REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Reportable

CASE NO: J618/14

In the matter between:

THE CITY OF JOHANNESBURG Applicant

and

SOUTH AFRICAN MUNICIPAL WORKERS UNION obo P M MOTAUNG First Respondent

THE SHERIFF OF THE HIGH COURT NO (DISTRICT OF JOHANNESBURG NORTH) Second Respondent

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Third Respondent

THEMBA HLATSHWAYO NO Fourth Respondent

Heard: 18 March 2014
Judgment: 19 March 2014

Summary: Test for granting of stay of execution of arbitration award concerning payment of money. Although interests of justice not decisive, an applicant is required to show genuine and bona fide

grounds for attacking arbitration award. In *casu*, stay application refused because there is no challenge to the arbitration award and no reasonable explanation why review application has not been brought.

JUDGMENT

NGCUKAITOBI AJ

INTRODUCTION

1. The applicant seeks an order staying and suspending the execution of a writ of execution obtained against the applicant in enforcement of an arbitration award of the South African Local Government Bargaining Council ("the SALGBC"). The applicant has not brought any challenge to the arbitration award, whose enforcement it seeks to stay. In the notice of motion, an order has been sought in terms of which I have been asked to direct the institution of a review application by a specific date. The employee, Ms PM Motaung is represented by the South African Municipal Workers Union. For the sake of convenience, I will refer to the employee as the first respondent.

2. Because the writ of execution is concerned with the payment of money by the applicant to the first respondent, I enquired from counsel for the first respondent whether Ms Motaung would be prepared to give an

undertaking to be recorded in my judgment that in the event of a successful review application which may be brought by the applicant, the money paid to her pursuant to the arbitration award would be repaid to the applicant. That undertaking was given. I revert to this later in this judgment.

MATERIAL FACTS

3. The first respondent is employed by the applicant in its Metropolitan Police Department. Prior to the events which form the subject matter of the dispute between the parties, she was employed as a Metropolitan Police Officer. She currently occupies the position of Administrative Officer, following the decision of the applicant to demote her.

4. Sometime during 2011, certain allegations of misconduct were levelled against the first respondent, which included the allegation that she attempted to defeat the ends of justice by interfering with the execution of duties by members of the Metropolitan Police Department. The result of those allegations was that the first respondent was charged with misconduct in an internal disciplinary enquiry. She was found guilty of misconduct. The sanction imposed was a demotion to the position of Administrative Officer. This demotion included a reduction in salary.

5. The first respondent challenged the decision of the applicant to find her guilty of misconduct and to impose the sanction of demotion in arbitration proceedings which were held at the SALGBC. The SALGBC delivered its award on 2 September 2013. It found that:-

5.1 the conduct of the applicant in demoting the first respondent constituted unfair labour practice within the meaning of section 186(2)(b) of the Labour Relations Act 66 of 1995 ("the LRA");

5.2 the applicant was ordered to reinstate the first respondent to the position as Metropolitan Police Officer;

5.3 the order of reinstatement was made retrospective to the date of demotion, being 1 September 2011; and

5.4 the applicant was ordered to pay Ms Motaung the amount of R62 604, 24 being arrear back-pay for the salary she lost during the period of her demotion, which was between 1 September 2011 to 1 September 2013.

6. At the arbitration proceedings before the SALGBC, the applicant was represented by Mr G W Leith, described in the founding affidavit as "*an official of the NEASA*". Although the papers do not give any further

description of the NEASA, I presume that this refers to an employer's association with rights of appearance at the SALGBC.

7. The award was transmitted by telefax to the applicant on 4 September 2013. The applicant did not implement the arbitration award. Nor did it institute any challenge to the award, in the form of review proceedings.

8. On 29 October 2013 the first respondent applied to have the award certified in terms of section 143(3) read with section 51(8) of the LRA as if it were an order of this Court and to obtain a writ of execution to recover the money due and owing under the award.

9. On the same date, 29 October 2013, the regional secretary of the SALGBC wrote a letter to the applicant. In that letter the applicant was invited to make representations to the director of the Commission for Conciliation Mediation and Arbitration ("CCMA") on whether the arbitration award should be certified as if it were an order of this Court. The letter also mentioned that any filing of the review application in terms of section 145 of the LRA will not stay the enforcement of the award. The applicant was afforded a period of fourteen days to make its written representations. No representations were made by the applicant as requested by the SALGBC.

