THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 20076/2014

Not Reportable

In the matter between:

THE WORKFORCE GROUP (PTY) LTD	**APPELLANT**
and	
MOTOR INDUSTRY BARGAINING COUNCIL	**FIRST RESPONDENT**
RETAIL MOTOR INDUSTRY ORGANISATION	**SECOND RESPONDENT**
FUEL RETAILERS ASSOCIATION	**THIRD RESPONDENT**
NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA	**FOURTH RESPONDENT**
MINISTER OF LABOUR	**FIFTH RESPONDENT**

Neutral Citation: *Workforce Group (Pty) Ltd v Motor Industry Bargaining Council* (20076/2014) [2015] ZASCA 66 (15 May 2015).

Coram: Navsa ADP, Ponnan, Shongwe, Wallis and Zondi JJA

Delivered: 15 May 2015

Summary: Costs – subsequent events and statutory amendments rendering appeal academic – liability for costs.

ORDER

On appeal from: The Gauteng Division, Pretoria (Fourie J sitting as court of first instance).

The following order is made:

The appeal is struck from the roll with costs, including the costs of two counsel.

JUDGMENT

Navsa ADP and Ponnan JA (Shongwe, Wallis and Zondi JJA concurring):

[1] This appeal was directed against a finding by the Gauteng Division of the High Court, Pretoria that an amendment to an agreement, concluded on 17 September 2010 by parties to the Motor Industry Bargaining Council (the Bargaining Council), which placed restrictions on the power of employers to utilise the services of 'temporary employment services' formerly known as labour brokers, was valid and binding, even on non-parties to the agreement operating within the Industry. Section 32 of the Labour Relations Act 66 of 1995 (the LRA) makes provision for the extension, by Ministerial proclamation, of a collective agreement concluded in a Bargaining Council to persons who fall within its registered scope, but are not parties to the bargaining council. The Minister of Labour, having been requested by the Bargaining Council to extend the 17 September agreement to non-parties, did so and published the requisite notice in the Government Gazette of 28 January 2011. During August 2011 the appellant, The Workforce Group (Pty) Ltd, which conducts business as an employment agency, applied in the High Court,[1] for an order declaring certain sub-clauses of the agreement regulating and restricting the use of temporary employment to be unlawful and invalid. The first respondent was the Bargaining Council itself. The second, third and fourth respondents were employer and employee parties to the Bargaining Council and by virtue of that fact also parties to the collective agreement. The fifth respondent was the Minister of Labour.

[1] Originally there were other applicants but only The Workforce Group (Pty) Ltd is a party to this appeal.

[2] The challenge to the material parts of the agreement was premised on the following: Firstly, that the restriction was unlawful at common law because it constituted a trade boycott. Secondly, that the impugned provisions were void for vagueness. Thirdly, that the agreement was ultra vires the Bargaining Council's own constitution. Lastly, that the provisions in question were in breach of a number of constitutional rights, namely, the right to freedom of association, the right to freedom of trade, occupation and profession, the right to fair labour practices and the right to just administrative action. After opposing affidavits were delivered the appellant amended its notice of motion to raise a challenge to the constitutionality of s 32 of the LRA under which the agreement had been extended to non-parties.

[3] The appellant was unsuccessful in the High Court. The application was dismissed with costs, including the costs of two counsel. Fourie J, who heard the matter in the High Court, granted leave to appeal to this court.

[4] The amending agreement was to endure for three years, expiring on 31 August 2013. On 23 April 2015 the Registrar of this court wrote to the parties requiring them to address the following question:

'In light of the provisions of the Bargaining Council agreement, in terms of which the agreement is to endure for a period that has already passed, has the dispute not become academic?'

[5] From the response of the parties to the Registrar's query it emerged that:

(a) On 24 January 2014, the operation of the amending agreement was extended until 31 August 2014 as per Government Notice R. 22, Vol: 583, No. 37247 dated 24 January 2014.

(b) On 4 April 2014, prior to expiry of the aforementioned extended period, the amending agreement was again extended until 31 August 2016 to non-parties by ministerial proclamation under s 32 of the LRA in Government Notice Number R.250, Vol: 856, No. 37508.

(c) In terms of the last extension of the amending agreement, a new clause was inserted as clause 3.7(8) which provided as follows:

'The current provisions shall prevail until new legislation is promulgated to which all Parties shall comply.'

