THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1023/23

In the matter between:

DSV ROAD LOGISTICS (PTY) LTD	Applicant
and	
NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT AND LOGISTICS INDUSTRY	First Respondent
KEKANA PRINCE *N.O.*	Second Respondent
PRIMESERV STAFF LOGISTICS (PTY) LTD	Third Respondent
MODUPI SAMUEL MSIYA AND OTHERS	Fourth to further Respondents

Heard: 17 April 2024

Delivered: 6 May 2024 (This judgment was handed down electronically by emailing a copy to the parties. The 6th of May 2024 is deemed to be the date of delivery of this judgment).

Summary: On review, DSV, client of the temporary employment service (third respondent) contending that it was entitled to be joined in the dispute between the first and third respondents regarding compliance with collective agreements of the Bargaining Council re. conditions of employment. Section 198(4)(a) and 198(4A)(c) of the LRA is applicable. Application for condonation dismissed.

JUDGMENT

DANIELS J

Introduction

[1] In this matter, the court was required to determine a review application brought by the client of a *temporary employment service* who takes issue with an enforcement award issued by the first and second respondents (hereafter the "Bargaining Council") against the *temporary employment service*.

[2] In addition, the review application was delivered late, and condonation is sought. The review application need only be considered if condonation is granted.

[3] For ease of reference, the third respondent, is hereafter referred to as the "*temporary employment service*" or the "labour broker". The applicant is hereafter referred to as "DSV" or "the client".

Material facts

[4] The labour broker supplies employees to DSV. In respect of such employees, the labour broker failed to comply with the Main Collective Agreement ("MCA") of the Bargaining Council.

[5] A designated agent of the Bargaining Council issued a compliance order to the *temporary employment service*, but it failed to comply. Accordingly, an arbitration was convened in terms of section 33A of the Labour Relations Act No. 66 of 1995 (hereafter "the LRA").

[6] The second respondent issued an enforcement award on 9 September 2022. The second respondent found that the *temporary employment service* was in breach of the MCA insofar as it related to terms and conditions of employment, and other issues. In fact, this was common cause during the proceedings.

[7] Following the issue of the enforcement award, DSV and the labour broker launched a joint application for rescission of the enforcement award. In the rescission application:

> 7.1 DSV contended that the enforcement award was erroneously granted in its absence, and it is therefore not required to show good cause for the rescission.
>
> 7.2 DSV stated that the employees supplied to it are deemed to be its employees, in accordance with section 198A(3)(b) of the LRA.
>
> 7.3 DSV states that it has reasonable prospects of success in the review and the rescission because the amounts claimed were not due and payable. Unfortunately, DSV provides no detail, or explanation as to what this means. DSV does not explain how it could possibly have reasonable prospects of success when the *temporary employment service* conceded that it had not complied with the collective agreement of the Bargaining Council.

[8] The Bargaining Council opposed the rescission application.

[9] The second respondent issued his ruling on 23 November 2022, in which he dismissed the rescission application. The second respondent noted there was no joinder application brought under the Bargaining Council's Rules. The second respondent held that DSV and the *temporary employment service* had failed to show good cause for the rescission.

[10] The rescission ruling came to the applicant's attention on 20 March 2023.

[11] The review application was due on 2 May 2023 but served on the parties on 7 June and filed on 12 June 2023.

[12] In the review, DSV contends that it had a direct and substantial interest in the compliance dispute and it should therefore have been joined.[1] DSV states that the employees supplied to it, by the *temporary employment service*, worked at DSV for periods more than 3 months and are therefore deemed to be its employees.[2]

Condonation application: applicable legal principles

[13] The decision in *Melane v Santam Insurance Co (Pty) Ltd*[3] is generally regarded as the *locus classicus* on condonation. Holmes JA held as follows:

"*In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive for that would be a piecemeal approach incompatible with a true discretion*."[4] (Own emphasis)

[14] Accordingly, the test for condonation involves a weighing up of all the relevant facts, so that, for example, a good explanation for the delay may compensate for weaker prospects of success.

[15] Our courts have repeatedly endorsed the principle that without a reasonable and acceptable explanation for the delay, the prospects of success

[1] The deponent to the founding affidavit states: "*Primeserv had in fact either applied or in some form requested that DSV be joined to the proceeding, yet the second respondent never issued any ruling in this regard*." No confirmatory affidavit, from Primeserv, is referred to in the founding affidavit.

[2] The applicant does not allege that the affected employees earned under the earnings threshold in section 6(3) of the Basic Conditions of Employment Act, 1997. Nor does the applicant deal with the provisions of section 198A(1)(b) or (c) of the LRA.

[3] 1962 (4) SA 531 (A) at 532C-D

[4] At 532C-D. This test has been repeatedly endorsed by the Labour Court and the Labour Appeal Court.

are immaterial. In addition, without any prospects of success, the explanation for the delay is immaterial.[5]

[16] In *Grootboom v National Prosecuting Authority and another*[6] the Constitutional Court held that the primary criterion is the "interests of justice" which was explained as follows:

"*…the standard for considering an application for condonation is the interests of justice. However, the concept "interests of justice" is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant*." (Own emphasis)

[17] At para 36 of *Grootboom*, the Constitutional Court stated: "*Although not decisive, the existence of prospects of success is an important component of the interests-of-justice analysis*."

