Court File

/SG

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DATE: 14/09/2011

CASE NO: 32773/2004 – 27531/2008

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

14/9/2011 .... DATE .... SIGNATURE

In the matter between:

TRANSMAN (PTY) LIMITED	APPLICANT/PLAINTIFF
And	
SOUTH AFRICAN POST OFFICE LIMITED	1ST RESPONDENT/ DEFENDANT
AUTENMAS PLACEMENTS CC	2ND RESPONDENT/ DEFENDANT

JUDGMENT

MAKGOBA, J

[1] The applicant/plaintiff is a labour broker. At all material times hereto the first respondent/defendant required the services of a considerable number of temporary employees throughout the country. It made use of various labour brokers, including the applicant/plaintiff.

On 31 March 2000 the parties entered into a written agreement titled: Temporary Assignments and Permanent Appointments Services Contract. That agreement was for a fixed period from 1 April 2000 until 31 March 2002. Upon the expiry of the agreement same was extended and operated on month to month basis until the agreement was terminated on 31 March 2005.

[2] In terms of the aforesaid agreement the employees' salaries had to be determined in terms of clause 3.8.1 of the agreement with reference to the hourly remuneration of permanent employees of the first respondent/defendant for similar work to which had to be added certain benefits in terms of the BCEA ("The Basic Conditions of Employment Act").

[3] It is appropriate at this stage to set out the provisions of clause 3.8.1 of the agreement as much turns around the interpretation thereof in this case:

> "3.8.1
>
> It is hereby accepted by the P.O. that should TES have performed its mandate to locate staff member(s) / candidate(s) to be appointed by P.O. then the P.O shall pay TES a fee per staff member per hour. The amount referred to is arrived at by means of calculating the hourly

> rate of an employee in the permanent employment of the P.O who is performing a similar task/job/service. In addition to the hourly rate an allowance for benefits as prescribed by the BCEA will be made."

In the above quoted clause "P.O" refers to the Post Office being the first respondent/defendant herein and "TES" refers to the applicant/plaintiff.

[4] For the sake of convenience in this judgment I shall refer to the applicant/plaintiff as "TRANSMAN" and the first respondent/defendant as "SAPO" (South African Post Office).

[5] The bone of contention in this matter is whether or not "TRANSMAN" was contractually entitled to further payments over and above the payments that it received on submission of its invoices.

[6] When this matter came to trial previously before my brother LEDWABA J on 20 April 2010, the merits of the dispute were conceded and a declaratory order was issued on the following terms:

6.1 It is declared that:

6.1.1 In terms of the original agreement (as defined in paragraph 3.1 of the declaration under case number 32773/04) and the agreement (as defined in paragraph 3.11 of the said declaration) the first defendant is obliged (subject to the issues referred to in paragraphs 3.1 and 3.2 below) for the period 1 April 2000 until 31 March 2005 to:

6.1.1.1 Pay to the plaintiff for each temporary employee placed by the plaintiff with the first defendant an amount representing the total of:

6.1.1.1.1 The hourly rates of a permanent employee employed by the first defendant in a similar task/job/service (subject to such adjustments as are provided for in the agreement; and

6.1.1.1.2 An allowance for benefits prescribed by the Basic

Conditions of Employment Act
75 of 1997;

6.2 The calculation of the amount to be paid in accordance with paragraph 1.1 is to be calculated by agreement between the parties within 40 court days of the granting of this order, failing which the parties are to refer the matter to arbitration if agreed to by the parties within 5 court days of the lapsing of the aforementioned period, failing which the calculation of the amount to be paid (including the issues referred to in paragraphs 3.1 and 3.2 below) shall be determined by this court at a date and time to be arranged with the registrar of this court;

6.3 The calculation shall be subject to:

6.3.1 such claims as may be proved by the first defendant or agreed to by the parties to have become prescribed;

6.3.2 the question of whether increases in rates/fees are limited in terms of clause 5.8.3 of the original agreement and the agreement (as defined);

6.4 The first defendant shall be obliged to make payment to the plaintiff of such amount as calculated in terms of clause 1, 2 and

3 above, within five days of such amount being determined, together with interest thereon calculated at the prescribed rate of 15.5% per annum from 9 December 2004 to date of payment.

