

07 February 2024

INDUSTRY CIRCULAR

Response to ISS Press Release

1. On the 25th of January 2024 ISS published an article in the press headed *“Innovative Staffing Solutions Legal Victories and Updates”* The article was fraught with factual inaccuracies and certain allegations are defamatory in nature. The purpose of this article is to correct the facts alluded to by Mare, the MD of ISS in his article.
2. To date, ISS has failed in all attempts to persuade the Labour Court and arbitrators that it is not a Temporary Employment Service. All attempts by ISS to stay or postpone the operation of the demarcation award dated 2 March 2021 declaring ISS a TES have been dismissed by the Labour Court, Labour Appeal Court and the Constitutional Court.
3. ISS has brought review applications against the Bargaining Council and Minister of Labour as alluded to in the article. It is the Bargaining Council's view that these applications have no prospects of success. ISS neglects to mention that Part A of ISS's review application against the Bargaining Council and the Minister of Labour has already been dismissed by the Labour Court. The remaining parts of the review application will in all likelihood be rendered moot before the time they are heard in the Labour Court.
4. In the article Mare also refers to a matter in which it alleges that it brought an urgent application in terms of Section 33A of the LRA. ISS launched an application in which it sought to relief based on the application of section 33A(4) of the LRA.

Judge Snyman dismissed ISS's application on 2 June 2023. The statement by Mare that *"Judge Snyman found that a non-party should object to the proceedings. The National Bargaining Council for the Road Freight and Logistics Industry must request the CCMA to appoint a CCMA Commissioner."* is factually incorrect. Judge Snyman in his analysis of the arguments put forward by ISS referred to Section 33A and confirmed that Section 33A(b) states that "if a party to an arbitration in terms of this section is not a party to the Council objects to the appointment of an arbitrator in terms of paragraph (a), the Commission on request by the Council must appoint a Commissioner."

5. Furthermore, in Snyman's judgment, ISS was previously warned against making unfounded blanket accusations against Commissioners simply because they are NBCRFLI-appointed Commissioners. Judge Snyman emphasized, [45] *"In sum, there is simply no case in existence in casu that an arbitrator appointed to preside over any enforcement proceedings, in which ISS and its clients are involved, would necessarily be biased just because that arbitrator may be affiliated with the NBCRFLI in some way...And finally, whether a particularly appointed arbitrator may be biased is similarly a case based on the facts of that particular case as and when they arise."*
6. Judge Snyman went on further to state, [45] *"But in casu, other than unfounded assertions and speculation of possible bias of 'affiliated' arbitrators that may be appointed to preside over enforcement arbitrations against ISS and its clients, there is actually no case of bias made out by the applicants that could serve as basis for the kind of relief they seek, which is simply not appropriate."*
7. Regrettably, ISS repeatedly continues to make unfounded statements of bias against NBCRFLI-appointed Commissioners.
8. Mare in the article makes reference to a ruling issued by Senior CCMA Commissioner Myhill on the 13th of December 2023, under case numbers GAUREG 514/22, FAU121/17661 and GAU097/22.

9. In this matter the Council sought to enforce its Main Collective Agreement against two of its members and ISS. ISS and the two members brought an application in which it alleged that the Commissioner had no jurisdiction to arbitrate the disputes on various grounds one being that Council cannot rely on ISS being a TES in the absence of evidence and the other being that the other being that the Commissioner has no jurisdiction to enforce any of the provisions relied upon by the to compel compliance with the collective agreement as the enforcement proceedings have been instituted outside a reasonable time period.
10. Senior Commissioner Myhill agreed with the Bargaining Council that the demarcation award which declared ISS a temporary employment service is valid and binding on ISS and all of its clients as well as prospective clients, in his ruling held that *“The Award is applicable to ISS’s services/operations and binds all of ISS’s clients who utilize ISS’s services in terms of the SLA.”* [76]
11. In support of his findings, the Senior Commissioner relied on the Labour Court Order (per Mahosi J), dated 24 November 2021, in *Innovative Staffing Solutions (Pty) Ltd v NBCRFLI*, where the Labour Court ordered the following.
 - 11.1.1 ISS is interdicted from holding out to any road freight companies that it is entitled not to comply with the NBCRFLI’s MCA or that s.198(3) of the LRA is not applicable to its operations;
 - 11.1.2 ISS is interdicted from advising any road freight companies that, if it engages its services in terms of its standard service level agreement, employees will no longer be subject to the provisions of the NBCRFLI’s MCA;
 - 11.1.3 ISS is required to comply with the provisions of the NBCRFLI’s MCA.
12. Senior Commissioner Myhill held that *“Mahosi, J thus effectively recognized the validity of the said demarcation award and held that it was binding on ISS and its present and prospective clients in the road freight industry to which ISS provided its services in terms of its standard level agreement.”* [para 72]

