IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

_____ _____

DATE SIGNATURE

CASE NO: A146/20

COURT *A QUO* CASE NR: 67517/19

DATE: JUNE 2022

In the matter between:-

RP AFRICA FLEET SERVICES (PTY) LTD Appellant

V

THE MINISTER OF HOME AFFAIRS First Respondent

ACTING DIRECTOR GENERAL: HOME AFFAIRS Second Respondent

THE DEPUTY DIRECTOR GENERAL: IMMIGRATION SERVICES Third Respondent

THE MINISTER OF POLICE SERVICES Fourth Respondent

THE NATIONAL COMMISSIONER OF POLICE Fifth Respondent

THE MINISTER OF LABOUR Sixth Respondent

SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION Seventh Respondent

ALL TRUCK DRIVERS FOUNDATION NPC (ATDF) Eighth Respondent

SIPHO SIBUSISO ZUNGU Ninth Respondent

NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT AND LOGISTICS INDUSTRY Tenth Respondent

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JUDGMENT

KOOVERJIE J

[1] This appeal is against the judgment and orders of the court *a quo* dismissing the mandatory interdict that was granted in favour of the applicant (RP Africa Fleet Services (Pty) Ltd) on 25 September 2019. The first to fifth respondents opposed

this application. They are referred to as the "DHA"[1] and SAPS"[2] respondents respectively.

[2] The appellant renders fleet management services which include facilitating the provision of foreign commercial truck drivers ("foreign truck drivers") to South African customers. In essence the applicant arranges for the services of foreign truck drivers through partner companies registered in neighboring countries. These foreign truck drivers are not employed by South African companies but are employed by foreign partner companies. These foreign truck drivers are tasked to drive trucks supplied by South African customers carrying their goods to part in South Africa from points of origin in neighboring countries.

Visitor's visas in terms of section 11(1) ad (2) of the Immigration Act[3]("the Act")

[3] In order for these foreign truck drivers to be allowed into the country to work, they had to have to be issued with a section 11(2) visitor's visa in terms of the Act. This type of visa is distinguishable from other types of visas, including a worker's visa.

[4] Section 11(1) and (2) of the Act provides as follows:

"(1) A visitor's visa may be issued for any purpose other than those provided for in Sections 13 to 24 and subject to subsection (2), by the Director

[1] The DHA respondents are the Minister of Home Affairs, the Acting Director General: Home Affairs and the Deputy Director: Immigration Services,
[2] The SAPS respondents are the Minister of Police and the National Commissioner of Police.
[3] Act 13 of 2002.

General in respect of a foreigner who complies with Section 10A and provides financial and other guarantees prescribed in respect of his or her departure: provided that such visa –

(a) may not exceed three months and upon application may be renewed by the Director General for a further period which shall not exceed three months; or

(b) may be issued by the Director General upon application of any period which may not exceed three years to a foreigner who has satisfied the Director General that he or she control sufficient available financial resources, which may be prescribed, and is engaged in the Republic in:

(i) academic sabbatical;

(ii) voluntary or charitable activities;

(iii) research; or

(iv) any other prescribed activity.

(2) The holder of the visitor's visa may not conduct work, provided that the holder of the visitor's visa issued in terms of subsection (1)(a) or (b)(iv) may be authorized by the Director General in a prescribed manner and subject to the prescribed requirements and conditions to conduct work."

[5] A foreigner entering South Africa on an (ordinary) visitor's visa is not, in terms of section 11(2) of the Act, allowed to work in South Africa. This section, however, provides the Director General with a discretion to authorise (in the prescribed

manner and subject to the prescribed requirements and conditions) that a foreigner on a visitor's visa may work in South Africa.

[6] Although these foreign truck drivers had been issued on arrival with a visitor's visa in terms of section 11(1) of the Act, they were often subjected to periodical arrest and detentions by members of the SAPS because they had not been issued with an authorization to work in terms of section 11(2) of the Act. Customs officials are said to have failed to issue a section 11(2) visitor's visa to these truck drivers.

