IN THE LABOUR COURT OF SOUTH AFRICA

DURBAN

Case no: D247/2022

Not Reportable

In the matter between:

DEEP BLUE OCEAN TRADING 787 CC
t/a AVEMEL LOGISTICS CC — First Applicant

BIG V HOLDINGS (PTY) LTD — Second Applicant

and

DETAWU ON BEHALF OF SIX MEMBERS — First Respondent

COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION — Second Respondent

THE NATIONAL BARGAINING COUNCIL
FOR THE ROAD FREIGHT LOGISTICS INDUSTRY — Third Respondent

SHERIFF OF THE HIGH AND LOW COURT
CHATSWORTH – MS HLOPHE N.O. — Fourth Respondent

Heard: 16 August 2022
Delivered: 20 September 2022

JUDGMENT

ALLEN-YAMAN AJ

Introduction

[1] The applicant seeks an order in the following terms,

'1.1 The fourth respondent be and is hereby interdicted from attaching any goods from the premises of Deep Blue Ocean Trading 787 cc t/a Avemel Logistics situated at 2 Strelitzia Road, Silverglen, Chatsworth, Durban.

1.2 That the Enforcement of Award dated 10 May 2022 and issued in terms of section 143 of the Labour Relations Act 66 of 1995 against the First and Second Applicants is hereby stayed and set aside.

1.3 That the First and Third Respondents be and hereby interdicted from issuing out any further Enforcement of Award/s under case numbers DBN 333/15386/18 and DBN 157/16386/19 until such time as the Second Applicant has obtained, from the South African Revenue Services, tax directives for all six of the member drivers on whose behalf the First Respondent acts.'

[2] The application was launched as a result of the third respondent having notified the first applicant of its intention to apply to the second respondent in terms of section 143 of the LRA to certify an arbitration award issued on 14 September 2021 ('the award'), in terms of which the first applicant had been directed to pay it an amount of R111 257.00.

Background

[3] The application has its origins in the non-payment by the first applicant of certain amounts which were required to have been paid by it to the six employees who are cited as being represented by the first respondent in these proceedings, identified as Mr Brian Mbuthu, Mr Sibonelo Madziise, Mr Alfred Mugumwa, Mr Robert Ngomambi, Mr Alfred Mbvizo and Mr Jimmy Mutongi ('the employees'). The non-payment in question arises from, *inter alia*, remuneration to which the employees were entitled in respect of work performed by them on Public Holidays and Sundays, and for time worked as overtime.

[4] The applicants alleged that the logistics portion of the first applicant's business was sold to the second applicant during or about November 2018. The employees of the first applicant were notified of the transfer on 15 January 2019, the assurance then being given to them that the transfer was one in terms of section 197 of the LRA, and that the second applicant would take over the employment of the first applicant's employees on terms and conditions which were on the whole not less favourable than those under which they had been employed by the first applicant.

[5] The first applicant alleged that the third respondent had been notified of the transfer, however the letter which was attached to its founding affidavit to demonstrate proof thereof was in fact the letter which it had addressed to its own employees some two months after they had allegedly been transferred to the second applicant.

[6] On 29 August 2020 the third respondent transmitted a compliance order to the first applicant, issued to the applicants in terms of section 33A(3) of the LRA under case number DBN333/15386/18. In that compliance order the second applicant was referred to as the 'Second Respondent'. The particulars of the compliance order so transmitted reveal that a complaint had been referred to the third respondent by the first respondent in terms of which it had been alleged that the first applicant had failed to comply with a number of clauses of the Main

Collective Agreement for the Road Freight and Logistics Industry ('the Main Collective Agreement') for the period from 1 January 2018 until 30 June 2018.

[7] The first applicant was ordered to pay the third respondent the amount of R33 556.88 in respect of its breaches of clause 15 of the Main Collective Agreement, being for work on Public Holidays; the further amount of R146 520.64 in respect of its breaches of clause 14, being for Sunday Work, and the amount R454 501.28 in respect of its breaches of clause 11, being in respect of Overtime Work. An amount of R12 691.57 was charged under clause 72 of the Main Collective Agreement in respect of interest.

