

SOUTH AFRICA / JUDGMENT

# Windybrow Theatre v Maphela and Others (JA47/15) [2016] ZALAC 27; (2016) 37 (ILJ) 2641 (LAC) (14 June 2016)

[2016] ZALAC 27

COURT  
Labour Appeal Court

BEFORE  
Waglay, Musi, Murphy

CASE / FILE NUMBER  
JA47/15

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IN

THE LABOUR APPEAL COURT OF SOUTH AFRICA,  
JOHANNESBURG

LAC Case no: JA47/15

DATE: 14 JUNE 2016

Reportable/Not Reportable

In the matter between:      WINDYBROW  
THEATRE.....Appellant  
And  
VUYO  
MAPHELA.....First  
Respondent  
SHERIFF  
OF THE HIGH  
COURT,.....Second  
Respondent  
JOHANNESBURG  
CENTRAL  
ALLIE  
ACHMAT.....Third  
Respondent

Heard:                              22 March 2016

Delivered:                        14 June 2016

## Summary:

Jurisdiction of the Labour Court for repayment of monies in light of a procedural defect in the execution of a writ – Labour Court having inherent jurisdiction to hear any matter related to its processes – powers of the Labour Court not extending beyond employment related matter – remedy for illegal payment arising out of a process related to the execution of the CCMA award, not incidental to the Labour Court’s performance of its functions - illegal or mistaken payment bearing no direct link to any function performed by the Labour Court in resolving an employment dispute  
- Sheriff’s wrongdoing giving rise to a distinct cause of action in delict not falling within the jurisdiction of the Labour Court – Labour Court’s judgment upheld albeit for different reasons – appeal dismissed.  
Coram: Waglay JP, Musi JA et Murphy AJA

## JUDGMENT

## MURPHY AJA

- [1] This is an appeal against a portion of a judgment and order of the Labour Court (Rabkin-Naicker J). The matter concerns the inherent powers of the Labour Court, with the question for determination being whether the Labour Court has the power to order the repayment of moneys attached and distributed in terms of an irregular and invalid attachment.
- [2] On 27 May 2014, the appellant dismissed the first and third respondents (“the respondents”) on the ground of alleged financial irregularities, involving an amount of approximately R64 million rand having being spent without proper procedures being followed.
- [3] The respondents referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) which found that their dismissal was both procedurally and substantively unfair and awarded compensation to the first respondent in the amount of R643 000.00 and to the third respondent in the amount of R648,785. The appellant filed an application to review and set aside the arbitration award on 12 November 2014.
- [4] On or about 20 November 2014, the respondents had the arbitration award certified and caused a writ of execution to be issued out of the Labour Court and sent it to the second respondent (“the Sheriff”) on 11 December 2014. Despite not having served the writ on the appellant, the Sheriff attached the appellant's property by serving garnishee orders on the appellant's bank, which transferred the funds to the Sheriff without notifying the appellant. The Sheriff attached two amounts from the appellant’s bank account: an amount of

R161,466.65 on 19 December 2014 and a further amount of R1 294,285.09 on 10 January 2015. The appellant only received notification that a writ had been issued or that execution would take place on 13 January 2015 when the Sheriff's office sent an e-mail attaching the writ of execution and notice of attachment. Confirmation was received from the appellant's bankers that the monies had been attached.

- [5] The appellant's attorneys of record sent a letter dated 14 January 2015 to the Sheriff, informing it that the appellant had instituted review proceedings and sought an undertaking that the Sheriff would not distribute any funds. The Sheriff advised the attorneys that the funds received on 19 December 2014 had already been distributed to the first respondent but undertook to keep any further monies in trust pending the outcome of the review.
- [6] The appellant's attorneys of record sent a letter to the first respondent informing him that the Sheriff had irregularly distributed the funds to him and that if he did not repay the money by 19 January 2015, urgent proceedings would be instituted against him. The first respondent did not respond to the letter, nor did he repay the money. The appellant accordingly instituted an urgent application in the Labour Court on 21 January 2015, in which it sought to interdict any further payments, and to claim repayment of moneys already distributed.
- [7] The Labour Court ordered the Sheriff to release the money retained in trust to the appellant. It further ordered that the enforcement of the writ of execution be stayed pending the finalisation of the review application. In respect of the relief sought for repayment of the money already distributed to the first respondent, the Labour Court held that it did not have jurisdiction to order the first respondent to repay to the appellant the money he had received from the Sheriff.
- [8] The Labour Court granted the appellant leave to appeal to this Court against its finding that it did not have jurisdiction to order the first respondent to repay the money to the appellant.
- [9] Service and execution of orders of the Labour Court takes place in accordance with the process applicable in the High Courts.[1] Section 44 of the Superior Courts Act[2] requires service by the Sheriff of process (including writs of execution) on the affected person (in this case the appellant as