10. On 5 November 2013 the CCMA certified the award in terms of section 143(3) of the LRA. That meant that the award could be enforced as if it were an order of this Court. Notwithstanding the certification of the award, the applicant failed to implement the order.

11. On 5 December 2013 a writ of execution was issued by the applicant directing the Sheriff to attach and take into execution moveable goods of the applicant to satisfy the amount of R62 604,24, being the amount due and owing under the arbitration award.

12. On 10 January 2014 the writ of execution was executed against the applicant. In terms of the return of service of the Sheriff, which is included in the papers, the writ of execution was served on Mr M Magagula, being a legal advisor of the applicant. It appears that during the service of the writ of execution, an inventory was compiled, comprising disposable property to satisfy the debt specified in the arbitration award.

13. This step of executing the warrant of execution and compilation of the inventory also did not result in any compliance with the arbitration award or any challenge to the award.

14. On 5 March 2014 the present attorneys of the applicant wrote a letter to the Sheriff informing her that they had been instructed to bring an

application for the stay of the execution of the writ of execution. They requested confirmation that the writ would be stayed. The letter from the applicant's attorneys also stated that the application for the stay of the writ of execution would be brought "*early next week*", this being the week commencing 10 March 2014.

15. The application for the stay of the enforcement of the arbitration award and writ of execution was brought on 13 March 2014. As noted above, it has been opposed by the first respondent.

16. In the founding affidavit the deponent on behalf of the applicant says that the applicant does not deny that the applicant was aware of the arbitration award. Nor does the applicant deny that it knew of the fact that an application had been made to the CCMA for the certification of the award. It is said that the applicant *"was unaware that there had been a certification of the award"*. The reason given in the founding affidavit for the applicant being unaware that the award had been certified is two-fold. First, it is stated that the applicant instructed its representatives, NEASA to make representations to the director of the CCMA that the award should not be certified. Although this clearly did not happen, the deponent says that the applicant believed that this would happen. (It is not clear from the founding affidavit when this instruction to NEASA was given.) Second, the deponent says that a decision was taken to take the award

on review. It is not clear when this decision was taken and if it was conveyed to the representatives of the applicant, NEASA. However, it is stated that the applicant was *"under the impression"* that *"ultimately [the award] was in the process of being reviewed."*

17. The applicant says that it was only when the Sheriff attended at the premises of the applicant on 25 February 2014 that it came to the attention of the applicant that the matter had not been taken on review.

18. The explanation tendered by the applicant was challenged as being vague in the answering affidavit of the first respondent. This resulted in a further explanation being provided in the replying affidavit. The replying affidavit stated that on receipt of the notice in terms of section 143 of the LRA, the *"[n]otice is forwarded to our Insurer, namely Camargue (Pty) Ltd in order to assess the merits of making representations and reviewing the order".* Upon such assessment *"the insurer subsequently refers the matter to NEASA to execute the representations on behalf of the City."*

19. It is not stated in the replying affidavit whether the process described therein was in fact followed by the applicant. It is, however, averred that the matter was handed over to NEASA, in particular to Ms Helen Strydom and Mr Simon Miyambo, who are representatives of NEASA. There is no confirmatory affidavit from Ms Strydom. The confirmatory affidavit filed by

Mr Miyambo is the standard confirmatory affidavit simply recording that he read the replying affidavit and agrees with its contents. Importantly, he gives no independent narrative of the facts described in the replying affidavit. The most important facts, for instance, pertain to whether he received the instruction to make representations to the director of the CCMA on the certification of the award. It must be recalled that the applicant was informed of the section 143(3) application on or about 29 October 2013. In addition, it is not explained if the instructions to challenge the award were conveyed and if so, what steps were taken to give effect to those instructions. For its part, the applicant provides no explanation in regard to any steps it took to ensure the implementation of its instructions.

20. The applicant says that until 25 February 2014, it had been unaware that the award had been certified or that the review application had not been instituted. It contended that it would be prejudiced by the enforcement of the award because it would be difficult to recover the money once it is paid to the first respondent. It also contended that it could not furnish security to the satisfaction of the amount in the award because it is a public entity and cannot *"place State money as security"* for all cases where it is a litigant, unless ordered to do so by a court.

