

SOUTH AFRICA / JUDGMENT

**Statistics South Africa v NEHAWU obo
Netshivungululu and Others
(J2110/2016; J2078/16) [2016] ZALCJHB
367; J2078/16 (27 September 2016)
[2016] ZALCJHB 367**

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhemaje

CASE / FILE NUMBER

J2110/2016; J2078/16

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IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J2110/2016

Case no: J2078/16

In the matter between

STATISTICS SOUTH AFRICA Applicant and NEHAWU obo NETSHIVUNGULULU AND ANOTHER
First Respondents MR. S ISMAIL NO. THE SHERIFF, PRETORIA SOUTH WEST Second
Respondent

Heard: 20 September 2016

Delivered: 27 September 2016

TLHOTLHALEMAJE, J.

Introduction:

- [1] There are two urgent applications for consideration before the court. The first was brought by the applicant to seek an order rescinding and setting aside an order granted by this Court on 31 August 2016 under case number J55/15 in terms of which an arbitration award issued under the auspices of the PSCBC was made an order of court. The applicant also seeks an order setting aside writs of execution issued by this court on 8 and 12 September 2016 under

case number J55/15; and for the second respondent to be ordered not to attach any property, and to return any property that has already been attached pursuant to the writs.

- [2] The second application under case number J2110/16 was also brought on an urgent basis by the Employees (Messrs Isaac Netshivungululu and Kenneth Ngubegusha). They seek an order interdicting their suspensions and any disciplinary measures that may be taken against them by the applicant. As shall become clearer, the two applications are interrelated, and were consolidated upon a directive issued by Van Niekerk J .
- [3] Given the fact that the second respondent had already attached and removed certain properties, which do not even belong to the applicant, and further having considered the circumstances of the case, the first application will accordingly be heard on an urgent basis.

Background:

- [4] The dispute before the court dates back to January 2010 when the applicant advertised two permanent positions within its Census Operations Division (Census Public and Stakeholder Relations). These positions were advertised at salary levels 12. The PSCBC subsequently passed Resolution 3 of 2009 in terms of which salary levels 10 and 12 were abolished. Having applied for the positions, the Employees were shortlisted and interviewed. They were informed during the interviews that by virtue of the provisions of Resolution 3 of 2009, the positions were now to be offered at salary level 11. The Employees then accepted the positions at that salary level, and signed contracts of employment in that regard.

- [5] The PSCBC subsequently passed Resolution 1 of 2012 in terms of which the salary levels abolished under Resolution 3 of 2009 were

reinstated[1]. The effect of the new resolution according to the applicant was that the Employees had to undergo a job evaluation and grading process before they could be upgraded to salary level 12.

- [6] Two separate disputes were referred to the PSCBC in terms of section 24 of the LRA relating to the interpretation and application of Resolution 1 of 2012. The first dispute was referred collectively by various unions, viz, NEHAWU, PSA, NUPSAW and HOSPERSA under case number PSCB 13/14. The Department of Public Service and Administration (DPSA) was cited as the only respondent in that matter. This dispute came before Commissioner KD Matji, who had issued an award (The Matji award) on 6 June 2014 in the following terms;

‘[63] Clause 18.1 of Resolution 1 of 2012 should not be effected in a staged and/or staggered approach or in a manner that differentiates between categories of employees especially core and corporate service employees.

- [64] The Respondent must apply the clause indiscriminately to all employees whose posts on 1 August 2012 were graded on salary levels 10 and 12 and to appoint and remunerate them accordingly on salary levels 10 and 12 respectively.

[65] There is no order as to costs'

[7] The applicant's contention is that the 'Matji award' was not made against it, nor did it result in the Employees being entitled to any relief, specifically since their posts were never graded on salary level 12.

[8] NEHAWU subsequently referred another dispute to the PSCBC under case number PSCB745-14/15, on behalf of the Employees, citing the applicant as the respondent party. That dispute also concerned the provisions of Resolution 1 of 2012, with the Employees contending that since their posts were advertised at post level 12, they should be upgraded to that level. The matter came before Commissioner Nsibanyoni who had issued an award ('The Nsibanyoni award') on 10 February 2016. The Commissioner's findings were that the Employees were at salary level 11 at all material times and were never graded. The Commissioner also made a finding that clause 18.1 of Resolution 1 of 2012 did not apply to the Employees as they were not graded. The Employee's claim was

accordingly dismissed.

