



**THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN**

**JUDGMENT**

**Reportable**

Case Number C435/15

In the matter between:

**CONCORD EMPLOYMENT CONTRACTORS (PTY) LTD**

Applicant

and

**BIDFREIGHT PORT OPERATIONS (PTY) LTD**

First Respondent

**THE INDIVIDUAL RESPONDENTS LISTED IN**

**ANNEXURE 'A'**

Individual Respondents

Date heard: 5 June 2015

Delivered: 26 June 2015

**Summary: Urgent application to restrain client of labour broker from poaching its employees; no breach of contract at time of hearing; Matter does not fall within the ambit of section 77(3) of the BCEA and application dismissed for want of jurisdiction.**

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**JUDGMENT**

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RABKIN-NAICKER J

- [1] In this application brought on an urgent basis the applicant company, a temporary employment service, seeks the following relief:

“That the First Respondent is interdicted and restrained from employing, directly or indirectly using the services of, or soliciting, enticing or otherwise attempting to persuade any of the individual Respondents to perform such services for the First Respondent, for as long as they are employed by the applicant, or for a period of six months thereafter”

- [2] The first respondent, a freighting company is a long-time client of the applicant. It has come to applicant's notice that first respondent has approached some 30 of applicant's employees and advised them to apply for positions in its employ telling them, as applicant avers, that “they could be guaranteed a better position including more shifts, better remuneration and more benefits tied to the relevant posts.” The applicant further avers that on 22 May 2015 he drew the attention of the first respondent to the fact

“..that there are significant discrepancies between the pay rates for the same work paid by the Applicant and by the First Respondent respectively, the First Respondent's rates being higher. I made it clear to the First Respondent, though Ms Lange, that unequal pay for equal work was not acceptable. The significance of this was that it created an improper incentive aimed at enticing employees of the Applicant to join the First Respondent.”

- [3] The above is a most novel reliance on the “unequal pay for equal work principle”. Be that as it may, applicant has since informed the first respondent of the ‘restraint clause’ in its contracts of employment with the individual respondents. The restraint clause bears recording:

*“17.1 The Employee accepts that he/she will not be allowed to conduct work whether directly or indirectly for the Employer's client or any of its associates or through another agency or placement company or contractor, for the period of*

*six(6) months after the termination of the employment relationship based on the assignment(s).*

*17.2 The Employee hereby further agrees and acknowledges that he/she has given careful consideration to the above restraint and that the said restraint goes no further than is reasonably necessary to protect the proprietary rights and interest of CEC”*

- [4] There had been no alleged breach of the restraint by the time the application was before me, which means that the remedy sought cannot be based on enforcement of the said restraints. It is trite that an employer seeking to enforce a restraint agreement is required to invoke it and show a breach of it.<sup>1</sup> Rather the applicant submits that this court has jurisdiction to provide the relief sought by virtue of section 77(3) of the BCEA i.e. that: **“The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.”**
- [5] In **Rand Water v Stoop & another (2013) 34 ILJ 576 (LAC)** the court per Waglay AJP (as he then was) held that the Labour Court has jurisdiction, by virtue of section 77(3) of the BCEA, to hear a counter claim by an employer for damages for breach of contract by dismissed employees. The cause of action giving rise to both claims in that matter was the alleged breach of a contract of employment between employer and employees. This is not the case in this matter. As alluded to above, there had been no breach of any term of an employment contract when this matter was brought to court. The application appears to have been brought to deter the first respondent from ‘poaching’ applicant’s employees and to deter those employees from applying for permanent employment, for a higher rate of pay, with applicant’s client. To put it bluntly the application reflects the fall out and resultant skirmish between a labour broker and its client in the wake of the 2014

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<sup>1</sup>EXPERIAN SOUTH AFRICA (PTY) LTD v HAYNES AND ANOTHER 2013 (1) SA 135 (GSJ) at paragraph 14

amendments to the Labour Relations Act, in particular the insertion of paragraphs 198A to 198D of the LRA.

- [6] In as far as reliance on section 77(3) of the LRA is concerned, I can do no better than quote from **Rand Water v Stoop & another**:

“[38] A teleological approach to interpretation of the BCEA is clearly appropriate, but this approach does not and cannot licence an Alice in Wonderland interpretation. Words must mean what they ordinarily mean not what we want them to mean: *S v Zuma & others*; *National Coalition for Gay & Lesbian Equality & others v Minister of Home Affairs & others*; *Daniels v Campbell & others*; *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others*; *In re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others*; and *Hoffmann v SA Airways*.”

- [7] This is not a matter ‘concerning a contract of employment’ in terms of section 77(3) of the BCEA. The applicant would like the court to find the restraint in question reasonable in order to prevent the poaching of its employees. As I am of the view that I do not have jurisdiction to hear the matter, I am not able to make a finding in this respect.

- [8] I see no reason why costs should not follow the result and order as follows:

Order

1. The application is dismissed for want of jurisdiction.
2. Applicant to pay the costs.

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

For the Applicant: F. Rautenbach instructed by Carelse Khan Inc

For the First Respondent: C. Nel instructed by Macgregor Erasmus Attorneys

LABOUR COURT