

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)

CASE NO: CA 1/2000

In the matter between:

CRAIG TAYLOR Appellant

and

PETER DE VRIES 1st Respondent

SHERIFF OF THE HIGH COURT, CAPE TOWN 2nd Respondent

JUDGMENT

NUGENT, AJA:

[1] This appeal highlights the difficulties that can ensue if an arbitration award is not directed against an identified legal persona.

[2] An arbitration award that is made in terms of the Labour Relations

Act 1995 is not enforceable directly by execution of the award itself. It is enforceable instead by converting the order of the arbitrator into an order of the Labour Court, as provided in s.143 of the Act, and then executing that order of the Court.

[3] In terms of s.163 of the Act, an order of the Labour Court may be executed as if it was an order of the High Court. Rule 45 of the Rules of the High Court, in turn, provides that a person in whose favour an order has been made may, at his or her own risk, “sue out of the office of the registrar one or more writs for the execution thereof ...”. Such a writ authorises the Sheriff to attach assets of the judgment debtor, and sell them in execution of the judgment debt.

[4] The present appeal arises from an arbitration award that was made by a commissioner of the Commission for Conciliation, Mediation and Arbitration on 27 May 1998. The commissioner ordered a firm, identified only as “Mac’s Computer Shop”, to pay to the first respondent an amount equal to his remuneration for a period of three months and seven days.

[5] Shortly after the award had been made, the first respondent received a letter from the firm’s attorney, advising him that their client had ceased trading on 14 June 1998 and had no funds at all.

[6] The first respondent thereupon applied to the Labour Court for the award to be made an order of that Court. The application, and the affidavit that was deposed to by the first respondent in support of the application, were in a standard form that is used in that court.

[7] While there can be no objection to an arbitration award, and consequently an order of the Labour Court, being made against a firm, it must be borne in mind that such an order is only capable of being executed against the assets of the firm. (*Vorster v John Jack Ltd* 1925 TPD 793; *Rees v Feldman* 1927 TPD 884 at 890; *Xakana v Elliot Brothers (Queenstown) (Pty) (Ltd)* 1967 (4) SA 724 (E) at 727 F). As pointed out in *Farm Fare (Pty) Ltd v Fairwood Supermarket* 1986 (4) SA 258 (C) at 262 D:

“ ... nothing prevents judgment being given against the firm as cited. A judgment in that form limits to the assets of the business the source from which plaintiff may recover the judgment debt. That was held as far back as 1927 by Tindall J in *Rees v Fedlam* 1927 TPD 884 at 890.”

[8] An inherent difficulty arises if the firm is no longer trading, or if it has insufficient assets to satisfy the writ, at the time that execution is sought to be levied. For while the judgment creditor might be entitled to have the judgment satisfied by execution against the assets of the proprietor, a writ may not be issued against the proprietor until judgment has been entered against him or her (*Rees v Feldman*, supra, at 891; *Xakana's case*, supra, at 727 H - 728 A).

[9] However, a person who has obtained a judgment against a firm is not without a remedy in those circumstances, for it lies within the inherent power of a court, upon a proper case being made out, to declare an individual to be the proprietor of the firm and thus liable to satisfy the judgment that has been granted against the firm (*Rees v Feldman*, supra, at 889; *M. Rauff (Pty) Ltd v Pietersburg Coal Agency* 1974 (1) SA 811 (T); *Roamer Watch Co SA & Another v African Textile Distributors also t/a MK Patel Wholesale Merchants & Direct Importers* 1980 (2) SA 254 (W) at 267

E - G), whereupon a writ may be sued out against the person concerned.

[10] In the application that was made in the present case for the arbitration award to be made an order of the Court, the appellant was cited as the respondent. Bearing in mind that all that was sought was an order converting the arbitrator's order (which had been made against the firm) into an order of the Court, the firm, and not the appellant, ought to have been cited in the proceedings, for no relief was being sought against the appellant. Nor, I might add, did the supporting affidavit make out any grounds for an order to be made against the appellant.

[11] On 18 August 1998 the appellant's attorney wrote a letter to the Labour Court advising that "our client is incorrectly cited as the respondent in this matter," because, so it was alleged, the first respondent had been employed by a close corporation, and not by the appellant personally. Later the appellant gave notice formally that he intended to oppose the application, and he filed an affidavit in support of his opposition.

[12] In that affidavit, the appellant alleged that the proprietor of the firm which had employed the first respondent, and against which the award had been made, was a close corporation known as Macs Computer Shop CC, of which he (the appellant) was the sole member. He pointed out that although he had been cited as the respondent in the proceedings, he was not a party to the award, and added that the close corporation had ceased trading on 14 June 1998 and had no assets other than a few items of nominal value. He deposed to a supplementary affidavit on 11 November 1998, to which were attached the first appellant's letter of appointment, and his terms and conditions of employment, both of which bore out his earlier allegations that the first respondent had been employed by the close corporation. No reply to those allegations was filed by the first respondent.

[14] The application came before Basson J on 18 November 1998. The learned judge declined to hear the appellant, on the grounds that his opposition had been entered out of time, and no application had been made to condone his default. While the learned judge might have been quite correct in the approach that he took, it is nevertheless unfortunate that he did not mero motu consider the misjoinder of the appellant (and the non-joinder of the firm), for it might have avoided the confusion which then ensued.