judgment debtor) either in person, by service on its address, or by telefax or other electronic e-mail. Rule 45 of the Uniform Rules of the High Courts regulates execution against movables of a judgment debtor. Rule 45 (3) provides that:

‘Whenever by any process of the court the sheriff is commanded to levy and raise any sum of money upon the goods of any person, he shall forthwith himself or by his assistant proceed to the dwelling-house or place of employment or business of such person (unless the judgment creditor shall give different instructions regarding the situation of the assets to be attached) and there

- (a) demand satisfaction of the writ and failing satisfaction;

(b) demand that so much movable and disposable property be pointed out as he may deem sufficient to satisfy the said writ ...'

[10] In executing the writ and in performing his functions generally, the Sheriff acts as an officer of the law and not as the agent of the judgment creditor or his attorney.[3] It is not for the judgment creditor to elect in what form or manner execution should take place, or which particular assets should be attached. Execution can only proceed to attachment, sale and distribution, once there is proper service of the writ of execution

on the judgment debtor. Failure to do so will render the execution invalid.[4] There will not be an attachment where neither the writ nor the notice of attachment have been served on or brought to the notice of the owner. The Labour Court was accordingly correct that the attachment of the applicant's funds was unlawful. The issue is whether it had jurisdiction to order that the moneys attached and disbursed to the first respondent be repaid to the appellant.

[11] The Labour Court held with reference to section 173 of the Constitution of the Republic of South Africa, 1996 (Constitution) and section 157 of the LRA that the Labour Court, being a creature of statute, does not have an inherent power to protect its own process in terms of the Constitution and thus lacked jurisdiction to make the order sought. For the reasons that follow, the finding of want of jurisdiction is correct, but the reasoning of the court a quo is overly broad and exclusive. The Labour Court does have an inherent power to protect and regulate its processes, but it does not extend to a jurisdiction to grant the appellant relief in delict or unjustified enrichment.

[12] The appellant claims that the Labour Court has an inherent or ancillary[5] power to order the first respondent to repay the monies attached and distributed to him by the Sheriff. The first respondent disagrees and contends that the inherent powers bestowed on the Labour Court in terms of section 151 of the LRA are applicable only in relation to matters of a procedural nature, whilst the ancillary powers in section 158 (1)(j) apply to matters closely connected to functions

performed within jurisdiction and do not extend to hearing either a delictual or enrichment claim.

[13] An enquiry into jurisdiction involves determining whether the court has the power by law to adjudicate upon, determine and dispose of a matter.[6]

[14] Section 173 of the Constitution provides that the Constitutional Court, Supreme Court of Appeal and High Courts have the inherent

power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice. It is silent on the position in relation to the Labour Court. However, section 151 (2) of the LRA deals with the matter. It reads:

‘The Labour Court is a superior court that has authority, inherent powers and standing, in relation to matters within its jurisdiction, equal to that which a court of a provincial division of the Supreme Court has in relation to the matters under its jurisdiction’.

The former provincial divisions of the Supreme Court are now the divisions of the High Court.