[8] The first applicant was afforded a period of fourteen days within which to pay the amounts so demanded, failing which the first applicant was notified that the matter would be referred to arbitration. In addition, the first applicant was advised that it could contact one of the third respondent's agents for particularity regarding the calculations or could invoke the objection procedure by making representations to the Secretary of the third respondent within 14 days of receipt thereof.

[9] On 6 September 2021 an arbitration hearing was convened at the offices of the third respondent in relation to the aforementioned compliance order together with a further compliance order issued under DBN157/15386/19.[1] The third respondent in these proceedings was the first applicant in the arbitration proceedings and the first respondent, the second applicant. The first applicant in these proceedings was cited as being the only respondent in the heading to the award, however, reference was also made in the body of the award to the second applicant in these proceedings, which entity appears to have been represented and to have participated in the proceedings.

[10] After the conclusion of the arbitration on 6 September 2021, but before the award was handed down, the third respondent transmitted an amended compliance order under DBN333/15386/18 to the second applicant. In this

[1] A copy of this compliance order has not been included as an annexure to any of the affidavits in this application.

compliance order, the amounts sought to be paid were somewhat reduced: the amount claimed for Overtime Work was then R45 000.00, for work on Public Holidays was then R9 000.00 and the amount claimed for Sunday Work was then R15 000.00. This amended compliance order no longer made reference to the first applicant, citing only the second applicant as both the 'Employer' and the 'Second Respondent'.

[11] One of the conclusions reflected in the award which is relevant to this application is repeated hereunder,

'Summary of Evidence and Argument
The parties agreed that a Section 197 transfer had taken place from Deep Blue Ocean Trading to Big V Holdings and Big V Holdings is therefore solely liable as the new employer. It was also agreed that an amount of R62 500 is due and payable for case number DBN333/15386/18 and an amount of R37 500 is due and payable for case number DBN157/15686/18.'

[12] The arbitrator's award *inter alia* directed the first applicant to pay the third respondent the amount of R100 000.00 in respect of 'Incentive Work', a penalty in the amount of R10 000.00, and the arbitration fee of R1 257.00. The amount payable in terms of the award was accordingly R111 257.00.

[13] On 28 September 2021 the first and second applicants jointly applied to the third respondent for variation of the award,

'… to confirm which entity is liable for non-compliances and to rectify the clauses of the main agreement that were in breach.'

[14] As a consequence of the application so made the arbitrator varied the award by Ruling that the award was enforceable against the second applicant only and by identifying the specific clauses in terms of which the amounts totalling R100 000.00 were payable, being Public Holiday pay, Overtime Work and Sunday Work. Such Ruling was dated 22 October 2021.

[15] The amounts in question were not paid by either of the applicants by 24 May 2022. On this date the first applicant received an email from the third respondent which the first applicant alleged included an Enforcement Award in terms of which its movables situated at 2 Strelitizia Road, Chatsworth were to be attached by the fourth respondent in execution.

[16] The applicant duly launched this application, seeking the relief previously set out.

Analysis

[17] The grounds upon which the applicants contend that they are entitled to the order sought are:

1. The first applicant is not liable for the indebtedness of the second applicant; and
2. The second applicant cannot pay the debt because it is unable to obtain tax directives in respect of the individual employees in relation to whom the debt relates.

[18] It is only the third respondent which has opposed the relief sought by the applicants. In opposing, the third respondent alleges:

1. The first and second applicants are jointly and severally liable for the debt by virtue of the provisions of section 197(9) of the LRA;
2. There is no need for the second applicant to obtain any tax directives as the amount to be paid is to be paid to the third respondent and not to the employees themselves; and
3. The application itself is premature for the reason that the Enforcement Award upon which the applicants rely in having launched this application had not been certified by the second respondent.

[19] In view of the fact that the relief sought by the applicants is final in effect, the applicants were required to establish the existence of a clear right. They were also required to demonstrate that without the granting of the relief sought, they

would suffer irreparable harm and that there exists no reasonable, alternative remedy by which such irreparable harm could be prevented.