APPLICABLE PRINCIPLES

21. Applications to stay the execution of arbitration awards are common-place in this court. As a result the relevant principles are well established. However, in view of the differing approaches adopted by counsel before me, it is useful to restate and clarify these principles.

22. The decision in *Gois t/a Shakespeare's Pub v van Zyl & Others*[1] was the first time where the Labour Court attempted a comprehensive elucidation of the principles applicable in a stay application in respect of CCMA awards which have been certified by in terms of section 143 of the LRA. In that case a dismissed employee obtained a default arbitration award which he then tried to enforce against his employer. The employer, which claimed to have been "*totally unaware*" of the entire proceedings until the Sheriff arrived at the premises and tried to execute the award, then approached the Labour Court seeking an order for the stay of the enforcement of the arbitration award. As soon as the employer became aware of the award, it filed an application for the rescission of the default award. The rescission application was refused by the CCMA for lack of jurisdiction.

23. Waglay J (as he then was) distilled the principles relevant in stay applications as follows:-

23.1 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*";[2]

23.2 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;[3] and

23.3 An application for a rescission, review or variation of an award qualifies as an attack on the *causa* underlying the award. "*Where an application for a rescission or review or variation of an award is pending, there is a possibility that the causa underlying the writ may ultimately be removed*".[4]

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[1] (2003) 24 *ILJ* 2302 (LC).

[2] *Gois* at para 32.

[3] *Gois* at paras 34-35.

[4] *Gois* at para 36.

24. On the facts of that case the court noted that an application for the rescission of the award had been placed before the CCMA "*which require[d] the [CCMA's] consideration.*"[5]

25. The judgment of Todd AJ in *Robor (Pty) Ltd. (Tube Division) v Joubert NO & Others*[6] confirmed that the discretion of this court to entertain a stay application is a wide one. In that case an arbitration award had been made in favour of the employee directing the payment of a certain amount as severance pay. The employer challenged the award on review, which application was brought timeously. However, the employer failed to prosecute the review for a period of four years. When the employee took steps to execute the award the employer sought an order staying the enforcement of the award, until the outcome of the review application. An interim order for the stay of the award was granted. The matter came before Todd AJ on the return day. He dismissed the application to stay the enforcement of the award.

26. In his reasoning for the order refusing the application for stay, Todd AJ held that the discretion of the Court to stay the enforcement of arbitration awards arises from the power of the Court to control its own process. The

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[5] *Gois* at para 40.

[6] (2009) 30 *ILJ* 2779 (LC).

overarching consideration is interests of justice. There is no closed list of factors to be taken into account when deciding what is in the interests of justice. Each case must turn on its facts. One of the factors to be taken into account is whether the attack on the underlying *causa* was brought in time and whether its prospects of success are strong. The justification for this view is to prevent injustice and to serve the goals of the LRA of expedition and finality in disputes.[7]

27. Thus, according to the *ratio* in *Robor (Pty) Ltd. v Joubert NO & Others*, the interests of justice are paramount. One of the reasons why it was against the interests of justice to grant the stay application in the *Robor* decision was the unexplained delay in the prosecution of the review application. Todd AJ also noted that it is not unusual for employers to argue before this Court that arbitration awards must not enforced because doing so would be prejudicial. While this is a factor to be taken into account, in appropriate circumstances, such prejudice as may exist, must yield to the overall interests of justice. The interests of the employee, who had been waiting for a lengthy period for the payment of monies under the award were also a weighty consideration.

[7] *Robor v Joubert* at para 16.

28. Although the approaches in *Gois* and *Robor* 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 do not read them as necessarily being irreconcilable. The principle permeating both decisions is the need to take into account the interests of justice. Thus understood, it is clear that the two judgments are compatible with each other. The power of this Court to grant stay applications ultimately derives from section 151(2) of the LRA, which establishes this court as a *"superior court that has authority, inherent powers and standing"* in relation to matters within its jurisdiction equal to that of the High Court. The decision to grant a stay application is of a discretionary nature, which is informed by the facts of each case.

29. The last decision which I must consider is that of *Cape Clothing Association v De Kock NO & Others.*[8] In that case Steenkamp J followed the approach taken by *Robor* in relation to the issue of the overall test – being one of interests of justice where a basket of factors is taken into account.