6.5 The first defendant is to pay the costs of the trial to date (excluding quantum but including the reserved costs of the interlocutory application set down on 19 April 2010) including the costs of two counsel.

6.6 The balance of the costs are reserved.

[7] This court is required to determine the amount due by "SAPO" to "TRANSMAN" pursuant to this order of court of 20 April 2010. This order is based upon the provisions of clause 3.8.1 of the agreement as stated in [3] above. The portion of the order that gives rise to a dispute as to its meaning and interpretation is that contained in paragraph 1.1.1.2 in terms of which SAPO is to pay TRANSMAN:

> "*an allowance for benefits prescribed by the Basic Conditions of Employment Act 75 of 1997.*"

[8] SAPO has raised two main defences:

Firstly, that part of the monies claimed by TRANSMAN relates to rates applicable in terms of a bargaining council determination or collective agreement of the NBCRFI ("The National Bargaining Council for the Road Freight Industry") to which SAPO is not bound. Their interpretation of clause 3.8.1 of the agreement means only the benefits as prescribed by the BCEA and not the BCEA as amended or varied by an applicable collective agreement such as the one under the NBCRFI.

Secondly, that the greatest portion of the original claims has become prescribed

[9] TRANSMAN's case is that the interpretation of clause 3.8.1 of the agreement should be such that it would mean that benefits as prescribed by the BCEA would include such benefits as amended or varied by an applicable collective agreement such as the one under the NBCRFI. In this regard reliance is based on section 49 and 50 of the BCEA.

On the issue of prescription raised by SAPO, TRANSMAN relies on its inability to quantify its claim as a result of SAPO's failure to supply the necessary information to it until it was so ordered by court during May 2005.

[10] The interpretation of clause 3.8.1 of the parties' written agreement should not be seen in isolation. Other clauses and in fact the whole agreement must be looked into. It is against this background that I refer to the undermentioned clauses of the same agreement:

<u>Clause 3.8.2:</u>

> "*[Transman] undertakes to pay its staff members a fair and reasonable remuneration as laid down by the law.*"

<u>Clause 3.11.1:</u>

> "*All and any leave by staff members of* [Transman] *shall be taken at* [Transman's] *sole expense without any expenses being attributed to the P.O at all.*"

<u>Clause 3.11.5:</u>

> "*Sick leave shall be granted in terms of section 22 of the Basic Conditions of Employment Act … as unpaid sick leave as far as the P.O is concerned and paid sick leave as far as* [Transman] *is concerned.*"

<u>Clause 3.14.1:</u>

> "[Transman] *acknowledges that in view of the nature of the relationship between the parties, no one of* [Transman] *staff*

shall become a member of the P.O's provident/pension fund or medical aid scheme, and ***shall not be entitled to any other service or fringe benefits applicable to permanent employees****.*"

Clause 3.14.3:

"*The staff members of* [Transman] *shall not be entitled to any severance pay or notice pay upon termination of the contract by the P.O for whatever reason.*"

Clause 5.1:

"*This constitutes the entire contract between the parties and no variance thereof shall be binding unless reduced to writing and signed by both parties.*"

Clause 5.8.3:

"*… All rates/fees for temporary assignments will be subject to adjustment yearly not to exceed the consumer price index.*"

[11] What was agreed to in clause 3.8.1 of the agreement was that SAPO would pay TRANSMAN the same hourly rates for its permanent employees doing similar work and in addition "an allowance for BCEA benefits". The clause is vague to an extent that it does not state or

indicate what allowances is to be made for BCEA benefits. The evidence of Mr Kevin Cowley, who testified for Transman, can be of assistance in this regard. He confirmed that this cannot be regarded as necessarily requiring the client (SAPO in this case) to pay the labour broker 100% of all benefits that may be payable to a particular employee under the BCEA. According to Mr Cowley it is up to agreement being reached between the parties as to whether and on what basis the client is to pay for such benefits.