[20] The first and second applicants each rely on separate rights insofar as the relief relevant to their own particular circumstances is concerned. The right relied upon by the first applicant is simply that it is not indebted to the third respondent, the liability for the indebtedness being that of the second applicant. The right relied upon by the second applicant is that it is prevented, as a matter of law, from paying the amount to the third respondent because the payment to be made constitutes remuneration payable to the employees which is subject to taxation in terms of the Income Tax Act, 1962 ('the Act').

Right relied upon by first applicant

[21] The first applicant denies liability to the third respondent by reason of a chain of events, alleged by it to have commenced with the transfer of its logistics business to the second applicant in November 2018.

[22] The first applicant provided no evidence of such transfer in its founding affidavit, save for a letter which was addressed to its employees in January 2019 advising them of this apparent occurrence. When challenged by the third respondent, it annexed a portion of what it purported to be a 'Section 197 Transfer Agreement' to its replying affidavit. The portion annexed is incomplete and evinces neither the signatures of the representatives of the respective parties nor even the date upon which it was alleged to have been entered into. A vast portion of the agreement annexed comprises mere repetition of certain of the provisions of section 197 of the LRA, devoid of any real substance, save that the date of transfer is noted as being 14 November 2018.

[23] The portion thereof upon which the first applicant relies (with its numerous grammatical and typographical errors left unchanged) reads as follows,

'5. BIG V HOLDINGS Liability in terms of Section 197(7)

The companies agree to a valuation of accrued benefits and payments as the date of in respect of transferring employees

5.1 For the purpose of the subsection, the collective agreements and arbitration awards that bound the Old employer in respect of the employees to be transferred, immediately before the date of transfer

5.2 Basic Salaries are to remain as per the NBCRFI National Salary Schedule and negotiated salary increases annually for all employees

5.3 Severance pay due to employees

5.4 Any payments due to the employees in terms of overtime etc

5.5 Payment of an paying over the any agreed contributions to pension/provident funds to Liberty Pension Fund

5.6 Compliance with the terms and conditions of NBCRFI Collective Main Agreement

5.7 UIF Obligations

5.6 Recognition of previous service of old employer

5.7 Big V Holdings will be liable for any claims from the employees or Compliance Orders from the NBCRFI in terms of Breach of collective Main Agreement that where such liability or claim Occurred prior to the transfer.

5.8 Any arbitration award made in terms of the Act, common law or any other law

5.9 Any collective agreement binding in terms of sections 23, and

5.10 For a period of 12 months after the date of the transfer, the old employer is jointly and severally Liable with the new the new employer to any employee who becomes entitled to receive a payment contemplated in subsection (7) a as a result of the employees dismissal for a reason relating to the employer's operational requirements or the employer's liquidation or sequestration unless the old employer's is able to show that it has complied with the provisions of this section'[2]

[24] If reference is to be had to section 197(7) of the LRA, it is readily observable that the first and second applicants' alleged attempt to comply therewith falls considerably short of the mark,

[2] The remainder of the 'Section 197 Transfer Agreement' is similarly drafted.

'(7) The old employer must-

(a) agree with the new employer to a valuation as at the date of transfer of-

(i) the leave pay accrued to the transferred employees of the old employer;

(ii) the severance pay that would have been payable to the transferred employees of the old employer in the event of a dismissal by reason of the employer's operational requirements; and

(iii) the other payments that have accrued to the transferred employees but have not been paid to employees of the old employer;

(b) conclude a written agreement that specifies-

(i) which employer is liable for paying any amount referred to in paragraph (a), and in the case of the apportionment of liability between them, the terms of that apportionment; and

(ii) what provision has been made for any payment contemplated in paragraph (a) if any employee becomes entitled to receive a payment;

(c) disclose the terms of the agreement contemplated in paragraph (b) to each employee who after the transfer becomes employed by the new employer; and

(d) take any other measure that may be reasonable in the circumstances to ensure that adequate provision is made for any obligation on the new employer that may arise in terms of paragraph (a).'

