THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

JUDGMENT

Not reportable

CASE NO: JS 996/18

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA Applicant

and

PFG BUILDING GLASS First Respondent

LSC STAFFING SOLUTIONS (PTY) LTD Second Respondent

Date enrolled: 18 August 2020 (in Chambers)

Date of judgment: 25 August 2020. Judgment distributed by email by 16:00

JUDGMENT

VAN NIEKERK J

[1] The applicant seeks a declaratory order to the effect that the services provided to the first respondent by the second respondent are temporary employment services as contemplated in section 198 of the Labour Relations Act (LRA). The applicant accepts that on the papers as they stand, it is not entitled to the relief sought. The only issue for decision is whether the matter ought to be referred to oral evidence.

[2] In support of the application, the deponent to the founding affidavit, the regional secretary of the applicant for the Ekurhuleni region, states that after the judgment by the Constitutional Court in *Assign services (Pty)td v National Union of Metalworkers of South Africa and others* [2018] BLLR 837 (CC), he communicated with several employers in the Ekurhuleni area who were utilising temporary employment services, one of them being the first respondent. In his email, he sought confirmation from the first respondent that *'all those employees who have been with the company for more than three months are now employees of the company'*. The first respondent replied by stating that service providers did not constitute temporary employment services and that this had been clarified with the applicant in more than one occasion. The regional secretary replied by requesting the contract entered into between the first and second respondents and seeking an undertaking that *where appropriate, all employee provided by LSC be converted into permanent employees of the PFG*. The first respondent replied by noting that the applicant's response appeared to concern one service provider, i.e. the second respondent, and reiterated that the second respondent did not supply a labour brokerage service to the first respondent. As the deponent puts it, it is apparent from the exchange of correspondence that the first respondent was of the view that the services provided by the second respondent were not temporary employment services as contemplated by the LRA, and that the applicant holds the opposite view. The applicant then annexes a copy of what it refers to be the contract between the first and second respondents. The boat the deponent avers that he has no reason to believe that the content of the signed copy is any different. He points to various clauses in the contract and submits that the applicant has made out a case for the declaratory relief sought.

[3] The respondents take the jurisdictional point to the effect that the true nature of the dispute is one that concerns the application of section 198A of the LRA, and that in terms of section 198D (1), any dispute arising from the interpretation or application of section 198A may be referred to the CCMA or a bargaining council

with jurisdiction for conciliation, and if not resolved, to arbitration. Section 157 (5) of the LRA provides that this court does not have jurisdiction to adjudicate an unresolved dispute if the dispute is to be resolved through arbitration.

[4] The respondents are correct to suggest that what the applicant ultimately seeks is an order in terms of section 198A to the effect that those of the second respondent's employees who have performed work for the first respondent for a period exceeding three months are deemed to be employees of the first respondent. This much is clearly apparent from the correspondence addressed by the regional organiser, and especially his references to the *Assign Services* judgment and the nature of his demands. But that is not the relief that is sought in these proceedings - the dispute in the present instance is the more limited question whether the second respondent is a temporary employment service. I will assume therefore for present purposes that this court has jurisdiction to entertain the application.

[5] The question remains though, whether the declaratory relief sought by the applicant ought to be granted. The court has a discretion to grant declaratory orders, a discretion that must be exercised judicially and with reference to all of the relevant facts. A court will not ordinarily grant a declaratory order or make a declaration of rights when there is no real or live issue before the court. In this sense, the jurisdictional point raised by the respondents is not so much a jurisdictional point (for the reasons given above) but a point that goes to the exercise of a discretion to grant a declaratory order. The only possible purpose of an order sought in these proceedings is for the applicant to then rely on s 198A, and submit that its members were engaged in a 'temporary service' in the employ of the second respondent, and that after a lapse of three months, they were deemed to be the employees of the first respondent. As I have indicated, this is a matter that falls within the jurisdiction of the CCMA or a bargaining council with jurisdiction. Section 198D (3) requires any dispute about the application or interpretation of s 198A to be referred to the relevant dispute resolution agency

within six months of the act or omission concerned. The present dispute has its roots in correspondence addressed by the regional organiser to the first respondent during July 2018, more than two years ago. It seems to me that the applicant would in any event be non-suited in the CCMA on account of the lapse of time since July 2018. Further, the lapse in time between the applicant's complaint and the hearing of the present application is a factor to be considered – the application was filed only on 28 November 2018, some 21 months ago. All of these factors weigh heavily against any referral to oral evidence.

[6] Insofar as the respondents contend that the application ought in any event to be dismissed on account of a foreseeable dispute of fact, the applicant submits that what is an issue is a point of law, i.e. whether or not the second respondent is a temporary employment service. It should be recalled that the mainstay of the application is the unsigned memorandum of agreement that the applicant annexed to the founding affidavit. That memorandum, unsigned as it is, fails to sustain any contention that the relationship between the first and second respondents is one between the client and a temporary employment service. In its answering affidavit, the first respondent states that it no longer makes use of the services of labour brokers and that the second respondent is an independent service provider, whose employees work under the supervision and direction of the second respondent's supervisory and managerial employees. Insofar as the unsigned memorandum is concerned, the first respondent avers that it was neither concluded nor signed by the first and second respondents, who have never operated terms of it. The second respondent, in its answering affidavit, also denied that the memorandum relied on by the applicant is not a service contract between the first and second respondents and that the nature of the relationship between the parties is that of an outsourced logistics service provider. Both respondents make reference to a dispute referred to the CCMA and a settlement agreement subsequently executed on 3 September 2018, in which the two respondents, amongst others, agreed to share relevant information pertaining to the nature of the relationship. Despite that exchange of information,

some two months later, the present proceedings were instituted. Further, the second respondent avers that it had engaged with the applicant in a collective bargaining process and reached agreement on 5 December 2018 in respect of the terms and conditions of employment of those of its employees who were members of the applicant. It is difficult to reconcile that fact with the contentions now made. In short, whether or not the second respondent constitutes a temporary employment service as defined is not a matter that can be determined solely by reference to any agreement between the first and second respondents. As this court has often declared, in the context of triangular employment relationships, the label that the parties attach to their relationship is of no consequence. It is inevitable that factual issues will arise, and they are often determinative. In the present instance, the applicant came to court with nothing but a series of demands made of the first respondent and an unsigned memorandum which it contended to be the basis of the contractual relationship between the first and second respondents. The applicant has failed to establish a rationale for any referral of the dispute to oral evidence. There is no attempt to establish a balance of probabilities in the applicant's favour nor is there any prospect of oral evidence to bring the balance in favour of the applicant. There is no indication as to how any evidence presented by either of the respondents is lacking in credibility, or how any referral to oral evidence will resolve this. In my view, the applicant has failed to establish any basis for a referral to oral evidence.

[7] Insofar as costs are concerned, section 160 of the LRA confers a broad discretion on the court to make orders for costs according to the requirements of the law and fairness. While I give the applicant the benefit of the doubt that these proceedings do not comprise, as the second respondent contains, a form of legal subterfuge to avoid the time limits established by section 198D, it seems to me that the dispute ought properly to have been referred to the CCMA from the outset and that little purpose was served by these proceedings. The application was always speculative, and without a proper factual foundation. The interests of the law and fairness are best served by an order that costs follow the result.

I make the following order:

1. The application is dismissed, with costs.

André van Niekerk
Judge of the Labour Court of South Africa

APPEARANCES

For the applicant: Adv C Orr, instructed by Nganko Attorneys

For the first respondent: Adv M van As, instructed by Cliffe Dekker Hofmeyr

For the second respondent: Mr S Snyman, Snyman attorneys.