[12] I pause to state that I have already made mention of other clauses in the agreement (see [10] above). Some of the clauses mentioned above establish an agreement between the parties with regard to some of the benefits prescribed by the BCEA.

Mr Cowley confirmed further that it would be up to the parties on whether the client would pay for example 100% or 50% or nothing for a particular benefit. In this case clauses 3.11.1, 3.11.4 and 3.11.5 of the agreement exclude payment of some BCEA benefits in the form of "any leave", "vacation leave" and "sick leave" respectively. Same is applicable with regard to clause 3.14.1 (fringe benefits) and to clause 3.14.3 regarding severance pay.

In my view it cannot simply be assumed that 100% of the benefits payable by TRANSMAN to its employees would now be payable by SAPO.

[13] The parties have in their written agreement specifically stated what they agreed upon. They specifically put clauses in their agreement as to which of the BCEA benefits are excluded. This is the agreement between the parties and should be taken as such. A court may not make an agreement for the parties by implying other terms. See ***Press v Jofwall Investments (Pty) Ltd*** **1981 1 SA 261 at 265E** and the authorities referred to thereunder.

[14] Even if counsel for the plaintiff (TRANSMAN) wanted to persuade me to find that the true intention of the parties underlying the last sentence of clause 3.8.1 was that there would be full compensation by SAPO to TRANSMAN for all BCEA benefits, there are the following hurdles which Transman has to overcome:

14.1 That a number of other clauses in the agreement as mentioned in [10] above, make it clear that the parties intended that various BCEA benefits would not be paid for by SAPO and that Transman alone would be responsible for these.

14.2 That some of the benefits do not arise in all circumstances and the manner in which Transman is claiming for this benefits involves unilateral determination by Transman of what it claims. This is not in compliance with what was agreed to or what is provided for in the BCEA.

[15] In my view the written agreement makes it clear that liability for payment to the temporary employees in respect of various forms of leave entitlement rests with TRANSMAN alone and SAPO is not liable to TRANSMAN for any form of payment in this regard. I have already alluded to clauses 3.11.1, 3.11.4 and 3.15.5 in this regard.

[16] To be more specific, Transman is therefore precluded from claiming form SAPO any amount in respect of vacation leave, sick leave, family responsibility leave or any other form of leave.

[17] As pointed out earlier TRANSMAN wishes to interpret clause 3.8.1 of the agreement in such a manner that the phrase "benefits prescribed by the BCEA" would include the benefits as prescribed by the Bargaining Council for the Road Freight Industry (NBCRFI).

[18] Some of the temporary employees provided by Transman to SAPO are covered by the NBCRFI and others are not covered by that Bargaining Council. SAPO itself is not covered by the NBCRFI, its constitution or

the collective agreements which prescribe minimum wages and other terms of employment. SAPO itself and its permanent employees are covered by another Bargaining Council which has been established specifically for the SAPO. The provisions of the latter Bargaining Council do not cover temporary employees provided by labour brokers such as Transman.

[19] In some cases the NBCRFI's collective agreements provide for benefits which are not payable under the BCEA at all, for example provisions for an annual bonus, study leave, provident fund benefits, subsistence allowance and night shift allowance. Other benefits such as entitlement to annual leave, sick leave and family responsibility leave which are the type covered by the BCEA are granted more generous rates under the NBCRFI collective agreements.

[20] The fundamental question in this case is whether there can be any claim for NBCRFI benefits in addition to those prescribed under the BCEA.

Clause 3.8.1 of the agreement specifically allows only "an allowance for benefits as prescribed by the BCEA". There is no specific reference in the contract to any allowance having to be made for benefits in excess of the BCEA benefits such as those under the more generous provisions of the NBCRFI collective agreements. In any event there are specific clauses in the contract as set out in [10] above that specifically exclude liability for payment by SAPO.

[21] The basis on which Transman sought payment of the benefits as prescribed by the NBCRFI collective agreement is its reliance on sections 49 and 50 of the BCEA.