[25] In the document relied upon by the first applicant, not a single value was ascribed to any of the amounts mentioned in subsection 197(7)(a) of the LRA. Those amounts not having been specified, that which purports to be an agreement between the first and second applicants under subsection 197(7)(b) of the LRA is not and cannot be an agreement contemplated in terms of that subsection.

[26] The first applicant's further failure lies in the notice of the transfer given by it to its (former) employees some two months after the alleged event, the content of which bears repeating,

'This letter has been drafted by Avemel Logistics CC (hereinafter referred to as he old employer), and it has been approved by Big V Holdings Pty Ltd (hereinafter referred to as the new employer)

It is our duty as Avemel Logistics CC, to inform you that the business has transferred the logistics part of the company to Big V Holdings PTY Ltd. The transfer as per section

197 of the LRA is a going concern. The new employer intends to comply with all legislative requirements as promulgated in the Act. The reason for the transfer is to increase profitability in the process of doing so it must be note that your terms and conditions will not be changed, if on the whole they are less favourable compared to what your current employer is offering, however your new employer has the powers to issue work practices

You are issued a letter explaining the transfer from Avemel Logistics to BIG V Holdings which will clarify any questions'

[27] This letter, like the 'Section 197 Transfer Agreement', did not evince compliance with the first applicant's obligations in terms of section 197(7)(c) of the LRA.

[28] Whatever the agreement between the first and second applicants was, it certainly was not one which articulated the value of the amounts due to the employees by virtue of the first applicant's failure to have remunerated them for the work they had performed on Public Holidays, Sundays and for overtime for the period January to June 2018. In the absence of that (or any other) amount having been specified, the 'agreement' on the part of the second applicant that it would be liable for 'any claims from the employees or Compliance Orders from the NBCRFI in terms of Breach of collective Main Agreement that where such liability or claim Occurred prior to the transfer' was not an agreement in compliance with section 197(7)(b) of the LRA.

[29] Moreover, even if it could, notwithstanding these failings, somehow be construed as such an agreement, it would nonetheless not have the effect of depriving the employees of their right to claim payment of the remuneration which was due to them by the first applicant for work performed by them for the first applicant. At best, it would give one or other of the applicants the right to recover payment made by each of them such portion as had been agreed between them would be paid by the other.

[30] In Almazest (Pty) Ltd v Alexander and Others (P03/2013) [2015] ZALCPE 33 Legrange J considered the effect of an agreement in terms of section 197(7) of the LRA and found that it might have been open to the new employer in that

matter to have argued (in the arbitration proceedings which were then the subject matter of the review application in the Labour Court) that the old employer had a duty to indemnify it in relation to a severance pay claim by the employee in question, but that such an agreement would not negate the liability of the new employer to pay the employee severance pay which arose as a matter of law.

[31] Similarly, section 197(9) of the LRA provides that the old and new employer are jointly and severally liable in respect of any claim concerning any term or condition of employment that arose prior to the alleged transfer. The employees' claims were undoubtedly claims which concerned their terms and conditions of employment, more particularly, the breaches thereof by the first applicant - for a period of some six months in 2018 the first applicant failed to pay the employees the amounts to which they were entitled as remuneration for Overtime Work, Sunday Work and work on Public Holidays.

[32] In the circumstances, the first applicant does not enjoy any right not to pay the amount required to be paid in terms of the Compliance Order by virtue of the alleged transfer or the 'Section 197 Agreement' between itself and the second applicant.

[33] However, whether by reason of a properly initiated variation application or otherwise, the award of 14 September 2021 was subsequently varied. A joint application made by the first and second applicants resulted in the variation thereof to the extent that only the second applicant was then required to pay the third respondent the amount in question. The award thereby became enforceable against the second applicant only.

[34] Accordingly, and in consideration of the issues which are germane to the determination of the relief sought by the first applicant, I find that the agreement ostensibly entered into between the first applicant and the second applicant did not operate to negate the first applicant's liability to pay the third respondent the amounts which it ought to have paid its employees in 2018, the first applicant's obligation to do so arising out of the provisions of section 197(9) of the LRA.