[15] In *Mukaddam v Pioneer Foods (Pty) Ltd and Others*,<sup>[7]</sup> the Constitutional Court stated in relation to section 173 of the Constitution:

‘Section 173 makes plain that each of the superior courts has an inherent power to protect and regulate its own process and to develop the common law on matters of procedure, consistently with the interests of justice. The language of the section suggests that each court is responsible and controls the process through which cases are presented to it for adjudication. The reason for this is that a court before which a case is brought is better placed to regulate and manage the procedure to be followed in each case so as to achieve a just outcome. For a proper adjudication to take place, it is not unusual for the facts of a particular case to require a procedure different from the one normally followed. When this happens it is the court in which the case is instituted that decides whether a specific procedure should be permitted.’<sup>[8]</sup>

[16] Section 158(1)(j) of the LRA further provides that the Labour Court may “...deal with all matters necessary or incidental to performing its functions in terms of this Act or any other law”.

[17] The inherent and incidental powers govern procedural questions related to matters within jurisdiction and the regulation of court processes. Matters and processes incidental to the regulation of the execution of orders fall within the inherent power of the Labour Court. Execution is a process of the court and the court has an inherent power to control its own process subject to the rules of court. It accordingly has a discretion to set aside or stay a writ of execution.

[18] The first respondent submitted however that the relief sought by the appellant goes beyond mere procedure or the protection and regulation of process, as it involves either a substantive delictual claim for damages against the Sheriff,<sup>[9]</sup> or an enrichment claim by the Sheriff against him (the first respondent) based on either the *condictio indebiti* or the *condictio sine causa*.<sup>[10]</sup> These are distinct causes of action arising from the conduct of the Sheriff and cannot be adjudicated by the Labour Court relying on its inherent or incidental powers to regulate its processes.

[19] The *rei vindicatio* is not available to the appellant as owner of the money on account of the principle that ownership of money passes with *commixtio*. In *First National Bank of Southern Africa Ltd (FNB) v Perry NO and Others*,<sup>[11]</sup> the Supreme Court of Appeal (“the SCA”) said:

‘It might seem a simple thing to recover stolen money from one found in possession of it. But the matter is complicated by the rule in our law, an inevitable rule it seems to me, flowing from physical reality, that once money is mixed with other money without the owner’s consent, ownership in it passes by operation of law....Accordingly a *rei vindicatio*, which is an assertion of ownership, does not lie... In such a case one must enquire, as a matter of substantive and not merely

procedural law, what cause of action may lie against the bank. Delict not having been alleged against it, the remaining possibility is unjustified enrichment.’[12]

[20] The first question to be asked is whether the inherent powers of the Labour Court permit it to entertain a cause of action in unjustified

enrichment, because were the order sought by the appellant to be made, the court would in effect be granting relief against the first respondent for the unjustified enrichment which arose as a consequence of the illegal or mistaken payment made to him by the Sheriff.

[21] The inherent powers provision in section 151(2) of the LRA confers “inherent powers and standing, in relation to matters under its jurisdiction”. The exclusive jurisdiction of the Labour Court is defined and limited by section 157(1) of the LRA. It provides:

‘Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.’[13]

[22] The matters within jurisdiction of the Labour Court are thus “all matters that elsewhere in terms of this Act or in terms of any other law” must be determined by the Labour Court. These matters are all employment related disputes, including the review of CCMA arbitration awards, alleged unfair operation requirements dismissals, unfair discrimination, collective bargaining disputes and contractual claims under the Basic Conditions of Employment Act.[14] For the most part, if not entirely, disputes falling within the jurisdiction of the Labour Court are those arising between employees

and employers or their bargaining agents. Nothing in the LRA or other legislation confers jurisdiction upon the Labour Court to adjudicate a delictual or enrichment claim arising out of illegal conduct by the Sheriff in the execution process. Thus, such causes of action not being within its jurisdiction, the Labour Court cannot have any inherent powers in relation to such claims, because section 151(2) restricts the Labour Courts inherent powers to powers “in relation to matters under its jurisdiction”. Thus, the first respondent’s submission that section 173 of the Constitution read with section 151 of the LRA does not provide the Labour Court with the inherent power to order the first respondent to repay the funds paid to him by the Sheriff is correct.