I agree with Mr Kennedy SC, counsel for SAPO that this reliance on section 49 and 50 is misplaced and legally unsustainable. According to Mr Kennedy all that sections 49 and 50 of the BCEA envisage is that the parties can, either on an ad hoc basis or thorough collective agreement, effectively contract out of the BCEA benefits by providing more generous benefits. That there is no provision to the effect that a benefit under the more generous provisions of a collective agreement concluded in a bargaining council are now to be deemed to be benefits under the BCEA. I agree.

[22] On a simple and proper interpretation of clause 3.8.1 of the contract and sections 49 and 50 of the BCEA I make a finding that the benefits payable under the Bargaining Council collective agreements cannot be regarded as “benefits prescribed by the BCEA”. They remain benefits prescribed by the Bargaining Council agreements – not the BCEA. Accordingly they cannot be claimed under clause 3.8.1 of the contract.

[23] Transman's claim schedule includes a specific item abbreviated as "LNR". The item is referred to as "Legitimate Expectation of Continued Employment/ Notice/Retrenchment/Legal costs/ Industrial Action/CCMA/ Interdicts". The schedule claims for each and every worker an allowance for payment of ten days or 84 hours per annum for this item SAPO contends, as part of its objections, that "LNR" is not a benefit payable to SAPO's permanent employees and therefore should not be an allowance. TRANSMAN conceded to this contention and as such I shall not take this issue any further.

[24] Furthermore TRANSMAN's schedules claim payment for three compensation funds, namely the Unemployment Insurance Fund, the Skills Development Levies and the Workmen's Compensation Commissioner. These are all charges paid to those statutory funds and they do not represent benefits under the BCEA.

TRANSMAN concedes. Again this issue will not be taken any further.

[25] TRANSMAN has sought to charge SAPO on the basis that charges escalate in accordance with changes in the SAPO's standard rates of pay for its permanent employees without regard for clause 5.8.3 of the contract.

The clause states that:

"*... All rates/fees for temporary assignments will be subject to adjustment yearly not to exceed the consumer price index.*"

This clause is crystal clear and simply means that the increase in hourly rates payable to Transman should be limited to the percentage increase in the CPI.

To the extent that Transman did not comply with the provisions of clause 5.8.3 of the contract it will be ordered that Transman's increases be adjusted accordingly.

[26] I now turn to the issue of prescription.

Transman launched these legal proceedings on 9 December 2004. SAPO contends that prescription must operate to exclude from Transman's claims amounts reflected in invoices delivered prior to 9 November 2001.

Transman contends that none of the amounts it claims has prescribed because it did not have the knowledge of the extent of its claim or the amounts because SAPO did not supply it with the hourly rates paid to the SAPO's own employees until ordered to do so by the court. There is merit in Transman's contention.

[27] Section 12 of the Prescription Act 68 of 1969 provides:

> "*12(1) Subject to the provisions of subsections (2) (3), (4) prescription will commence to run as soon as the debt is due.*
>
> *(2) ...*
>
> *(3) a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.*"

The party raising prescription must allege and prove the date on which the creditor acquired knowledge of the debtor's identity and the date on which the creditor acquired knowledge of the facts from which the debt arose. The defendant may, in the alternative, allege and prove the date on which the creditor could, with the exercise of reasonable care, have acquired the relevant knowledge – See: ***Gericke v Sack*** **1978 (1) SA 821 (A)**.

[28] *In casu*, SAPO has failed to allege these facts. Accordingly SAPO must show on the evidence when Transman learned or is deemed to

have learned of the facts form which the debt arises. The deeming provision only kicks in if SAPO can demonstrate that Transman by exercising reasonable care could have known of the date sooner.

[29] In this case it is common cause that the application in which Transman claimed the debt was served on SAPO on 9 December 2004. Accordingly if prescription is to be applied, it is only to invoices of the date older than 9 November 2001.

In order to make a claim Transman needed to know what hourly rate of an employee in the permanent employment of SAPO who was performing a similar task/job/service was. In the application served on 9 December 2004 Transman sought and obtained an order that SAPO "deliver forthwith details of the remuneration paid to the categories of permanent employees in the respondent's employ set out in schedule "A" for the period April 2000 to date hereof".