Such amount may not, however, presently be claimed from it by the third respondent in terms of the award, as the varied award does not direct the first applicant to make any payment at all.

Right relied upon by the second applicant

[35] On 17 March 2022, the second applicant, through its attorneys, addressed a letter to the third respondent in which it was advised that the amount due to be paid to it could not then be paid because the second applicant was unable to determine the amount of employee's tax to deduct from the payment. It would appear that it had taken the second applicant some five months to arrive at this particular conclusion, arrived at the day before an arbitration hearing which had been scheduled to take place between the parties in respect of the self-same matter as had previously been dealt with in September 2021.

[36] In these proceedings, the second applicant asserts that the payment due in terms of the award is payment of remuneration, as a result of which it is obliged to obtain tax directives in respect of each employee from the South African Revenue Services ('SARS'), and to deduct such amounts as it may be advised by SARS to deduct in terms of such tax directives before any payment can be made to the employees. A SARS IRP3(a) form cannot be completed for each of the employees in question, as the specific amount payable to each is unknown.

[37] The legal basis upon which the second applicant advanced the aforementioned assertions was not articulated in its founding affidavit. In its replying affidavit, the second applicant elaborated in the following terms,

'The Second Applicant is obliged to apply for a tax directive for each Employee and, after receiving the directive back from SARS, make payment in terms thereof to SARS for each individual employee. The amount that is payable in terms of the tax directive for each Employee will be different, as it is based on how much of the award the Employee received,'

'… as the settlement agreement between the applicant and the employees did not deal with the issue of tax on the settlement amount, the settlement amount of R100 000.00 is inclusive of tax and that tax would not be paid separately onto the amount of R100 000.00,'

'…the award amount is for income that is taxable in the hands of the Employee and the Employer is required to apply for and obtain a tax directive for each Employee,' and

'… when an arbitration award and / or compliance award is awarded to an employee for the payment of Overtime, Sunday Pay, Public Holiday Pay the cause of that award is the Employee's employment and thus the award would be taxable as income tax in the hands of the Employee.'

[38] In its heads of argument, the second applicant placed reliance upon Interpretation Note Number 26, issued by SARS on 30 March 2004, as well as the cases of Stevens v CSARS [2006] SCA 145 (RSA) and the unreported judgment of Al Sha Trading (Pty) Ltd v Neil Harrison and Others (J235/15) (22 May 2015) as support for its assertions, which will now be considered.

[39] The obligation on the part of an employer to deduct income tax from certain amounts payable to employees arises from the Act. The position in relation to remuneration is regulated by Schedule 4 to the Act, paragraph 2 of Part II requiring that every employer who pays or who becomes liable to pay any amount by way of remuneration to any employee shall, unless the employer has been granted authority to the contrary by the Commissioner, deduct from that amount an amount which is capable of determination by way of employee's tax.

[40] Remuneration is defined in paragraph 1 of Part 1 of Schedule 4 to the Act to mean any amount of income which is paid or payable to any person by way of salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument, pension, superannuation allowance, retiring allowance or stipend, whether in cash or otherwise and whether or not in respect of services rendered. A number of types of payments are thereafter expressly identified.

[41] Uncertainty having prevailed concerning whether amounts payable to employees pursuant to having achieved some measure of success by way of arbitration proceedings through the second respondent, or adjudication of disputes through this court, SARS published Interpretation Note Number 26 on 30 March 2004, which was intended to provide clarity on the resultant tax implications arising from awards in favour of employees and former employees in the CCMA, as well as judgments of this court.

[42] Having considered the various types of awards and judgments which could potentially be made in favour of an employee, the conclusion reached by SARS was that in the majority of cases the amount payable to an employee in terms of an award or a judgment would fall within one of the categories of gross income as defined in section 1 of the Act, under paragraphs (c), (d), or (f), and would therefore constitute remuneration as defined in paragraph 1 of Part 1 of Schedule 4 to the Act. As such the amount in question would be required to be subject to the withholding of employee's tax by the employer.