The 31 March 2011 order

[7] On 31 March 2011 the High Court ordered that *foreign truck drivers employed by South African employers* were allowed to enter South Africa with a visitor's permit as envisaged in section 11(1) of the Act, and ordered the second respondent (the Department of Home Affairs) to grant them authorization to work as contemplated by section 11(2) of the Act. That order read as follows:

"The foreign truck drivers employed by South African employers (including the applicants) may enter the Republic of South Africa validly and legally with a visitor's permit as contemplated in Section 11(1) of [the Act].

The second respondent, insofar as he has not done so, to authorize the aforesaid foreign truck drivers including the applicants) to conduct work in the capacity in the Republic of South Africa in terms of Section 11(2) of the Act."

[8] Consequent thereto, the Deputy Director General of Immigration Services issued the Immigration Directive ("the Directive")[4] providing for the following:

"On 31 March 2011 the North Gauteng High Court issued a ruling on the subject matter above, by instructing the Department of Home Affairs to allow foreign truck drivers employed by South African employers [sic] (including applicant) admission on a visitor's permit as contemplated in Section 11(1) of the Immigration Act 2002 (Act 13 of 2002) and be authorized to conduct work in the capacity of the Republic of South Africa in terms of Section 11(2) of the said Act."

"The truck drivers are still required to meet all the admission requirements when entering and departing at the ports of entries and should also be notified that should they overstay in the Republic they will be declared undesirable. ***This directive is applicable to truck drivers employed by South African employers****.*[5] *Upon entry the truck drivers will be granted a visitor's permit under Section 11(1) subject to subsection (2) of the Immigration Act, 2002 (13) of 2002 as amended for a period not exceeding three months.*

This directive is applicable with immediate effect from date of signature until further notice and must be brought to the attention of all immigration officers at the ports of entry, therefore the cooperation of all officials at the ports of entry would be appreciated."

The urgent application before Tolmay, J

[4] Directive 12 dated 24 June 2014
[5] My emphasis.

[9] Despite the Directive having been issued, the harassment of foreign truck drivers continued. This caused the applicant to launch an urgent application claiming that foreign truck drivers were still being harassed and threatened by Immigration and SAPS officials and that they were still subjected to unlawful arrest and detentions.

[10] The urgent application served before Tolmay, J on 26 September 2019. Tolmay, J issued a *rule nisi* ordering the first, second and third respondents to comply with the obligations resting on them in terms of the Directive. More in particular, immigration officers and other persons employed by the first respondent at ports of entry who are empowered or authorised to issue visas in terms of section 11(2) of the Act, were directed to issue section 11(2) visas to foreign commercial truck drivers who qualify for such visas and to endorse and stamp the passports of such foreign commercial truck drivers who are lawfully permitted to work in South Africa ("the mandatory interdict). Members of SAPS were interdicted from arresting such commercial truck drivers only by reason that they are in South Africa and carrying on work. The eighth and ninth respondents were interdicted and restrained from assaulting, abusing, harassing and intimidating foreign commercial truck drivers and from damaging the trucks of the appellant and its customers ("the prohibitory interdict").

[11] Tolmay, J was satisfied that the appellant had an adequate interest in the subject matter of the litigation and described it as a direct interest that is not too remote. The court relying on the dictum in *Four Wheel Drive Accessory Distributors CC v Leshni Rattan N.O*[6] held that:

[6] 2018 ZASCA 124

"I am of the view that on the facts already referred to, all these requirements have been met. RP Africa certainly has a prima facie right to protect its business and customers from potential harm caused by the incidents described.

The unlawful arrest and detention and threats as set out in the papers prove that there is a very real potential that customers and employers could suffer irreparable harm if there is no intervention from the court.

The balance of convenience also favours RP Africa as the order will assist to try to alleviate the potential unlawful and violent actions of the respondents and the DHA respondents can avoid all the uncertainty by simply endorsing passports in a way that will assist foreign truck drivers to prove that they are lawfully in the country.

RP Africa, also at this point in time, definitely has no other satisfactory remedy available against the respondents against whom the order is sought".

The court a quo

[12] The return date of this *rule nisi* (which was extended to 5 May 2020 but anticipated on 12 March 2020) served before Neukiricher, J. On the return date of the said application, the third and fourth respondents joined as further parties and consequently filed affidavits.