[8] (2013) 34 *ILJ* 1957 (LC).

30. But Steenkamp J also introduced a vital codicil which went beyond the interests of justice standard. He addressed the argument raised[9] (but not addressed) in *Robor,* that employers usually argue that they will suffer irreparable harm if execution takes place. He held:-

> "*The case before me, as I stated in the introductory remarks, is an unusual one. The workers have not been dismissed. They are still in the employ of the CCA's members. Should the CCA's members pay the workers the two days wages in accordance with the arbitration award, and should the CCA be successful on review, its members would be able to deduct those amounts from their employees' wages. They would be within their rights to do so in terms of Section 34(1)(b) of the Basic Conditions of Employment Act.*
>
> *Any harm that the employers will suffer at this stage by giving effect to the arbitration award is not irreparable. Even if the CCA were to be successful on review, its members are in the unusual position that they can recover the money that they have paid to the employees without much further ado. It is obvious that the*

[9] *Robor v Joubert* at para 15.

CCA and its members therefore also have an alternative remedy in due course, should the application for review be successful."[10]

31. In this case as I have stated, I enquired from counsel for the first respondent whether she would be prepared to undertake to repay any monies paid to her in the event of a successful review application. I was informed that she would undertake to repay any monies paid over to her under the arbitration award, should it be reviewed and set aside. I have also taken into account that the first respondent is in the full time employ of the applicant. The applicant would, in these circumstances and in the event of the failure of the first respondent to repay the money be entitled to effect deductions in accordance with Section 34 of the Basic Conditions of Employment Act 75 of 1997.

APPLICATION TO THE FACTS

32. Based on the judgment of *Gois*, the applicant submitted that I should grant the stay because it disputes the arbitration award and intends instituting review proceedings in due course. Furthermore, it was submitted that I need not concern myself with the merits of the review application to be brought by the applicant.

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[10] *Cape Clothing Association v De Kock & Others* at paras 25-26.

33. The submission made by counsel for the applicant – that the merits of a review application are not decisive in a stay application – is correct. However, I must take into account the fact that in this case the applicant has not brought any review application. Therefore, the underlying *causa* of the warrant of execution is not under any attack. It is true that the applicant says that it intends to launch a challenge to the award. The fact of the matter, however, is that it has not done so yet.

34. Moreover, the *ratio* of the *Gois* decision must be understood in the light of its facts where a rescission application had been brought against an award obtained in default. Those facts are distinguishable from a situation, such as the present, where the applicant was present at the arbitration and has been aware of the adverse arbitration award. Waglay J made it clear that the underlying *causa* must be under attack. A mere disagreement with an arbitration award does not constitute an attack to the underlying *causa* of the writ. An attack to the underlying *causa* of the writ would be a rescission application or a review application.

35. The applicant suggested that I should make an order putting it in terms to file a review application within a specific period of time. This would be inappropriate because a court cannot create an attack on the underlying *causa*, where the applicant has elected not to do so. Although it is so that the merits of any attack on the arbitration award are not decisive, I do not

read the *Gois* decision as saying that any challenge to the award, regardless of its circumstances, would warrant the granting of a stay of execution. By its nature, a stay of execution is a discretionary remedy. It is intended to prevent injustice from being perpetrated against a party. A stay application cannot be founded on spurious grounds. An applicant for a stay application must demonstrate that the underlying *causa* is being attacked on genuine and *bona fide* grounds. In *Gois* Waglay J was clearly satisfied on the facts that the challenge to the default arbitration award, being the rescission application, which had to be addressed by the CCMA.

36. There is no proper explanation given why the review application has not been brought to date. The arbitration award was made on 2 September 2013. A copy of the award was given to the applicant on 4 September 2013. The application to certify the award in terms of Section 143 of the LRA was granted in October 2013. The applicant was aware of the application for the certification of the arbitration award.