[43] In Stevens v CSARS [2006] SCA 145 RSA the Supreme Court of Appeal was called upon to determine whether an *ex gratia* payment made to the appellant fell within paragraph (c) of the definition of gross income in the Act, the appellant having been paid an amount of R38 250.00 by his employer, and the respondent having taken the view that the amount so paid constituted gross income and was therefore taxable. The SCA found that the payment had been received by the appellant in respect of or by virtue of his employment and was therefore subject to the payment of income tax.

[44] A similar conclusion was reached by Steenkamp J in Al Sha Trading (Pty) Ltd v Neil Harrison (J235/15) (22 May 2015), in which a settlement agreement had been reached at the second respondent in terms of which the applicant, the former employer, was to pay the respondent, its former employee, a total amount of R241 000.00. Pursuant to having obtained a tax directive from SARS the applicant deducted the amount of R96 400.00 from the payment to be made to the respondent and paid him the difference. The respondent caused a writ to be issued for that portion which had not been paid to him. Referring to

Stevens, this court confirmed that the *ex gratia* payment paid in settlement of an employment dispute was taxable,

'I agree with him that, where an ex gratia payment is made to an employee in recognition of his service to the employer, there is an unbroken causal relationship between the employment on the one hand and the receipt on the other. There is a causal connection between the employment and the receipt, and the receipt is taxable.'[3]

[45] Undoubtedly, had the first applicant paid the employees the amounts which were due to them some four years ago, provided that the remuneration payable to the employees in question was not below the threshold required to be met for the purposes of taxation,[4] it may have been obliged to have deducted a certain portion thereof in respect of income tax payable to SARS.

[46] Moreover, given that the original claim in terms of the compliance order related to non-payment by the first applicant to its employees, it is certain that, subject again only to the question of whether those employees earned an amount warranting the imposition of tax, had either the first or second applicant, or both, been found upon the conclusion of the arbitration to have been liable to pay the employees themselves the amounts claimed on their behalf, or had willingly agreed thereto, the payment so made would likewise have been subject to the deduction of income tax.

[47] However, whatever the original cause of action between the employees, on the one hand, and the first and second applicants, on the other, may once have been, that cause of action no longer exists, the parties having compromised the employees' claims.

[48] A compromise is a settlement of litigation or envisaged litigation.[5] It is an agreement for the settlement between the parties of a dispute concerning

[3] At paragraph 11
[4] With effect from 1 March 2022 the rate was determined by SARS to be R91 250 per annum
[5] Lawsa, Volume 19, paragraph 241

something which is in doubt or uncertain, without litigating the issue to conclusion.[6] An agreement of compromise produces a new self-standing agreement which materially alters the rights and obligations of the parties.

[49] In this case, the settlement of the dispute which had been referred to arbitration produced a new self-standing agreement. In terms of the new agreement so reached, there is no obligation on the applicants to pay the employees anything at all. All that is required is that the admitted indebtedness be paid to the third respondent, a bargaining council. This agreement is wholly unaffected by the provisions of Interpretation Note Number 26 which regulates only certain types of payments made to employees and former employees.

[50] The question of the tax implications arising out of moneys paid by employers to bargaining councils has been considered by the Legislature, as a consequence of which the Act was amended by the Taxation Laws Amendment Act, 23 of 2018. By way of this amendment, two further subparagraphs were added to the Seventh Schedule to the Act, 'Benefits of advantages derived by reason of employment or the holding of any office.'

[51] The amendment to paragraph 12 was the addition of subparagraph (m),

'2 Taxable Benefits

For the purposes of this Schedule and of paragraph (i) of the definition of "gross income" in section 1 of this Act, a taxable benefit shall be deemed to have been granted by an employer to his [or her] employee in respect of the employee's employment with the employer, if as a benefit or advantage of or by virtue of such employment or as a reward for services rendered or to be rendered by the employee to the employer-

…

(m) the employer has made any contribution for the benefit of any employee to any bargaining council established under section 27 of the Labour Relations Act, 1995, in respect of a scheme or fund as contemplated in section 28(1)(g) of that Act, other than any payment to a pension fund or provident fund as contemplated in subparagraph (l).'

