

SOUTH AFRICA / JUDGMENT

IT Knowledge and Expertise CC v Verwey and Another (J2650/14) [2014] ZALCJHB 483 (5 December 2014) [2014] ZALCJHB 483

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhamajane

CASE / FILE NUMBER

J2650/14

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J 2650/14

IT KNOWLEDGE AND EXPERTISE CC.....Applicant

and

ADELAIDE VERWEY.....First Respondent

THE SHERIFF OF THE COURT, JOHANNESBURG EAST.....Second Respondent

Heard: 7 November 2014

Delivered: 5 December 2014

TLHOTLHALEMAJE, AJ

Introduction:

- [1] The Applicant brought this application before the court on an urgent basis in terms of which it sought an order staying the writ of execution issued by the Registrar of this Court at the instance of the First Respondent (Verwey). In terms of the writ issued, the Second Respondent (Sheriff) is directed to take into execution, certain property belonging to the Applicant. The Applicant further sought an order interdicting the Sheriff from removing the goods already attached pending the review application it had brought before the court. In

the event that the application is unsuccessful, the Applicant had in its replying affidavit, indicated its intention to launch an interpleader, as some of the items attached on the Sheriff's inventory do not allegedly belong to it. Verwey did not take up the issue of urgency any further despite the fact that the matter was postponed on 4 November 2014 to 7 November 2014 in order to enable the Applicant to file its replying affidavits. However since Verwey is in possession of a writ of execution, which the Sheriff had already acted upon, the matter will still be treated as urgent.

Background

to the application:

[2] Verwey was employed by the Applicant with effect from August 2009 as a personal assistant as well as office manager. She was dismissed following upon a disciplinary enquiry held in July 2010 into a plethora of charges related to misconduct against her. Following her dismissal, she then referred a dispute to the Commission for Conciliation, Mediation and Arbitration. A conciliation meeting held on 18 August 2010 was unsuccessful, and Verwey referred the dispute for arbitration. The arbitration

hearing was held on 15 February 2011, which resulted in an arbitration award being issued on 21 February 2011. In terms of

the award, Verwey's dismissal was found to be procedurally and substantively unfair, and she was awarded compensation in the amount of R83 832.00

[3] Aggrieved at the arbitration outcome, the Applicant had through its then attorneys of record, History Matukane Attorneys (Matukane),

filed a review application in terms of section 145 of the LRA on 11 April 2011. Verwey's contention is that the review

application was filed 8 weeks after the Applicant admitted receipt of the arbitration award, and further that the application was not properly served in terms of the Rules of this Court on her, the CCMA and the Commissioner, thus rendering it defective. On the Applicant's version, it has yet to be furnished with a copy of the recordings of the arbitration proceedings by the CCMA, and Verwey's answering affidavit to that review application.

[4] On or about 2 November 2011, Verwey had launched an application in terms of section 143 of the LRA to certify the arbitration award. Despite the Applicant's contention that this application was opposed, the CCMA had nevertheless certified the arbitration award in terms of section 143 of the LRA, enabling Verwey to approach the Sheriff to attach its property in order to satisfy the award. On 5 February 2013, the Applicant had filed an urgent application to stay the writ under case number JR784/11. That application is dated 11 December 2012, and Verwey again contends that this application was similarly defective, as it was not served on her. It appears that the Applicant never pursued the application.

- [5] Verwey had instituted proceedings in terms of Rule 11 of the Rules of this court to dismiss the review application under case number JR784/11. The Applicant denies knowledge of this application, whilst Verwey contends that Makutane was informed of the intention to bring such an application as early as 18 March 2014, which in any event it had served on Makutane on 28 March 2014 and on the applicant by registered mail.
- [6] Despite a notice of set-down sent to Makutane on 12 August 2014 in respect of the Rule 11 application, the matter was heard on an unopposed basis on 21 October 2014, and the review application was subsequently dismissed. On 21 October 2014, the Sheriff had attended at the premises of the Applicant in order to attach property valued at R83 832.00. The Applicant had then approached its current attorneys of record to launch the present application
- [7] The Applicant essentially blames Makutane for not attending to the matter promptly and or failing to take the necessary steps to have the review application heard. It was contended that the new attorneys of record have since also filed an application to rescind the court order in terms of which the review application was dismissed.
- [8] Verwey's contention on the other hand was that the Applicant cannot merely blame Makutane, as it was also not interested in pursuing the matter promptly. She contended that the Applicant had more than enough opportunity to enquire into the matter and ensure that it was finalised since it held the view that the CCMA had made an erroneous award.