[13] On the return date, the main contention raised by the respondents in opposition was that the Directive was only applicable to *"foreign truck drivers who are employed by South African employers"*. Since neither the appellant nor its South

African customers employed the truck drivers (which was common cause), it was argued that the appellants did not have *locus standi*. Simply put, the Directive is not applicable to foreign truck drivers referred to in this matter.

[14] Neukircher J agreed with the respondents and dismissed the application on the basis that the foreign truck drivers were neither employed by the appellant nor were their salaries paid by the appellant. The court concluded that the inherent characteristic of an employer and employee relationship is that a contractual relationship between the parties must exist and relied on the decision in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck*[7] where the term "employer" was defined as the person with whom the employee had a *contractual relationship*, no matter that he might be performing his contractual obligations for someone else. The court concluded:

"[28] [t]he applicant has no contractual relationship with the foreign truck drivers and therefore it is not their employer and they are not its employees.

[29] Therefore, in my view, the directive is not applicable to them and Mr Mooki is correct in his submission that the applicant has no locus standi to launch this application."

The appeal

[15] The appeal lies against this order. The appellant raised two main issues:

(i) The first is whether foreign truck drivers are covered and protected by the the Directive. In particular, what the ambit and purpose of the Directive is

[7] 2007 (2) SA 118 SCA at [28]

and the meaning to be ascribed to "employed by" and "employers" referred to therein.

(ii) The second is whether the appellant has *locus standi* to seek compliance with the Directive (the mandatory interdict); and to obtain an interdict to prevent government and police officials from arresting such foreign truck drivers only because they are in South Africa driving trucks for South African companies (the interdictory relief). As will be pointed out herein below, this issue of the interdictory relief is not before us.

[16] On appeal, the appellant submitted that the court *a quo*'s finding that the appellant does not have *locus standi* since it is not the *employer* of the foreign truck drivers is a too restrictive interpretation of "employer" and "employee" in the context of the Directive and therefore inappropriate. With reference to the definition of "employer" in the Basic Conditions of Employment Act[8] ("the BCEA"), the Labour Relations Act[9] ("the LRA") and the National Bargaining Council Agreement ("the NBCA"), it was submitted that a wider definition ought to find application when dealing with the Directive. This wider definition extends the ambit of the relationship between the employer and employee to include a person who permits any person to assist them in the *carrying on* or *conducting their business*.

[17] An "employee" is defined in the BCEA and the LRA to include –

"(b) any other person who in any manner assist in carrying on or conducting a business of an employer, an employment has a similar meaning."

[8] Act 75 of 1997.
[9] Act 66 of 1995.

An “employer” is defined in the NBCA to include –

“any person –

(b) who permits any person to assist them in carrying on or conducting their business; and employ have a similar meaning”.

[18] Elaborating on this submission, the appellant argued that, in applying this wider interpretation, the appellant falls within the definition of a “South African employer” as required in the Directive. It was further submitted that consideration must be given to the role the appellant plays with respect to the foreign truck drivers and the local customers: These foreign truck drivers are clearly assisting in the carrying on of the business of both the appellant and its South African customers, more particularly in that:

(i) the appellant is the entity who assigns the services and provide such services to local customers;

(ii) the drivers are expected to drive carefully and look after the goods transported by them;

(iii) the appellant contracts with these customers for the provision of services which include goods being transported cross-border by foreign truck drivers as well as with its affiliated companies in neighboring states;

[19] On this basis, the appellant does have *locus standi*. Since the appellant contracts with its customers and provides services which includes cross-border driving by foreign truck drivers, it would constitute a breach of contract if the foreign truck drivers are not permitted to transport the goods for the South African customers.

The appellant is therefore directly affected if it cannot fulfill its contractual obligations towards its customers.

[20] More particularly, the appellant illustrated that its interests were directly affected, in the following manner:

(i) it has established that cross-border officials were not always implementing the requirements of the directive;

(ii) the contractual relationship with the appellant's customers are being directly affected;

(iii) customers will look to the appellant for damage to its trucks and loss of business due to the arrest of foreign truck drivers;

(iv) the appellant secures the employment of foreign truck drivers and is duty bound to take all reasonable steps within its power to ensure their safety.

[21] With regard to the mandatory relief sought, I am, however, not persuaded that the appellant has *locus standi* in respect of the enforcement of the Directive. I will now briefly set out my reasons for saying so.

