



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

CASE NO: J1380/21

In the matter between:

INNOVATIVE STAFFING SOLUTIONS (PTY) LTD

Applicant

and

NATIONAL BARGAINING COUNCIL FOR THE
ROAD FREIGHT AND LOGISTICS INDUSTRY

Respondent

Heard: 17 December 2021

Delivered: This judgment was handed down electronically by circulation to the Applicant and the Respondent's Legal Representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 16h30 on 7 January 2022.

JUDGMENT

LALLIE, J

[1] The applicant brought this urgent application seeking an order suspending the operation and execution of paragraph 3 of the order granted by this court on 24 November 2021 pending the outcome of the appeal process against that order. The application is opposed by the respondent.

[2] Paragraph 3 of the order of 24 November 2021 (the impugned order) reads as follows"

Pending the final determination of the review application brought by the applicant under case number JR510/21:

1. The applicant is interdicted and restrained from holding out to any road freight companies that it is entitled not to comply the respondent's Main Collective Agreement (MCA) or that section 198(3) of the LRA is not applicable to its operations;

2. The applicant is interdicted and restrained from advising any road freight companies that, if it engages its services in terms of its standards service level agreement, employees will no longer be subject to the provisions of the respondent's MCA;

3. The applicant is required to comply with the provisions of the respondent's MCA.

[3] The respondent is the bargaining council for the road freight and logistics industry. Parties to the respondent are trade unions and employers' organisations which operate in the road freight and logistics sector. One of the respondent's objects is to regulate terms and conditions of employment in the road freight and logistics industry. The applicant business provides a number of truck drivers to businesses. It is, however, not a party of the respondent bargaining council. In 2018, the respondent referred a demarcation dispute to the commission for Conciliation, Mediation and Arbitration (the CCMA) in which it sought an award placing the applicant within its registered scope and under its jurisdiction. At the

commencement of the arbitration which was scheduled to resolve the dispute, the applicant's representative moved an application for the recusal of the arbitrating commissioner. The application was refused and the arbitration proceeded. On 2 March 2021, the commissioner issued an award in which she found that the part of the applicant's operations pertaining to the provision of staff to businesses in the road freight industry falls under the respondent's registered scope. The applicant launched an application to have the award and the recusal ruling reviewed and set aside. The review application is still pending.

- [4] The applicant filed an urgent application to stay the execution of the award pending the determination of the review application. An order granting the stay was issued subject to certain conditions by agreement between the parties. The conditions are couched in the following terms:

3.1. For each and every month the *interim* orders remain in place, the applicant is to render returns in respect of all of its employees engaged at entities conducting business in the Road Freight Industry in accordance with the provisions of the third respondent's Main Collective Agreement, which returns shall be rendered as follows:

3.1.1 the returns of May 2021 to be rendered by no later than 30 June 2021;

3.1.2 the returns of June 2021 to be rendered by no later than 31 July 2021;

3.1.3 the returns of July 2021 to be rendered by no later than 31 August 2021;

3.1.4 all returns thereafter to be rendered on a monthly basis in accordance with the third respondent's Main Collective Agreement.

3.2 The applicant is to make payment to all of its employees engaged at entities conducting business in the Road Freight Industry of amounts in respect of minimum wages, annual bonuses, annual leave and sick leave no less than those stipulated in the third respondent's Main Collective Agreement.

4. In the event of the applicant breaching any of the conditions set out in paragraph 3 hereof, the relief granted in paragraphs 1 and 2 hereof shall lapse.

[5] In November 2021 the applicant launched an urgent application seeking an order interdicting the respondent from interfering with the business of one of its clients. The respondent opposed the application and filed a counter application. In a judgment dated 24 November 2021, the applicant's urgent application was dismissed and the respondent's counter application granted in paragraph 3 of the order, which forms the subject of this application.

[6] The suspension of a court order pending an appeal is governed by section 18 of the Supreme Court Act¹ (the SC Act) which provides as follows:

"1. Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

2. Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

3. A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the party will not suffer irreparable harm if the court so orders."

[7] One of the grounds on which this application is opposed is that the impugned order is not appealable. It was argued on behalf of the applicant that it is the Labour Appeal Court that has the requisite jurisdiction to determine the appealability of the judgment. I have considered the arguments on behalf of both parties on the issue as well as the authorities they sought to rely on. I am of the view that whether the order of 24 November 2021 is appealable or not is of no moment because the test for the determination of this application is provided in clear terms in section 18(3) of

¹ Supreme Court Act 10 of 2013.

the SCA. Even in *Martycel Properties CC v Slip Knot Investments 777 (Pty)Ltd in re: Slip Knot Investments 777 (Pty) Ltd v Martycel Properties CC*² a decision the respondent sought to rely on, the court expressed the insignificance of the correctness of the conclusion whether the order was appealable.