The legal framework and evaluation:

- [9] Prior to dealing with the approach followed by this court in dealing with applications to stay writs of execution, a few observations need to be restated in view of this court being inundated with such applications. In *Chilibush Communications (Pty) Ltd v Michelle Gericke & others* Molahlehi J had lamented over various types and categories of cases that are regularly before this court wherein parties seek to stay writs of execution. These are:

9.1 Cases where there is a clear abuse by an employer of the process. In this instance the process of staying of a writ of execution is used to frustrate and delay the employee in enjoying the fruits of the arbitration award issued in his or her favour.

9.2 Other such applications quite often involve insignificant compensation amounts.

9.3 In some instances, the employer does nothing in the form of challenging the award but waits until the employee takes steps to

have the award enforced. The first time that the employer reacts in these types of cases is when the Sheriff arrives at its premises to attach property to realize the debt arising from the arbitration award.

9.4 Aligned to the above, some employers when suddenly confronted by the Sheriff would rush to Court with a half-baked review application, and an urgent application to stay the writ.

9.5 The other type of cases are those where the employer has initiated steps towards or has commenced with review or a rescission

application and does nothing, until the employee instructs the Sherriff to attach.

[10] Added to the above are instances as in this case, where the employers in the face of an unfavourable award allegedly instructs attorneys to file a review application, and thereafter fold their arms and take no steps in ensuring that their instructions are carried through. When faced with attachment orders, these employers then wash their hands of any wrongdoing, blame the circumstances they find themselves in on their inept legal representatives, and expect newly instructed attorneys to perform miracles and succeed in staying the writs of execution.

[11] In *Chilibush*, Molahlehi J had also summarised the approach of this court in dealing with applications to stay a writ of execution pending a review or rescission application in the following terms;

‘In terms of section 145(3) of the LRA, the Court has the discretion to stay the enforcement of the arbitration award pending the outcome of the review application. This discretion which is very wide has to be exercised judicially taking account certain factors. The most important consideration in the exercise of the discretion is whether there is a pending underlying cause of action arising the arbitration award or in certain instances arising from the Court order. There is a wide range of factors which the Court will take into account in considering whether or not to order a stay of the execution of an arbitration award, the most important of which is whether the interest of justice supports the stay of execution pending the finalization of the review or rescission application.’

The factors which the Court will take into account are:

- a) Whether the stay of the writ based on the underlying causa was filed timeously filed,
- b) The existence of prospects of success in the review or rescission application;
- c) The interest of all parties in securing finality;
- d) The cost of the delay in finalising the matter to all the parties;
- e) the cost to all parties of instituting or opposing further proceedings
- f) The risk of injustice being done to the less powerful party to the dispute.

[12] In *Gois t/a Shakespeare’s Pub v van Zyl & Others*, it was held that this court will favourably consider granting the stay of execution when “real and substantial justice requires such a stay or, put differently, where injustice would otherwise result”. Waglay J (as he then was) had added that in exercising its discretion to grant a stay of execution, a court is not required to take the merits of the underlying attack on the causa of the writ into account. It is sufficient that there must be a possibility that the causa underlying the writ may ultimately be removed. An applicant is accordingly not required to satisfy the court of the

existence of prospects of success in the principal dispute; and further that an application for a rescission, review or variation of an award qualifies as an attack on the causa underlying the award.