[22] It is common cause that the truck drivers are employed by foreign partner companies located, *inter alia*, in Zambia and Zimbabwe and not by any South African company. They have entered into their respective employment contracts with the foreign partner companies and their salaries are paid by the said partner companies as is evidenced by their salary slips. On the face of it, they are the employees of these foreign partner companies. This much is common cause.

[23] The National Bargaining Council for the Road and Freight and Logistics Industry, has issued jurisdictional rulings on the issue whether these foreign truck drivers may be regarded as “employees” within the context of South African labour laws. In terms of various jurisdictional rulings by the tenth respondent it was held that since the truck drivers were not employed by South African employers, it did not have the requisite jurisdiction to adjudicate the disputes referred to it.

[24] On closer reading of the express words used in the Directive, the appellant’s reliance on the wider interpretation does not, in my view, have credence, more particularly in that:

(i) The Directive applies only to *“drivers employed by South African employers”*. The order of 31 March 2011 and which gave rise to the issuing of the Directive also made reference to *“truck drivers employed by South African employers”*.

(ii) The appellant’s proposition that as a provider of management services which involves the provision of foreign commercial truck drivers to its South African customers, its interests are directly affected, and as such, has *locus standi*, in my view, is misplaced. The Directive finds no application under the said circumstances as the foreign truck drivers in question are not employed by the “South African employer” as envisaged in the Directive.

[25] In the premises, the court *a quo* was correct in finding that the appellant was not a South African employer and therefore does not have the requisite *locus standi* in respect of the Directive. The Directive finds application only to foreign truck drivers employed by South African employers.

[26] In light of this finding the appellant is not entitled to the relief sought in prayers 2, 3 5 and 6 of the Notice of Motion which pertains to the enforcement of the Directive (mandatory relief).

Prohibitory Interdict

[27] As earlier stated in this judgment, Tolmay J issued a *rule nisi* which amongst others interdicted members of SAPS from arresting the foreign commercial truck drivers only by reason that they are in South Africa and carrying on work; and further, interdicted and restrained the eighth and ninth respondents from assaulting, abusing, harassing and intimidating foreign commercial truck drivers and from damaging the trucks of the appellant and its customers ("the prohibitory interdict").

[28] On the return date of the *rule nisi* which served before Neukircher J only the issue of the *locus standi* of the appellant was entertained which involved the mandatory interdict. The *rule nisi* pertaining to the prohibitory interdict was not entertained by that court nor was the return date extended. This is common cause.

[29] In argument in court, counsel for the appellant requested the court to confirm the *rule nisi* pertaining to the prohibitory interdict on the basis that it was not opposed before Neukircher J and before this court.

[30] It is, however, my view that even if there is no opposition to this issue it cannot be dealt with by this court for the reasons that follow hereunder:

(i) Firstly, the judgment of Tolmay J in which the rule nisi was issued, is not on appeal before this court. Therefore, this court can neither confirm nor discharge the rule nisi.

(ii) Secondly, when the rule nisi served before Neukircher J she did not per se deal with the prohibitory interdict, and, as such, she did not make an order that could be appealed by the appellant – hence the interdict is not before this court.

(iv) Thirdly, Neukircher J did not extend the rule nisi and it has as a result lapsed. The appellant has to apply for the revival of the rule nisi, which application cannot serve before this court.

(v) Lastly, the appellant's counsel conceded in answer to a question put to him by this court that the prohibitory interdict was not included as one of the grounds of appeal set out in the notice of appeal, therefore, it cannot be said to be before this court.

[31] In the premises, therefore, the following order is made:

The appeal is dismissed with costs, which costs include the cost of senior counsel where so employed.

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H KOOVERJIE

JUDGE OF THE HIGH COURT

I agree

_____

M KUBUSHI

JUDGE OF THE HIGH COURT

I agree

_____

AC BASSON

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Appellant:	*Adv P Strathern SC*
Instructed by:	*Hinrichsen Attorneys*

c/o Friedland Hart Solomon & Nicholson Attorneys

Counsel for the Respondents:	*Adv O Mooki SC*
	Adv S Luthuli
Instructed by:	*The State Attorney*
Date heard:	*25 May 2022*
Date of Judgment:	*June 2022*