- [8] It is common cause that the impugned order is an interlocutory order as envisaged in section 18(2) of the SC Act. Section 18(2) of the SC Act provides that the order that the applicant seeks is granted under exceptional circumstances. It is trite that the onus of proving the exceptional circumstances is on the applicant. Section 18(3) of the SC Act expressly provides that in addition to the existence of exceptional circumstances, the applicant is required to prove on a balance of probabilities that it will suffer irreparable harm if the court does not grant the order and that the respondent will not suffer irreparable harm if the order is granted.
- [9] In an attempt to prove exceptional circumstances the applicant submitted that the effect of the impugned order is that it will lose the protection of the order of 11 May 2021 pending the determination of the review. The applicant also relied on the pending dispute between the parties in relation to allegations of non-compliance with the conditions of paragraph 3.1 of the order of 11 May 2021. The predicament of being with no relief and having to comply with the impugned order regardless of the outcome of the appeal which will not be finalized before the review is determined was alleged to constitute exceptional circumstances. The forfeiture of substantive relief because of procedural delays and excellent prospects of success on appeal against the impugned order were added to the list of exceptional circumstances.

² (55004/2021) [2016] ZAGPPHC 1214 (6 December 2016).

- [10] The respondent denied that the applicant has shown exceptional circumstances on the basis that the review will be finalized within a few months and the appeal will be academic. It added that the pending application is a delaying tactic. The respondent further submitted that the finalization of the appeal is irrelevant and that the applicant has no prospects of success in an application for leave to appeal. The applicant denied the respondent's averments.
- [11] It is common cause that the impugned order was granted pending the final determination of the review application. It therefore does not have a life of its own and will be discharged when the review application is finalized. The applicant conceded that the appeal will not be finalized before the review is determined. When the review is finalized there will therefore be no impugned order to appeal against. The life span of the impugned order left the applicant without a basis for the averment that it will be left with no relief and having to comply with the impugned order regardless of the outcome of the appeal. The applicant's arguments on its excellent prospects of success on appeal overlook the reality that the order it will be appealing against would have been discharged. Absent the explanation on how it will succeed when the order has been discharged, the applicant has not succeeded in proving reasonable prospects of success on appeal. The applicant has, in the circumstances, not shown exceptional circumstances.
- [12] The applicant submitted that it will suffer irreparable harm should the application not succeed because in order to comply with the impugned order it has to reduce the basic salaries of its employees who will be moved from their medical aid scheme and transferred to the respondent's wellness fund which offers less benefits. In addition, the applicant will have to pay the respondent monthly levies of R196 000.00. It will also be required to pay monthly payments of R9 286 585.00 in respect of pro rata payments for the sick and absence fund, holiday pay and bonus fund. The reduction of the income and benefits of the applicant's employees

as a result of the compliance with the impugned order will prejudice the employees and result in labour unrest. The payment of the large amounts of money will have a negative effect on the applicant's cash flow and lead to job losses. The applicant also fears that there is no guarantee that should the review application succeed, the respondent will be able to refund all the money it would have paid in compliance with the impugned order.

[13] The respondent denied that the applicant has proved that it will suffer irreparable harm. It argued that it will be the one that will suffer such harm.

[14] The applicant has not proved that it will suffer irreparable harm if this application is not granted. The reasons are that the impugned order endures until the finalization of the review application. The applicant did not refute the respondent's averments that the amount it will pay in compliance with the impugned order will be kept in trust until they are due and payable to its employees. It therefore has not proved the risk of losing them. If the applicant is in a financially sound position as it alleged it is able to comply with the impugned order without suffering the harm of job losses and cash flow difficulties. If it is in financial difficulties, the respondent's fear that it may be liquidated may become a reality. The harm that liquidation stands to cause may be irreparable. In the absence of exceptional circumstances and irreparable harm which the applicant will suffer should this order not be granted and the existence of irreparable harm on the respondents should it be granted this application cannot succeed.

[15] I have considered the arguments on costs and am of the view that the applicant did not act unreasonably in bringing this application. A cost order will, in the circumstances not be applicable.

[16] In the premises, the following order is made:

Order:

1. The application is dismissed.
2. There is no order as to costs.



Z. Lallie

Judge of the Labour Court of South Africa

LABOUR COURT

Appearances

For the Applicant : Advocate Hein Gerber SC with Advocate ASL Van Wyk

Instructed by : Hefferman Attorneys

For the Respondent : Advocate Wayne Hutchinson

Instructed by : Tricker Incorporated Attorneys

LABOUR COURT