- [13] In reconciling the approaches in *Gois and Robor*, *Ngcukaitobi AJ in City of Johannesburg v South African Municipal Workers Union obo Motaung and Others* held that the two approaches might appear to be at odds with each other on the issue of the relevance of prospects of success in the underlying challenge to the causa of a writ. I am in agreement with *Ngcukaitobi AJ* that that these approaches are not necessarily irreconcilable and are instead compatible with each other, as the principle permeating in both is the need to take into account the interests of justice.
- [14] The application under consideration typifies a combination of the types of cases *Molahlehi J* had identified in *Chillibush*. It was common cause that there was an award in favour of *Verwey*. The review application launched is alleged to be defective as it was not served on *Verwey* hence a lack of answering affidavits in that regard. As at the hearing of this application, the provisions of Rule 7 of the Rules of this Court had not been complied with, as a record of proceedings had not yet been filed.
- [15] The award was further certified through the provisions of section 143 of the LRA. An urgent application initially launched to stay the writ of execution subsequent to the section 143 of the LRA application does not appear to have seen its day in court, and it is apparent that it was merely launched to frustrate *Verwey*. Thereafter there was an application in terms of Rule 11 of the Rules of this Court, which was granted in default, resulting in the dismissal of the review application. Following attempts at executing the writ, the Applicant has suddenly approached the Court with an application for rescission. In all of this, the Applicant attributes the blame squarely on *Matukane*, and expects its newly instructed attorneys to perform miracles.
- [16] In this case, the Applicant had clearly instructed *Makutane* to attend to the review application and thereafter washed its hands off the matter. It is trite that a litigant cannot expect leniency from the courts by simply blaming ineptness on the part of its chosen legal representatives. This point was long made in *Saloojee & another v Minister of Community Development*, where it was further added that there is a limit beyond which a litigant cannot escape the results of his attorneys' lack of diligence.
- [17] It is therefore required of any litigant, especially one that claims to be a layperson as the Applicant does, to not only issue

instructions to its chosen representatives but to also ensure that its instructions are carried through to the letter. In this case, the Applicant had merely instructed *Makutane* to file a review application and had on its own version, "merely entrusted its attorneys to act in its best interest and therefore never questioned the attorneys' actions". Further on its version, the Applicant was duly invoiced and had paid *Makutane*. This was despite its alleged attempts to ascertain the status of the matter, which proved to be unsuccessful. Surely if a client has paid an attorney for services

allegedly rendered, results should be visible, more specifically an update on the status of the litigation should be required and obtained. The Applicant's contention that it had since laid a complaint with the Law Society is in my view, little comfort for Verwey, who is unable to act on an award received almost four years ago.

- [18] Amongst factors that are relevant to the question whether the interests of justice require a stay of execution include the question whether the attack on the underlying cause of action was brought in time. The interests of justice will not warrant a stay of the writ in circumstances as in this case, where the review application as matters stand is not properly before the court as it was not served on Verwey, or in the alternative, no means have been taken to ensure that it is timeously prosecuted. Furthermore, notwithstanding the Applicant's contentions, the prospects of success in respect of the review application are not necessarily a primary consideration on their own.
- [19] The fact that the Applicant has not made any efforts in compliance with the provisions of Rule 7 of the Rules of this Court in pursuance of the review application is a factor that counts against it. The Applicant's contention that it is still waiting for such a record from the CCMA is clearly not an excuse, in the light of the absence of any indication as to what was done to secure that record from the CCMA. All that appears to have been done in this regard appears to be Matukane's letter sent to the CCMA on 13 December 2011 in this regard, and nothing else thereafter. Furthermore, the Rule 11 application was unopposed, and as things stand, that review application has since been dismissed. The rescission application may also be the underlying causa to attack the award. However, that attack prima facie, appears insurmountable in view of the problems pertaining to the review application as set above, including the fact that an application for condonation may also be necessary in respect of that application.
- [20] A further consideration is the issue of finality that the parties are entitled to in this case. The award was issued on 21 February 2011, and Verwey is entitled to finality. She cannot continuously be inconvenienced by the ineptness of the Applicant's chosen representatives, and she is entitled to finality. In the light of the Applicant's previous propensity to bring applications to this court which it had not bothered to see through, resulting in further costs to Verwey who is obviously in a less powerful position in this dispute, she faces more risk of injustice being done to her. In the circumstances, the interests of justice do not support the stay of execution. Further having taken into account the interests of law and fairness, it is my view that Verwey should be entitled to costs.

Order:

The application to stay the writ of execution issued by the Registrar of this Court is dismissed with costs.

Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Mr. C Levin of Clifford Levin Attorneys

For the First Respondent: Ms. J Keet of Keet Attorneys

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