[9] On 20 January 2015 NEHAWU on behalf of the Employees subsequently approached the Court under case number J55/15 in terms of the provisions of section 158 (1) (c) of the LRA, to make the 'Matji award' under case number PSCB 13/14 an order of Court. The applicant, the DPSA, the State Attorney and Minister in the Presidency Planning, Monitoring and Evaluation were cited as the respondent parties. The matter came before Whitcher J on 9 June 2015 and was postponed to afford the applicant and opportunity to file a supplementary affidavit. It again came before Coetzee AJ on 1 September 2015, and was postponed sine die to afford the applicant an opportunity to file an answering affidavit together with an application for condonation. On 31 August 2016, Van Niekerk J granted the order in terms of section 158 (1) (c) of the LRA.

Evaluation:

The application to rescind and set aside the Van Niekerk J's order:

[10] Section 165 of the LRA provides that;

'Variation and rescission of orders of Labour Court

The Labour Court, acting of its own accord or on the application of any affected party may vary or rescind a decision, judgment or order –

- a) erroneously sought or erroneously granted in the absence of any party affected by that judgment or order;
- b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
- c) granted as a result of a mistake common to the parties to the proceedings'.

- [11] To the extent that the applicant is relying on the provisions of section 165 (a), the principles governing rescission of court orders on that ground are trite. A judgment or order is erroneously granted if there existed at the time of its issue, a fact of which the judge was unaware of which would have precluded the granting of the judgment and which would have induced the judge (if aware of it) not to grant the judgment[2]. Furthermore, it has been held that a party may have an order of the Labour Court rescinded under section 165(a) if it is shown that the order was erroneously sought or granted in the absence of that party. Whether the court grants a rescission application under this provision does not depend upon the applicant showing good or sufficient cause (i.e. reasonable explanation for the default and a reasonable defence to the claim). It is enough if the order was erroneously sought or granted in the absence of that party[3].
- [12] In this case, it is accepted that the section 158 (1) (c) of the LRA application under case number J55/15 was properly served on the applicant. The fact that the Applicant had changed attorneys of record does not assist its contention that it was not aware of the application. The orders of Coetzee AJ and Whitcher J as indicated elsewhere in this judgment clearly indicate that the applicant was fully aware of that application. It had clearly attended to the matter through its erstwhile attorneys of record, and on no less than two occasions, it was afforded an opportunity to file opposing or supplementary papers in that regard.
- [13] Flowing from the applicable principles to rescission applications as set out above, it is however of no consequence that the Applicant is unable to demonstrate good cause where it can be shown that the order was erroneously sought and/or obtained. In my view, the circumstances of this case point to the order having been erroneously sought for the reasons advanced by the Applicant. To reiterate, the dispute referred for arbitration under case number PSCB 13/14 resulting in the 'Matji award' was between various unions, including NEHAWU and the DPSA. The applicant in this case was not a party to those proceedings. At no point was an application for a joinder under Rule 22 of the Rules of this Court made to join the applicant. Even then, such a joinder application in any event would not have been competent in circumstances where a final order or judgment had already been rendered[4].
- [14] To the extent that it might be argued that the 'Matji award' is applicable to the Employees by virtue of the fact that NEHAWU had referred that dispute on their behalf, there is yet another hurdle that they need to surmount. In approaching the court in terms of section 158 (1) (c), the NEHAWU had cited the applicant and a variety of other respondents who were not party to the arbitration proceedings in the first place.

[15] The second hurdle is that the 'Matji award' is not an award sounding in money. It merely related to the interpretation and/or application of particular provisions of Resolution 1 of 2012, and to the extent that this award would have been made an order of court, that would merely have been to compel the DPSA in particular, to implement those provisions in a particular manner. As to whether that process if enforced would ultimately have had financial benefits for employees that duly qualified is another

matter altogether. However, as per the 'Nsibanyoni award', the Employees' claim against the applicant was dismissed as they were found not to qualify for the levels they sought as they had not been graded. It follows that on these grounds, the Van Niekerk J's order ought to be rescinded, even moreso for grounds as set out further below.