[23] The appellant’s reliance on section 158(1)(j) of the LRA also does not assist it. The subsection bestows a power on the Labour Court to deal with all matters “necessary or incidental to performing its functions” in terms of the LRA or any other law. A function is the purpose or

activity for which a thing exists or is used. The certification of an arbitration award constitutes the performance of a function in terms of the LRA; and the issuing of a writ is an incidental and necessary consequence of the performance of such function and thus falls within the ambit of section 151 and section 158(1)(j) of the LRA, as would the stay or setting aside of such writ. The ordering of the repayment of funds in casu however falls outside the ambit of section 158(1)(j) of the LRA, because it is neither necessary nor incidental to the Labour Court's

performance of its functions. It is not necessary because such an order has no bearing upon the Labour Court's task of determining the unfair dismissal dispute regarding the respondents. And in so far as the mistaken or illegal payment arose out of a process related to the execution of the CCMA award, the illegality or mistake (the actionable conduct) was remote and any remedy for it is not incidental to the Labour Court's performance of its functions, in the sense of being an ancillary subordinate means of fulfilling any function. The matter of the illegal or mistaken payment bears no direct link to any function performed by the Labour Court in resolving an employment dispute. The Sheriff's wrongdoing has given rise to a distinct cause of action in delict in respect of which there may be substantive defences. Any relief against the first respondent would accrue in terms of the *condictio indebiti* or the *condictio sine causa*. The following statement of the Supreme Court of Appeal in *Makhanya v University of Zululand*[15] is apposite:

'Once more, so it seems to me, [this case], like all the cases that preceded it, [is] not about jurisdiction at all. It [is] about

whether there [is] a good cause of action. In my view the least said about jurisdiction in such cases the better because, once that red-herring is out of the way, courts will be better placed to focus on the substantive issue that arises in such cases, which is whether, and if so in what circumstances, employees might or might not have rights that arise outside the LRA.'[16]

[24] The Labour Court, although mistaken in its reasoning, was consequently correct in refusing to order repayment. This Court is

not without sympathy for the appellant. It has floundered on a jurisdictional issue arising from complexity in the statute. Its

ethical assertion that the respondents should wait until the review is determined before receiving any payment, is compelling. One would have preferred to see the first respondent return the money to the Sheriff until the dispute was finally determined. Those misgivings however cannot justify an assumption of jurisdiction where none exists. They are nonetheless relevant to the question of costs. For that reason, I prefer to make no award of costs.

[25] The following orders are made:

- i) The appeal is dismissed.
- ii) There is no order as to costs.

JR Murphy AJA

I agree

Waglay J

C J Musi JA

APPEARANCES:

FOR THE APPELLANT:

FOR THE FIRST RESPONDENT:

[1] Section 163 of the Labour Relations Act 66 of 1995 (LRA).

[2] Act 10 of 2013.

[3] Sedibe v United Building Society 1993 (3) SA 671 (T); Schoerie NO v Syfrets Bank Ltd 1997 (1) SA 764 (D) 773; Mpakathi v Kghotso Development CC 2003 (3) SA 429 (W) at para 8.

[4] Campbell v Botha

[2008] ZASCA 126; 2009 (1) SA 238 (SCA).

[5] Section 151 and section 158(1)(j) of the LRA.

[6] Ewing McDonald & Co Ltd v M & M Products Co

[1990] ZASCA 115; 1991 (1) SA 252 (A) at 256G-H; Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board 1950 (2) SA 420 (A) at 424; and Spendiff NO v Kolektor (Pty) Ltd

[1992] ZASCA 18; 1992 (2) SA 537 (A) at 551C.

[7] 2013 (5) SA 89 (CC).

[8] At para 42.

[9] Upon attachment, the possession, custody and control of the property are vested in the Sheriff who is liable to both the judgment debtor and creditor for loss caused by improper control of or negligent custody of the property - Morrison NO v Rand NO 1967 (2) SA 208 (D) at 210; and Menzies Motor Co (Pty) Ltd v Turkstra 1955 (3) 408 (T) at 412.

[10] Rahim v Minister of Justice 1964 (4) SA 630 (A).

[11]

[2001] 3 All SA 331 (A) at paras.

[12] At para 16 and 19.

[13] Section 157(2) of the LRA confers a concurrent jurisdiction with the High Court in Bill of Rights disputes which is not relevant in this matter.

[14] Act 75 of 1997.

[15]

(2009) 30 ILJ 1539 (SCA).

[16] At para 93.

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