IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN **REPORTABLE**

CASE NO: J619/05
Date Heard: 29/03/2005
Date Delivered: 05/04/2005

In the matter between

TRANSMAN **APPLICANT**

and

SOUTH AFRICAN POST OFFICE **RESPONDENT**

J U D G M E N T

PILLAY D, J:

1. This is an unusual application between two employers. The applicant provides temporary employment services to the respondent. The applicant and respondent are employers of the 750 employees placed by the former with the latter.

2. This application is brought on an urgent basis for an order interdicting the respondent from obstructing the applicant in the process of conducting consultations with the employees and to compel the respondent to provide it with certain information to enable it to comply with its obligations in terms of section 189 and 189(a) of the Labour Relations Act 66 of 1995 (LRA).

3. The relationship between the parties began in 1994. Contracts were concluded at the time for the supply of services. The applicant was responsible for paying the employees and the respondent undertook to pay the applicant various rates that were agreed within 30 days of receipt of an invoice.

4. It was also a term of the agreement that although the parties were jointly and severally liable not to commit a breach of clause 5.4.1, the applicant alleges that the party at fault indemnified the other party unconditionally against such breach. Clause 5.4.1 of the agreement records *inter alia* the applicant's undertaking to observe

the provision of the LRA and the Basic Conditions of Employment Act 75 of 1997. On 21 June 2000 the respondent issued a memorandum to employment service providers who tendered successfully to the effect that the respondent's remuneration of the temporary service providers would be based on the rate of remuneration of the permanent employees. The applicant and its partner tendered successfully and were accepted as service providers on 12 April 2000. Precisely what the remuneration amounted to is the subject of litigation pending in the High Court.

5. Following the 12 April tender the applicant accepted payment of an amount less than that to which it alleged it was entitled to from the respondent. When this contract terminated on 30 March 2002 the respondent offered to renew it on the same terms and conditions but on a month to month basis. That is the basis on which the contract between the parties continued. On 24 December 2004 the respondent gave the applicant notice of its intention to terminate the contract and services of its employees effective after 31 January 2005.

6. The applicant met the respondent on 10 January 2005. Following that meeting the respondent agreed on 11 February 2005 to extend the termination notice to 31 March 2005. It re-iterated that it would proceed with the cancellation of the contract.

7. Based on certain alleged conduct of the respondent's managers, the applicant deduced that the respondent still required the services it provided. This, the applicant informed the respondent, was either a waiver of its notice of termination, or it was an interference with the relationship between the applicant and its employees, which amounted to unlawful competition.

8. On 18 February 2005 the respondent denied that it waived its rights and persisted that the notice of termination was valid. The applicant urged the respondent to reconsider its position and to furnish an explanation for replacing it as a service provider. It also sought to hold the respondent liable for payment of certain statutory dues. The respondent declined to disclose the reasons for terminating the contract and denied liability for payment of the statutory dues.

9. The applicant requested even more information and re-iterated that

it was unable to consult meaningfully with its employees in terms of the LRA. On 18 March 2005 the respondent again resisted the request. The applicant further alleges that on 22 March 2005 the respondent denied the applicant's access to its employees in order to consult with them. The respondent denies this and contends that the applicant did not make proper arrangements. For reasons that will emerge, it will be obvious that this is not a dispute of fact that I need to resolve. Nor is it one that I can resolve on the papers.

Urgency

10. The first ground on which this application is challenged is that it is not urgent. The contract was to terminate the day after the hearing of the application, that is on 31 March 2005. The applicant took steps to avoid the application. But the respondent has consistently and firmly resisted all the applicant's requests for information. The applicant should have realised that the respondent was unrelenting. It also had enough time to bring the application in the ordinary course, during normal Court time and with preference on the roll. Nevertheless I agreed to waive compliance with the normal rules of Court, because of the importance of the matter and the number of employees involved and in the interest of expeditious, effective dispute resolution.

Jurisdiction

11. It became evident for the first time during argument that the applicant was relying on sections 157(2)(a) and 158(1)(a)(iii) of the LRA. Section 157(2)(a) provides:

> "The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in chapter 2 of the Constitution of the Republic of South Africa, 1996, and advising from;
> a) employment and from labour relations"

Section 158(1)(a)(iii) provides:

> "The Labour Court may
> a) make any appropriate order including;
>
> (iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this act."