The writs of execution:

[16] Having obtained the order in the manner that they did, the Employees then presented it to the applicant on 6 September 2016. Attached to the order was an affidavit in which the Employees had calculated the amounts they alleged they were entitled to. On 9 September 2016, the second respondent attended to the applicant's premises and presented it with the first writ of execution in the amount of R315 176.34 owed to Netshivhungululu. The writ of execution had been issued by the Registrar of this Court on 8 September 2016.

[17] On 12 September 2016, Ngubegusha personally served the applicant with a second writ of execution in terms of which an amount of R2 315 176.34 was due to him. That writ was issued on 12 August 2016.

[18] The two writs of execution are peculiar for a variety of reasons. The first is that both were issued in the name of 'Isaac Netshivhungululu and another'. Despite being purportedly issued as based on the Van Niekerk J's order, they were nevertheless issued on different dates and in respect of different amounts.

[19] Even more worrying though is the fact that the second writ was issued on 12 August 2016 when the Van Niekerk J's order was only issued on 31 August 2016. It is indeed highly irregular and unusual that a writ of execution can precede a court order. To the extent that this writ bears two different dates and further does not bear an official Court stamp, there is a need for the office of the Registrar to give an account of how that writ was issued without a valid court order, or in the alternative, to explain

how a monetary amount found its way in the writ.

[20] The court order made no reference to any amounts due to the Employees. It is apparent that they made out their own amounts for the purposes of obtaining the writ, and it is inexplicable how the office of the Registrar could have issued the writs in circumstances where the court order made no reference to any amounts payable. Parties are not entitled to thumb-suck any amounts that they think are due to them for the purposes of obtaining a writ of execution. Any amounts reflected on the writ must as further illustrated below, be in conformity with the court order or judgment.

- [21] The requirements of a valid writ of execution entail that there must be a judgement liability in which the debt or other obligation of the judgement debtor, which is to be enforced by the sheriff, is specifically set out and described. A valid judgement or order is a prerequisite for the issuance of a writ. As a rule, only one writ of execution may be issued in respect of one judgement.
- [22] It is further trite that a writ may be set aside on a variety of grounds, including that the writ had not been issued in conformity with the judgment; or where the wrong party/entity is named therein as a party[5]. The two writs as issued on different dates in this case ought to be set aside on the basis that they emanate from one judgment or order; that they were not issued in conformity with the order in that nowhere in the order is any amount of money mentioned; and lastly, to the extent that the 'Matji award', formed the basis of that order, that award was not issued against the applicant. Finally, the 'Van Niekerk J's order' did not sound in money, and cannot therefore be enforced by levying of a writ of execution. Only contempt proceedings would have been appropriate, and even then to the extent that the 'Matji award' was binding on the applicant or issued against it. In the light of all these factors, the writs ought to be set aside.

The suspension of the Employees:

- [23] For the sake of expedience and consistency, the parties in second application urgent application will be referred to as 'the Employees' and 'the applicant'. According to the Employees, having served the 'Van Niekerk J's order' on the applicant on 6 September 2016, the latter's written response on 9 September 2016 was that it would not comply with that order.
- [24] Having further obtained the writs of execution, and after the second respondent had attached certain movable properties of the applicant on 14 September 2016, the Employees were then summoned to the office of the Statistician General (Mr Pali Lehohla) and issued with letters of intention to suspend them. They were given until 15 September 2016 to show cause why they should not be suspended. The allegations against them was that they had committed serious acts of misconduct by making a claim against the applicant. They however contend that the 'intention to suspend is both unfair and procedural' (sic).
- [25] In opposing the urgent application, the applicant's contention was that having been served with the court order and the writs, it had investigated the circumstances under which the Employees had obtained those writs. Its contention was that the Employees had obtained the writs in circumstances that constituted misconduct and had accordingly suspended them.