[6] L R Caney: Law of Novation, page 45

[52] The newly inserted paragraph 12E reads as follows,

> *'(1) The cash equivalent of the taxable benefit contemplated in paragraph 2(m) is the amount of any contribution or payment made by the employer in respect of a year of assessment, directly or indirectly, to any bargaining council that is established in terms of section 27 of the Labour Relations Act, 1995, in respect of a scheme or fund as contemplated in section 28(1)(g) of that Act.*
>
> *(2) Where an appropriate portion of any expenditure contemplated in subparagraph (1) cannot be attributed to the employee for whose benefit the amount is paid, the amount of that expenditure in relation to that employee is deemed, for the purposes of subparagraph (1), to be an amount equal to the total expenditure incurred by the employer during that year of assessment for the benefit of all employees divided by the number of employees in respect of whom the expenditure is incurred.'*

[53] This is the only discernible provision in the Act which imposes an obligation on an employer to withhold tax in circumstances in which an amount is to be paid to a bargaining council such as the third respondent; when the amount in question is to be paid for the benefit of an employer's employees who are participants in a fund which has been established in terms of section 28(1)(g) of the LRA. Even in this instance, the legislature made provision for a practical means by which an employer could determine the tax liability of its employees, other than by way of obtaining tax directives in respect of each of them.

[54] Accordingly, the second applicant's specific reliance on Interpretation Note Number 26 and its general reliance on unspecified provisions of the Act is misplaced. The obligation to withhold money on the part of an employer in terms of the Act, clarified by Interpretation Note Number 26, arises only in circumstances in which the money in question is to be paid to that employer's employees or former employees. As the third respondent is neither, and as the circumstances envisaged under paragraph 12E of the Fourth Schedule to the Act do not find application, there is no basis in either fact or law for the second applicant not to pay the amount it has admitted is due to the third respondent.

Irreparable harm

[55] The applicants did not deal expressly with the issue of irreparable harm. Contained in their affidavits is a single allegation that,

'Enforcement of the award is for the full amount of the award and will result in the property of the second applicant being attached which is greater than the amount which would be payable by them, to the first respondent.'

[56] Premised upon the notion that the second applicant is obliged to deduct from the amount payable an amount to be paid to SARS, the statement is both factually unsupported and legally incorrect.

[57] Other than the general complaint by the first applicant that it ought not to be liable for the indebtedness in question, I infer no more from the aforementioned statement that the harm envisaged by the applicants is financial. In consideration of the alternative remedies at the applicant's disposal, such alleged financial harm could never be categorised as irreparable.

Alternative remedies

[58] As was stated above, the applicants have approached this court in circumstances in which the award has not been certified in terms of section 143 of the LRA, let alone has the fourth respondent been authorised to attach the first applicant's assets in execution. In having launched this application, the applicants appear to have overlooked the most obvious course of conduct that was in fact open to them, and that was simply to have opposed the third respondent's application in terms of section 143 of the LRA.

[59] A cursory examination of the documentation served on the deponent to the founding affidavit by way of email on 24 May 2022 reveals that, at that stage, the third respondent had done no more than to have initiated an application under section 143 of the LRA. The covering letter, addressed to both the applicants, reads as follows,

'Notice of application in terms of section 143 of the Labour Relations Act, 1995

1. *Attached hereby is an application in terms of section 143 of the Labour Relations Act to have the award issued in case number DBN157/15386/19 certified as if it were an order of the Labour Court.*
2. *If you wish to oppose this application or make any representation with regard to this application, you are required to submit such opposition or representation in writing to this office within 14 days of date hereof.*
3. *The papers for opposing the application or any representation you wish to make must be served on the National Bargaining Council for the Road Freight and Logistics Industry, as well as the Director of the CCMA.'*

[60] Further consideration of the documentation in question reveals that the Director of the second respondent had not then certified the award; it was neither signed nor stamped where places are provided for her to do so on the Form 7.18A.