12. Mr Van Blerk for the applicant drew my attention to my judgment in the matter of *PFG Building Glass (Pty) Ltd v CEPPAWU & Others* (2003) 5 BLLR 475 (LC) relating to the disclosure of information in order to exercise a right or carry out an obligation. The applicant alleged that it was entitled to the information to enable it to carry out its obligation under the LRA and the BCEA. It denied that it relies on the contract as the basis for the information.

13. The respondent contended that the Court also lacked jurisdiction to resolve this dispute as it was between employers. The right to the information truly belonged to the employees and not to the applicant, so it was submitted.

14. It is obvious that the applicant had not considered the issue of jurisdiction until the respondent raised it. It should have been specifically pleaded so that the respondent would have been aware of the case it had to meet. As a public entity it is also possible that the respondent has an obligation under the Promotion of Administrative Justice Act No.3 of 2000 (PAJA) to provide information. Neither party had prepared argument on whether the respondent is an organ of state, whether PAJA applies to it, and whether there was an alternative remedy that the applicant should have pursued instead of this application. Consequently, I can make no finding in that regard. Considering that the applicant was represented by two counsel, the respondent was justified in its objection to jurisdiction. Nevertheless, the Court has to satisfy itself that it has jurisdiction even if it is not specifically pleaded. The Court is satisfied that on the basis of the sections of the LRA referred to above it has jurisdiction to hear the matter.

Lis Pendens

15. The third objection raised was a defence of *lis pendens* based on the application pending in the High Court. The relief claimed in the High Court and in this application are different even though similar issues would be traversed. But the Labour Court exercises in addition an equity jurisdiction. The considerations that apply in the Labour Court are different from those taken into account by the High Court. Relevance and confidentiality may be headings under which both Courts may consider an application for disclosure of information. However, its relevance to protecting socio-economic rights, such as fair labour practises, may differ from the relevance

of information in a purely commercial, contractual dispute. In my view therefore the defence of *lis pendens* must fail.

The need for the information

16. The applicant requires the information purportedly to consult meaningfully with the employees. Yet it has not placed any evidence before the Court as to what steps it has taken thus far in carrying out its obligations in terms of section 189 and 189(a) of the LRA. More specifically, there is no evidence as to when and whether the applicant notified its employees that the contract with the respondent would terminate on 31 March 2005. The strongest ally the applicant could have drawn into the application is its workforce. If the applicant is to be believed that it is in the interest of the employees that this application was launched, the applicant has not led any evidence of attempts to secure the participation or even endorsement of the employees of this application.

17. On the applicant's version the respondent is contracting with some of the employees directly. Perhaps the employees are not unhappy with this development. If the information is needed by the employees, they can initiate their own proceedings to obtain it. If the applicant had given notice of the possibility of their dismissal as soon as it became aware on 24 December 2005 of the termination of the contract with the respondent, the employees might have had sufficient time to ask the respondent and the applicant since they are both jointly and severally liable towards their mutual employees for the information. If the respondent resisted furnishing the information, the CCMA could have been seized with the matter without the need for this application.

18. The Court has not been told that the employees are aware that their employment at the respondent would terminate a day after the hearing of this application. Nor is the Court aware of what, if anything, the employees intend to do about that.

19. If concern for the employees' interests was the principal, if not the sole reason for this application, the applicant has clearly underplayed their role in the entire dispute. Hence, I am not convinced that this application is motivated by the interests of protecting the employee. There is another interest at play. That is the interest that the applicant has in retaining a commercial contract

with the respondent. That is a matter that is still pending in the High Court. I cannot discount the strong likelihood that this application is subversively aimed at pre-empting the outcome of the High Court application. This application is a second bite at the cherry.

20. If I am wrong, then the employees still have the option of asking for the information themselves. If the applicant does not have the information and is genuinely unable to comply with its obligations, then it could have a good defence against a claim for unfairness by its employees. This application would be testimony to its efforts at complying with its obligations.

21. Nevertheless, the alleged lack of information does not prevent the applicant from carrying out its obligations towards its employees to ensure that their dismissal is otherwise fair.

22. In so far as this application is a stratagem by the applicant to escape compliance with those obligations with which it could have complied, the Court will not allow itself to be used in that fashion.

23. In the circumstances, I dismiss the application with costs.

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Pillay D, J

FOR THE APPLICANT:	Adv. P. Van Blerk
INSTRUCTED BY:	Sim Attorneys Inc.
FOR THE RESPONDENT:	Maserumule Inc