours the granting of a temporary interdict. The ultimate effect of the relief sought by the applicant will definitely have unintended

consequences of staying the order of 24 November 2021. Conversely, there is no imminent harm facing ISS if the order is not granted.

- [10] There is no merit in ISS's contention that, if the order is not granted, it will be compelled to comply with the Main Agreement. As stated above, it is the order of 24 November 2021 that enjoins ISS to comply with the Main Agreement and not the extension by the Minister.

- [11] In the same way, ISS's contention that it will suffer financial hardship if it were to comply with this order of 24 November 2021 is untenable. During oral arguments, I specifically asked ISS's counsel whether there is any reason for ISS not to avail itself to the NBCRFLI's exemption procedure if indeed it has financial constraints and is not able to comply with the Main Agreement. His answer was that ISS is not inclined to comply with the Main Agreement, since the unlawful extension is impugned. Well, ISS stance in this regard is patently ill-conceived in light of what I have alluded to above.
- [12] In sum, the application falls to be dismissed. On the issue of costs, NBCRFLI is seeking punitive costs. I agree that costs are warranted in the present instance and it would not offend the principles of law and fairness to do so. Yet, I am not convinced that they should be punitive.
- [13] In all the circumstances, the application is dismissed with costs.

P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Advocate P Ellis SC, Advocate R Grundlingh &

Advocate ASL Van Wyk

Instructed by:

Hefferman Attorneys

For the Second Respondent:

Advocate W Hutchinson

Instructed by:

Tricker Incorporated

- [1] See: *Masako v Masako and another* 2022 (3) SA 403 (SCA) at para 10.
- [2] See: NBCRFLI's Answering affidavit, p 397, paras 38-39.
- [3] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) at para 48-52.
- [4] *Id.*

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