[26] It needs to be stated from the onset that the Employees' urgent application is bare, thin in substance and particularity, and does not set out the basis upon which the matter should be accorded urgency, let alone be granted. It is trite that other than satisfying the requirements of Rule 8 of the rules of this Court, the Employees to be successful, and to the extent that they seek final relief, need to show a clear right, a well-grounded apprehension of irreparable harm, the balance of convenience, and the

absence of alternative relief. It is understandable that the Employees approached the court on their own. However, even then, a

case needed to be made out in line with these requirements, as to the reason they should be granted the relief they seek.

[27] Based on their papers alone, it is concluded that no case has been made for the relief that the Employees seek. Most importantly, they clearly have an alternative remedy in that to the extent that they may be aggrieved by their suspension, they are entitled to approach the relevant bargaining council for relief. It follows that their application ought to be dismissed.

Costs:

[28] The applicant in respect of the first urgent application sought a cost order against the Employees and the second respondent. Costs against the second respondent were sought on the basis that despite the best efforts of the applicant and its attorneys of record to persuade him, he had nevertheless proceeded in executing the writ, and had already attached and removed property, which does not belong to the applicant. On the applicant's version, the second respondent proceeded with the attachment despite being informed of the urgent application before the court and the fact that it was already placed on the roll.

[29] This court may make an award of costs in accordance with the requirements of law and fairness. It is my view that given the contentions of the applicant as above, the second respondent acted precipitously and unreasonably in persisting with the execution of the writ and subsequent attachments. Common sense given the circumstances of the case would have dictated that the second respondent should have afforded the applicant an opportunity to contest the writs, especially where he had been informed that an urgent application had already been filed and a hearing date allocated. I however deem it appropriate not to make any cost order against the Employees in respect of both applications.

Order:

- i. The order granted by this court on 31 August 2016 under case number J55/15, in terms of which the arbitration award issued on 6 June 2014 under case number PSCB13/14 under the auspices of the PSCBC was made an order of court, is rescinded and set aside.
- ii. The writs of execution issued by the Registrar of this Court under case number J55/15 dated 12 August 2016 and 8 August 2016 respectively are set aside.

- iii. The Second Respondent is ordered not to attach any property of the Applicant and/or sell such property pursuant to the issuance of the writs.
- iv. The Second Respondent is ordered to with immediate effect, and upon being served with this order, release any property of the Applicant that was attached pursuant to the writ.
- v. The Second Respondent is ordered to pay the costs of the application under case number J2078/16.
- vi. The Office of the Registrar of this Court is directed to investigate the circumstances under which the two writs of execution under case number J55/15 were issued, and to file a report with the office of the Judge President of this Court within 30 days from the date of this order.
- vii. The urgent application brought by the individual applicants (Messrs Netshivhungululu and Ngubegusha) under case number J2110/16 is dismissed.
- viii. There is no order as to costs in respect of the matter brought under case number J2110/16.

Tlhotlhlalemaje J

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Mr. I Gwaunza of Edward Nathan Sonnenbergs

For the First Respondents: In person

[1] Clause 3.6.3.2 of Resolution 1 of 2012 provides that; ‘Resolution 3 of 2009 is hereby amended to allow employees whose posts are graded level 10 and 12 to be appointed and remunerated on salary level 10 and 12’

[1] Clause 3.6.3.2 of Resolution 1 of 2012 provides that;

‘Resolution 3 of 2009 is hereby amended to allow employees whose posts are graded level 10 and 12 to be appointed and remunerated on salary level 10 and 12’

[2] South African Revenue Services v Mhlongo (JA 115/2013) (12 March 2015) at para 5

[3] F & J Electrical CC v MEWUSA obo E Mashatola and Others (2015) 36 ILJ 1189 (CC) at para 27. See also Superb Meat Supplies CC v Maritz

(2004) 25 ILJ 96 (LAC) at para 15 where it was held that ‘When the court considers whether a judgment has been granted erroneously, it does not investigate whether good cause has been established or whether there has been wilful default’

[3] F & J Electrical CC v MEWUSA obo E Mashatola and Others (2015) 36 ILJ 1189 (CC) at para 27. See also Superb Meat Supplies CC v Maritz

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[4] See *Du Preez v LS Pressing and Another* (J861/11) 2012 ZALCJHB 74 (26 July 2012) at para 18

[5] Erasmus. *Superior Court practice*. Second Ed Vol 2 at D1-604 to D1-605

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