[61] The applicants assert that by virtue of the letter dated 10 May 2022 having been served on the first applicant only on 24 May 2022, it was then too late for them to have opposed the application, hence the need to approach this court. Clearly this is not correct as the fourteen-day period would have been required to have been calculated from the date upon which service had been effected. Moreover, had there been any doubt regarding the matter, a simple enquiry made to either the second or the third respondent would have established that the award had not yet been certified.

[62] If either or both the applicants actually paid the amount due to the third respondent in terms of the award, there is no reason why each could not recompense their own losses (if any) by way of action proceedings. If the second applicant were to be required to pay any amount found to have been payable to SARS in due course, such amount could be reclaimed from the third respondent. If the first applicant were to be required to pay the full amount to the third respondent, there is no reason why it could not reclaim the amount so paid from the second applicant by virtue of their 'Section 197(7) Agreement', or fifty percent thereof by virtue of the provisions of section 197(9) of the LRA. The third respondent has not been alleged to be unlikely to be able to afford to

be able to pay such an amount and, on the applicants' own version, the second applicant is fully operational.

[63] It accordingly cannot be found that the applicants did not have any suitable, alternative remedies at their disposal.

Counter application

[64] The third respondent seeks not only the dismissal of the applicants' application but also an order declaring that it is entitled to execute against both the first and second applicants. The execution is sought on the basis of the provisions of section 197(9) of the LRA.

[65] I would have granted such order but for the existence of the award which presently stipulates that only the second applicant is liable for the debt. On applicants' version, which has not been disputed in these proceedings, the third respondent was given notice of the variation application and did not oppose it. It may be that this is not the complete picture of the events, however, until and unless the varied award is rescinded, varied, reviewed and set aside or otherwise altered, it remains one which is binding on the parties in its present form.

Costs

[66] The third respondent has sought an order that the applicants pay its costs.

[67] The irresistible inference to be drawn from the facts of this matter is that the application was not merely ill-conceived but was in fact an abuse of the processes of this court designed to delay payment to the third respondent.

[68] This conclusion is drawn, firstly, from the close relationship which exists between the individuals who are the representatives of both the applicants:

1. The sole active member of the first applicant is one Melinta Venkeltroyalu Naidu,
2. The first applicant's Chief Executive Officer, who deposed to the founding affidavit on behalf of the first applicant, is one Avendra Venkeltroyalu Naidu,
3. Avendra Venkeltroyalu Naidu was previously the director of the second applicant, having resigned from such position in December 2019, and
4. The sole director of the second applicant is now one Kandhruben Venkeltroyalu Naidu, who assumed such position upon the resignation of Avendra Venkeltroyalu Naidu.

[69] Accordingly, when Avendra Venkeltroyalu Naidu addressed the letter to the first applicant's (former) employees on behalf of the first applicant in January 2019, in which they were advised that their services had been transferred to the second applicant two months previously, he was also contemporaneously a director of the second applicant, a position which he continued to hold for more than one year after the purported transfer of the first applicant's business to the second applicant in November 2018.

[70] Such purported transfer of the first applicant's business to the second applicant allegedly took place a mere two and a half months after the third respondent had transmitted a compliance order to the first applicant in which it had been advised that it was then required to pay the third respondent the amount of R647 270.37.

[71] The commonality of Avendra Venkeltroyalu Naidu in the businesses of the first and second applicants, together with the dearth of any objective evidence demonstrating that an actual transfer took place, leads to the inescapable conclusion that both the first and second applicants are working together to the end of defeating the third respondent's claim.

[72] The third respondent ought never to have been obliged to expend its resources in having to oppose this application, and I accordingly I intend to exercise my discretion in ordering that the first and second applicants, jointly and severally, pay its costs, including those previously reserved on 17 June 2022 and 26 July 2022.

Order

1. The application is dismissed.

2. The first and second applicants are directed to pay the third respondent's costs, including the costs reserved on 17 June 2022 and 26 July 2022, jointly and severally, the one paying, the other to be absolved.

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Kelsey Allen-Yaman

Acting Judge of the Labour Court of South Africa

APPEARANCES:

APPLICANTS: Mr M Vawda, Mahomed Salek Incorporated

RESPONDENT: Ms M Naidoo, Mooney Ford Attorneys