13. In terms Mahosi, J Court Order, ISS was required to register with the Council as a TES and to comply with the Council's Main Collective Agreement which to date it has refused and remains in breach of the Court Order.

14. Importantly, Senior Commissioner Myhill held that ISS's clients are jointly and severally liable for their contraventions of the Bargaining Council's Main Collective Agreement. The Senior Commissioner relied on section 198(4) of the LRA which states: [para 57]

"The temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any of its employees, contravenes –

(a) a collective agreement concluded in a bargaining council that regulates terms and conditions of employment;

15. In essence this means that the Bargaining Council is entitled to directly claim relief in enforcement proceedings against ISS's clients and prospective clients regardless of whether they have entered into a Service Level Agreement with ISS. Clients of ISS therefore will not be able to hide behind ISS to circumvent the MCA in enforcement proceedings. ISS's clients that continue to engage with ISS by virtue of the Service Level Agreement will be held directly liable and will be required to pay the NBCRFLI for their contraventions of the MCA in enforcement proceedings.

16. Senior Commissioner Myhill ruled that the Bargaining Council should institute enforcement claims within 90 days. No time period is prescribed in the LRA or the MCA. The Councils position is that Senior Commissioner Myhill's finding that a 90-day period is reasonable for issuing of a claim is wrong and has reserved its right to take the matter on review to the Labour Court at the appropriate time.

17. Unlike demarcation awards which are ratified by NEDLAC and distinguishable from ordinary arbitration awards, the 90-day ruling of Commissioner Myhill is not binding on other commissioners. ISS claims that the 90-day period for issuing compliance orders is a ground breaking victory but neglects to mention that Senior Commissioner Myhill ruled that the Bargaining Council is entitled to apply for

condonation which is pending before the CCMA. Furthermore, ISS does not mention that all future compliance orders issued by the Council that fall within a 90 day period may be enforced directly against ISS members without the need to apply for condonation.

18. The Bargaining Council has explained in its condonation application that it has faced ongoing litigation instituted by ISS and its clients which included litigation to suspend the operation of the demarcation award which caused delays and uncertainty in the industry.
19. The term “exploitation” used against the Bargaining Council by Mare in the article is not only without any factual or legal basis but is also defamatory. The Bargaining Council is within its right to enforce its main collective agreement.
20. The bald allegation by Mare that *“the NBCRFLI and various bargaining councils often filed enforcement proceedings late as an exploitation tactic and the allegation that “This ruling will prevent them from doing this moving forward is devoid of any truth, has no factual or legal basis and is defamatory against the Council and all other bargaining councils. It is the first time that any ruling has been made dealing with what constitutes a reasonable time period. the ruling is only binding on the parties to the dispute, other commissioners are not bound by the finding of Myhill.*
21. Mare alludes to a stakeholder newsletter published by the Council in which he alleges that it is riddled with defamatory accusations towards ISS. This is factually incorrect. The Council highlighted areas of concern in the newsletter namely the truck attack which resurfaced in July 2023 placing the sustainability of the Council at stake and a legal smear campaign by ISS. This paragraph was misinterpreted by ISS who believed that Council was accusing it of posing a challenge to the sustainability of the trucking and road freight industry by grouping it with truck attacks and torching.
22. The Council acknowledged that the use of the word smear campaign was poor choice of words and published the following retraction: *“In the stakeholder newsletter sent out on the 19th of December 2023, the Council referred to one of*

the challenges being faced by it in 2023 was a “legal smear campaign” by ISS. The Council retracts this statement. The challenge being referred is the ongoing litigation between ISS and council and the continued refusal by ISS to comply with the Councils Collective Agreements.”

Yours Faithfully

National Secretary

(This document has been sent electronically and it is therefore not signed)