The judgment was granted in favour of Transman on 19 May 2005. Despite the court order Transman was only given the rates of the various employees approximately a year after having brought the application.

[30] SAPO did not lead any evidence on the prescription issue. It has also not pleaded when Transman could reasonably have acquired the necessary knowledge.

In the circumstances the defendant of prescription cannot succeed.

[31] The final issue raised by SAPO concerns interest.

Transman claims interest at the prescribed interest rate of 15.5% *a tempore morae* to date of payment. SAPO argued that account must be taken of the *in duplum* rule – which precludes charging interest in a total amount which exceeds the capital.

The argument raised by SAPO in this regard is unsustainable in the light of the authoritative argument presented by counsel for Transman, Mr Van Blerk SC. With reference to the Supreme Court of Appeal decided cases counsel submitted that the *in duplum* rule does not apply because the *in duplum* rule is suspended *pendent lite*, and that the *lis* is said to commence upon service of the initial process, whereafter interest runs again. Interest is only sought from service of the proceedings and does not apply –

See: ***Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (In Liquidation)*** **1998 1 SA 811 (SCA) 828A-D**;

***Commissioner, South Africa Revenue Service v Wouligde* 2002 1 SA 68 (SCA) para [12]**; and ***Nedbank Ltd and Others v National Credit Regulator and Another* 2011 3 SA 581 (SCA) para [37]**

Transman is accordingly entitled to charge interest at the prescribed rate of 15.5% *a tempore morae*.

[32] The following orders are granted:

32.1 The plaintiff (Transman) is entitled to payment from the first defendant (SAPO) for each temporary employee placed by the plaintiff with the first defendant of an amount representing the total of:

32.1.1 the hourly rate of a permanent employee employed by the first defendant in a similar task/job/service as agreed by the parties; and

32.1.2an allowance for benefits prescribed by the Basic Conditions of Employment Act 75 of 1997 which is to be calculated by <u>excluding</u>

32.1.2.1 any amounts as prescribed by collective agreements of the National Bargaining Council of the Road Freight Industry (NBCRFI);

32.1.2.2 a claim for annual leave sick leave, family responsibility leave, items referred to by Transman in its schedules as "LNR" being amounts claimed for "legitimate expectation of continued employment/ notice/ retrenchment/ legal costs/ industrial action/ CCMA/ interdicts" public holidays and night shifts.

32.1.2.3 any amounts for levies payable by it to statutory funds such as Unemployment Insurance Fund, Skills Development Levies and funds for the Workmen's Compensation Commissioner.

32.2 No amount may be claimed by plaintiff as an allowance for BCEA benefits in the absence of agreement being reached between the parties as to what such allowance should be.

32.3 The plaintiff's claim for payment of amounts in respect of wages and overtime, ordinarily calculated as being equivalent to the rates paid by the first defendant to its own employees doing similar work, shall be adjusted to limit any increases to a maximum equivalent to the increase in the Consumer Price Index for the year in question.

32.4 No claims have been proved by the first defendant or agreed by the parties to have become prescribed;

32.5 The plaintiff is entitled to charge interest at the prescribed rate of 15.5% *a tempore morae*;

32.6 Within ten days of the grant of this order the parties are to advise the court as to whether they have agreed in the computation of the figure due by the first defendant to the plaintiff taking the above order into account, alternatively and if they have not agreed, the parties are to make any written submissions they may be advised to make for purposes of ruling on the amount due.

32.7 The first defendant is to pay the plaintiff's costs including the costs of two counsel but excluding the costs of experts.

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E M MAKGOBA
JUDGE OF THE NORTH GAUTENG HIGH COURT

Heard on:	25, 26 & 30 August & 5 September 2011
For the Applicant/Plaintiff:	Adv P J Van Blerk SC & A C Botha
Instructed by:	Sim & Botsi Incc/o R E Megaw Attorneys, Pretoria
For the Respondent/Defendant:	Adv P Kennedy SC
Instructed by:	Maserumule Inc c/o Ledwaba Mazwai Attorneys, Pretoria
Date of Judgment:	14/9/11.