

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN**

CASE NO: JR 376 / 05

In the matter between:

Anthony Shaw

Applicant

And

**National Bargaining Council
For the Freight Industry**

1st Respondent

UTI/Sun Couriers

2nd Respondent

JUDGMENT

Justice Ngcamu AJ

1. This is a review application brought by the applicant to review and set aside the Ruling of the first respondent in which it decided that the applicant was an independent contractor and it had no jurisdiction. The application is opposed by the second respondent on various grounds.
2. On 14 January 2003 an agreement was entered into between the second respondent and Shaw Express Deliveries CC the sole member of which is the applicant. The agreement was for the collection and delivery of packages of customers of the second respondent.

3. The applicant referred a dispute of unfair discrimination to the first respondent. On 15 October 2004, the first respondent ruled that it did not have jurisdiction. The applicant requested a written ruling from the first respondent. The applicant received the written ruling on 7 February 2005. The review application was filed on 15 February 2005.
4. The person who made the ruling on behalf of the Bargaining Council has not been joined in these proceedings. I raised the issue of the non-joinder with Mr. Ford who appeared for the applicant. His response was that it was not necessary to cite the person who made the ruling. He mentioned that the decision was made by a panel. The written ruling that appears on page 9 of the papers was signed by Mr. S. Mothibedi the chairperson of the Dispute Committee. I disagree with the submission that it is not necessary to cite the person who made the ruling. The person who made the ruling has an interest in the matter His ruling is being attacked on review and yet he is not given an opportunity to be heard. He was not even served with the application for review. The failure to join the person who made the ruling is fatal to the application for review. As the applicant has failed to cite such person, that is the end of the review application. The application can be dismissed without dealing with other issues.
5. The applicant submitted that the ruling by the first respondent had no logical nexus with the evidence led and it was not justifiable. There is no record before court on the evidence led at the Bargaining Council.
6. The applicant's problem is that the founding affidavit does not set out the grounds of review. It merely deals with the legal issues. There is no specific factual allegation on which the applicant relies for alleging that the ruling is not rational. No grounds are also highlighted in the heads of

arguments. The reliance is on legal issues. This is also fatal to the application.

7. The applicant seems to rely on the presumptions in Section 200A of the Labour Relations Act to argue that the applicant was an employee. There is no evidence to show that evidence was led at the Bargaining Council relating to the presumption in Section 200A. The applicant is precluded from raising new issues on review.
8. The respondent's version is that the applicant was an owner-driver and operated under his Close Corporation the Shaw Express Deliveries CC with which the respondent signed a contract. The applicant operated on a specific route. The Close Corporation was set up by the applicant. The applicant relied on the document appearing at page 80 which he claimed was a pay slip and that it showed that the applicant was an employee of the second respondent.
9. That document deals with the particulars of the operator of Route 30. The applicant is indicated as the operator of that route. The information recorded on this document is consistent with the respondent's argument that the applicant was an owner-driver.
10. On 10 May 2004, the applicant addressed a letter to the second respondent. The letter appears at page 44. The applicant stated the following in the first paragraph:

“I, Anthony Shaw acting on behalf of Shaw Express Deliveries am compelled to bring the following matters to the management of Sun Couriers' attention...”

11. The applicant is cited as the director of Shaw Express Deliveries. This indicates that the applicant was not an employee of the second respondent but a director of the Shaw Express Deliveries which had a contract with the second respondent.
12. In coming to the conclusion that the Council did not have jurisdiction, the Chairperson of the Committee that decided the point raised in the investigative hearing was that it was established that the applicant was not an employee but a contractor. This appears on the minutes of Disputes Committee at page 55 of the documents. Mr. Mothibedi in his written Ruling referred to the contract signed by the parties in particular to clause 2.5 which reads:

“It is recorded that nothing in this agreement, whether express or implied, shall be construed as creating the relationship of either employer and employee or franchisor and franchisee between the parties.”
13. Paragraph 2.6 of the agreement provides that the provisions of the agreement, where applicable shall also apply to the directors, members and shareholders of the contractor. This therefore includes the applicant who is the director of Shaw Express Deliveries. The agreement is so extensive that it leaves no doubt that there is no employment relationship.
14. In the light of this, there is no basis for interfering with the ruling as it is rational and justifiable on the information presented to the Disputes Committee.
15. The respondent raised the question of the lateness of the review application. The applicant submitted that it was not late as the written ruling was received on 7 February 2005. It is however clear that the applicant became aware of the Ruling on 15 October 2004. In the letter

appearing at page 51 dated 26 November 2004 Mr. Ford who acted for the applicant addressed a letter to the Bargaining Council. In paragraph 2 of the said letter, Mr. Ford wrote :

“The matter was scheduled as an investigative hearing on 15 October 2004 and the committee ruled that the Council does not have jurisdiction, but that we have the right to take the decision on review and that the written decision would be served on us. Since 15 October 2004 to date, we have on various occasions attempted to get the decision in writing in order that we can refer to it in our review application.”

16. This shows that the applicant was aware of the ruling as o 15 October 2004. It was not necessary for the applicant to have to wait for the written ruling. The applicant had to make an application for review within reasonable time after he had become aware of the ruling. The application was not made within a reasonable time. The applicant did not file any application for condonation. On this aground, the application should also fail.

17. The application for review is dismissed with costs.

NGCAMU AJ

Date of Hearing: 24 October 2006

Date of Judgment: 16 January 2006

Appearance:

For the Applicant:

Mr. B. Ford (SAHCTU)

For the second Respondent:

Mr. R.T. Maddery (Attorney)