37. The applicant was also aware of the steps taken subsequent to certification of the arbitration award. In particular, the Sheriff attended at the premises of the applicant on 10 January 2014 and served the writ of execution to one of the legal advisors of the applicant. The founding affidavit records that the applicant became aware of the writ on 25

February 2014. Although this is somewhat at odds with the objective facts in this matter, the point is that even if one took into account 25 February 2014 as the date when the applicant became aware of the writ of execution, the explanation remains inadequate. If it is correct that instructions were given to officials of NEASA, then it would have been expected that there would be a follow up on the steps being taken to prosecute the review application. For a period of approximately five months, this did not occur. Furthermore, there is still no explanation why, after 25 February 2014, no review application was brought. As we sit today, 18 March 2014, it is approximately a month since the applicant, on its pleaded version, became aware of the writ of execution. Yet, it has not taken any steps to attack the underlying *causa* giving rise to the writ of execution. In the absence of any attack to the underlying *causa* I cannot find that the prerequisites for the granting of the stay as set out in the *Gois* decision have been met by the applicant. On this ground I must refuse the stay application.

38. Given this conclusion, it is not necessary to make conclusive remarks about the strength of the applicant's review application, which has not been instituted, save for what I have stated above concerning the general approach.

39. I was also asked to take into account the prejudice that would be suffered by the applicant in the event of a refusal of this application. I do not believe that the balance of convenience necessarily favours the applicant. Nor do I believe that the applicant would necessarily suffer irreparable harm if I refuse the application. The first respondent has made an undertaking, which is recorded in this judgment, that the money would be repaid to the applicant in the event of a successful review application. Furthermore, the applicant, being the employer of the first respondent, is in a position to deduct the monies outstanding from her salary in terms of Section 34 of the BCEA. This approach was indeed endorsed by this Court in *Cape Clothing Association v De Kock NO & Others*.

40. On the other hand, I must take into account the prejudice suffered by the first respondent. A reduction in salary and rank will inherently bring prejudice to any employee. From the arbitration award, it is clear that the salary earned by the first respondent before the demotion was R12 340.71 per month, which was reduced to R9 732.20 as a result of the demotion. The difference in pay, which is being executed in terms of the writ of execution is R2608.51 per month. In the greater scheme of things, these sums may appear trifling. But I have no doubt that they are hugely significant to the first respondent. Todd AJ reminded us in the *Robor* decision to pay attention to the financial strengths of the respective

parties when dealing with stay applications to awards involving payment of money. He said that one of the factors to take into account is:

> *"[t]he risk of injustice being done to the less powerful party to the dispute. The stronger financial position of most employers enables them to mount attacks on the underlying cause of action which the employee party is frequently powerless to oppose or to expedite. This may lead to an outright abuse of the dispute resolution system."*[11]

41. I am not satisfied that the balance of convenience favours the granting of the application and I do not believe that a proper case is made out for irreparable harm on the part of the applicant. It is not in the interests of justice to grant the stay application.

CONCLUSION AND COSTS

42. Counsel for the first respondent asked for a punitive costs order in the event of a dismissal of the application. The main submission was that the applicant had given a false explanation about when it became aware of the writ of execution. The falsity, it was submitted, is in the fact that the

[11] *Robor v Joubert* at para 16.4.

writ of execution was served on 10 January 2014, but the founding affidavit says it was received on 25 February 2014. Counsel for the applicant countered this and submitted that the deponent was merely conveying the date when he became aware of the writ of execution, not when it was served on the applicant.

43. Counsel for the applicant is indeed correct in her submission. In paragraph 25 of its founding affidavit the applicant stated the following:-

> *"Only upon the Sheriff of the High Court, Johannesburg North attending at the applicants (sic) premises on or about 25 February 2014, did it come to the applicant's attention that the writ had been issued, and that the matter had not been taken on review, as they had instructed their representatives to do."*

44. This allegation was disputed in the answering affidavit and it was stated that the return of service shows that the writ was served on 10 January 2014. In the replying affidavit, the applicant explained that he personally became aware of the writ, when it was brought to him on 25 February 2014.

45. It is clear from the return of service that service was made to an official other than the deponent. There is accordingly no basis to find that the

explanation is false or misleading as suggested in argument. I do not propose awarding punitive costs in the matter.

46. I do not see why costs must not follow the result. The application is dismissed with costs.

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TEMBEKA NGCUKAITOBI

ACTING JUDGE OF
THE LABOUR COURT OF SOUTH AFRICA

Appearances

For the applicant: Advocate Samantha Jackson
Instructed by Barbosa Gouws Attorneys

For the respondent: Mr Reynaud Daniels
(Attorney at Cheadle Thompson & Haysom Attorneys)