[6] It was apparent from the terms of this clause that the parties anticipated that legislation would be passed to deal with temporary employment services and new legislation was indeed promulgated in the form of the Labour Relations Amendment Act 6 of 2014, which came into effect on 1 January 2015. The aforesaid Act amended s 198 of the LRA and also introduced ss 198A – 198D regulating temporary employment services. The effect is that the provisions of the agreement, which the appellants had sought to have declared unlawful and invalid, no longer apply.

[7] In these circumstances, the parties agreed that the appeal had been rendered academic and that it should be struck from the roll. But no agreement could be reached about liability for costs. The parties having agreed, the court directed that the issue of costs would be decided on the basis of their written representations without the need for oral argument. We turn to deal with the contending submissions.

[8] The respondents took the view that an important consideration in determining liability for costs in relation to an appeal rendered moot, is the fact that the appellant is *dominus litis*. They point out that the amendment referred to in paragraph 6 was assented to on 15 August 2014 and that that in itself was sufficient to render the appeal moot even before the amendment actually came into force. In this regard it is necessary to note that the appellant's heads were filed on 9 September 2014, some three weeks after the amendment had been assented to. The amendment took effect on 1 January 2015. From that time until the response to the query from the Registrar there was no indication from the appellant that the appeal had been rendered moot, when it ought to have been obvious to it that there was no longer any live issue in the appeal. For all these reasons, so the respondents submit, the appellant was undoubtedly liable for costs.

[9] The appellant on the other hand, in an affidavit filed in response to the note from the Registrar, merely stated the following:

'At the time the Labour Relations Amendment Act came into effect, the appellant had already prosecuted its appeal and all the parties had already delivered their respective heads of argument.

It is submitted that the appellant could not have anticipated the above and had no alternative but to proceed with the appeal at the time. In the circumstances, it is submitted further that it would be unreasonable to hold the appellant liable for costs and each party should pay their own costs.'

[10] In *Deutsche Altersheim Zu Pretoria v Roland Heinrich Dohmen* [2015] ZASCA 3 (5 March 2015) this court, in dealing with its inherent discretion to make orders as to costs, took the view that a primary consideration was that the appellant was *dominus litis.* It had initiated and prosecuted the appeal. Even after the amendment had come into operation, the appellant continued as if nothing had changed and took no steps to limit the incurring of further costs. Plainly, the appellant was obliged to have reconsidered its position, which it failed to do. In *JT Publishing (Pty) Ltd v Minister of Safety and Security* 1997 (3) SA 514 (CC), (CCT 49/95) [1996] ZACC 23; 1997 (3) SA 514; 1996 (12) BCLR 1599 (CC) the Constitutional Court, having regard to the enactment of a statute, which had not by then come into operation but which, upon its coming into operation (which it was anticipated would happen shortly) would have the effect of rendering the statute there under consideration obsolete, came to the conclusion that there was no point in dealing with the repealed statute and that there was no clearer instance of an issue becoming academic and having no other interest but a historical one. The asserted justification here by the appellant for having proceeded with the appeal, is no justification at all. We are in agreement with the submissions on behalf of the respondents.

[11] The following order is made:

The appeal is struck from the roll with costs, including the costs of two counsel.

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M S NAVSA

ACTING DEPUTY PRESIDENT

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V M PONNAN

JUDGE OF APPEAL

REPRESENTATIONS:

FOR APPELLANT:	Adv. M S M Brassey SC (with him L M Malan) Instructed by: Hunts (Inc. Borkums) Attorneys, Johannesburg Phatsoane Henney Attorneys, Bloemfontein
FOR FIRST RESPONDENT:	Adv. G Marcus SC (with him S Budlender) Instructed by DLA Cliffe Dekker Hofmeyr Inc., Johannesburg Matsepes Inc. Bloemfontein
FOR FOURTH RESPONDENT:	Adv. P Kennedy SC (with him N Rajab-Budlender) Instructed by Haffegee Roskam Savage Jooste Attorneys, Pretoria Webbers Attorneys, Bloemfontein
FOR FIFTH RESPONDENT:	Adv. N H Maenetje SC (with him P G Seleka) Instructed by State Attorney, Pretoria State Attorney, Bloemfontein