Explanation for the delay

[18] The review application was delivered 39 days late, a lengthy period. Unfortunately, the applicant does not offer a detailed explanation for the delay. In this regard:

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[5] *NUM v Council for Mineral Technology* (1998) 3 LCD 448 (LAC); *PPAWU & others v A F Dreyer & Co (Pty) Ltd* [1997] 9 BLLR 1141 (LAC); *Toyota Marketing v Schmeizer* [2002] 12 BLLR 1164 (LAC) at para 15; *Miya v Putco Ltd* (1999) 4 LLD 236 (LAC)

[6] (2014) 35 ILJ 121 (CC)

18.1 The deponent explains that the rescission ruling came to its attention on 20 March 2023. The deponent explains that the first draft of the review papers was completed on 12 April 2023 and sent to counsel to settle. The attorneys were aware of the deadline to file the review and advised counsel of this as well.

18.2 Thereafter, between 12 April 2023 and 7 June 2023 the explanation is that there was miscommunication between the director handling the matter and the attorney he was working with.

18.3 The miscommunication between the applicant's attorneys only gets it so far. The attorneys explain that counsel was provided with the draft review application on 12 April and he was informed of the due date to file the review. Regrettably, counsel provides no explanation at all at why he could not settle the papers in 2 weeks. This is unacceptable particularly where counsel was informed of the deadline by his instructing attorney.

18.4 In the circumstances, I consider the explanation to be weak and lacking in transparency. Condonation is not merely for the asking.

Prospects of success

[19] The applicant's case is premised on its allegation that it has a direct and substantial interest in the subject matter of the enforcement proceedings. It provides no explanation as to why the third respondent brought no application to join it, nor was this explained in the rescission application where the *temporary employment service* was a co-applicant. DSV does not explain how it allegedly had no knowledge of the enforcement proceedings though its *temporary employment service* was intimately involved.

[20] While the applicant is correct that, in general, where a party has a direct and substantial interest in a dispute, that would entitle it to be joined. However,

this fails to consider the legislative provisions applicable to this dispute. These are discussed below:

20.1 Section 198(4) of the LRA states that the labour broker and the client are jointly and severally liable if the *temporary employment service* contravenes a collective agreement of a Bargaining Council which regulates terms and conditions of employment in the industry.

20.2 Section 198(4A)(c) of the LRA provides for two scenarios. The provision states that where:

20.2.1 The client and the *temporary employment service* are jointly and severally liable in terms of section 198(4), then any order or award made[7] against the *temporary employment service* or the client may be enforced against the other,

20.2.2 The client is deemed to be the employer in terms of section 198A(3)(b) any order or award against a *temporary employment service* or the client may be enforced against the other.

[21] Thus, the rule relating to joinder of parties with a direct and substantial interest cannot be strictly applied in circumstances contemplated by section 198(4) and 198(4A). Those sections contemplate that either the client *or* the *temporary employment service* would be parties to the proceedings. The drafters of the LRA acknowledge the intimate nature of the relationship between the client and its labour broker. The temporary employment services profits from the supply of labour while the client profits from the labour and the products or services emanating from such labour.

[22] Section 198(4) and 198(4A) is specifically designed to protect vulnerable employees and to avoid technical points by the *temporary employment* service

[7] Any order or award made in terms of this subsection. This includes the scenario we are dealing with in this matter – breach by the TES of a collective agreement of a bargaining council.

or client who may try to avoid their obligations under collective agreements concluded at sectoral level. Section 198(4) and 198(4A) creates an exception to the general rule that parties with a direct and substantial interest *must* be joined. The drafters of the LRA took into account that the identity of the true employer is, in triangular employment relationships, particularly difficult to discern. The drafters awareness of this difficulty is apparent from the creation of statutory presumptions regarding the employment relationship.

[23] The applicant, in its rescission application, offers no more than a general statement that it has good prospects of success. It offers no detail whatsoever. It does not explain how it could have good prospects of success when the *temporary employment service* conceded it had not complied with the Main Collective Agreement. These concessions are recorded in para 15 of the rescission ruling, and the enforcement award itself.

Other relevant factors

[24] Given the weakness of the explanation and the absence of any real prospects of success it is unnecessary to explore the other factors in any detail.

[25] It suffices to mention that, in my view, these factors (the importance of the issue, nature of the relief, or administration of justice) weigh against the applicant. The review has the effect of delaying enforcement of an industry collective agreement. This hinders two key objectives of the LRA namely effective dispute resolution and support of collective bargaining at sectoral level. The review application has the effect of undermining the Bargaining Council and its enforcement mechanisms.

[26] The review application does not advance the administration of justice in any manner that is apparent. Notably this issue was not pertinently addressed in the condonation application. The issue in dispute is clearly just as important to the individual employees (if not more important) when compared to the interests of the client and the labour broker.

Conclusion

[27] In the circumstances, I find that the period of the delay is substantial, the explanation inadequate, and the prospects of success virtually non-existent.

[28] In the exercise of my discretion, having considered all relevant factors, I do not believe it is in the interests of justice to grant condonation for the late filing of the review application. The application for condonation is dismissed.

RN Daniels
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv A Nel
Instructed by: Darran Ledden Incorporated