[15] The learned judge made an order in the following terms:

"The arbitration award dated 27 May 1998 and attached hereto as annexure "A" is

made an order of court in terms of section 158(1)(c) of the Labour Relations Act 66 of 1995.”

That order, in its terms, is unexceptional. When read together with the arbitration award that was attached, it did no more than to order the firm known as Macs Computer Shop to pay to the first respondent the amount which had been awarded, to which neither the firm nor the appellant could have raised any objection. But insofar as that order was subsequently interpreted, by the appellant and the first respondent alike, to mean that the appellant was obliged to satisfy the award, that is not correct. Nor, might I add, would such an order have been competent in proceedings in which an order in these terms was never sought, and no evidence was tendered to justify such an order being granted.

[16] I have already indicated that a party in whose favour an order of the Labour Court has been made may, at his or her own risk, sue out of the office of the Registrar a writ of execution. On 24 February 1999 a writ of execution was issued by the Registrar, directing the Sheriff of the High Court to “attach and take into execution the movable goods of Craig Taylor” and to cause the same to be sold in execution.

[17] Quite clearly, in my view, a writ in those terms ought not to have been applied for, nor issued, for a writ may only be issued in the terms in which it is authorised by the judgment of the court (*Rees v Feldman*, supra, at 891). The order in the present case had been made against the firm,

albeit in proceedings in which the appellant was cited as the respondent, but no order had been made against the appellant. In *Xakana v Elliot Brothers*, *supra*, the following was said at 728 F-H:

“Such a writ was not in accordance with the judgment entered and was therefore invalid and void *ab initio* (*Kaplan v Union Government*, 1924 T.P.D. 532; *Emms v Viljoen*, *supra*). The mere fact that the respondent may or may not have been satisfied in his own mind that the appellant was the sole proprietor of A.I. Butchery, cannot, to my mind affect the matter one way or the other. As was pointed out in *Rees’* case, *supra*, he might conceivably have been wrong, and to allow a writ to be sued out which does not accord with the summons or with the judgment entered simply because the plaintiff thinks he knows who should be held responsible for the judgment debt, could lead to grave prejudice and is something which the court should not allow unless the Rules compel it.”

If the first respondent alleged that the appellant was the proprietor of the firm, and thus liable to satisfy the terms of the order, his proper course was to seek and obtain a declaration to that effect, in proceedings in which that issue would properly be determined.

[18] Nevertheless, the Sheriff of the High Court, as he was directed to do by the writ, proceeded to attach the appellant's interest in a close corporation known as DTP World CC, and gave notice that it would be sold in execution on 5 May 1999.

[19] On 15 March 1999 the appellant applied to the Labour Court for an order setting aside the writ. That application came before before Wagley J

on 26 April 1999, but no order was made, apparently because the application was in some way defective.

[20] The appellant then launched the application which is the subject of this appeal. In those proceedings the appellant sought the following orders as a matter of urgency:

“2.1 That the Order issued by this Honourable Court on 18 November 1998 be varied in terms of Section 165 of the Labour Relations Act 66 of 1995 to reflect the Respondent as Macs Computer Shop CC on the basis that there is an ambiguity or obvious error or omission.

2.2 That the Writ of Execution dated 23 February 1999 be set aside.”

In support of that application, the appellant related the history of the matter, much as I have outlined it.

[21] The first respondent opposed the application and deposed to an affidavit in support of his opposition. He attached to his affidavit the letter appointing him to his employment, with its attached terms and conditions, which were the same documents that the appellant had tendered in the earlier application. It is quite apparent from the face of the letter that the proprietor of the firm was a close corporation, and the attached terms and conditions make it equally clear that the first respondent was employed by a corporate body, albeit that it was incorrectly referred to as a company. The first respondent pointed out that the letter of appointment, which was signed by the appellant as “owner/manager”, constituted a “legally binding document”, but provided no real explanation for why the appellant was liable for the debt.

[22] The application was dismissed by the Labour Court on 3 May 1999, and the appellant now appeals against that decision, with leave granted upon petition to the Judge President of this Court.

[23] In my view the foundation for the application was misconceived from the outset, with the result that the Labour Court erred in the conclusion that

it reached.

[24] The principal relief sought by the appellant was to “vary” the order made by Basson J, so as to “reflect the Respondent as Macs Computer Shop,” on the grounds that the order contains an ambiguity, or error, or omission. The order made by Basson J requires no “variation”, for in any event it was directed against that firm, and not the appellant. It has simply been misconstrued, by the appellant and the first respondent alike. Although the order was made in proceedings in which the appellant was the respondent, no order was made against the appellant. The order, when read together with the award which was attached, did no more than to convert the arbitrator’s order that had been made against the firm into an order of the Court. That much is plain from the terms of the order. There is accordingly no error or ambiguity that falls to be corrected. If there was an error at all in those proceedings, it was only that the appellant ought not to have been joined, but that has had no material consequence, except to introduce some confusion. The real difficulty is that a writ of execution was issued which did not coincide with the terms of the order.

[25] I might only add that the learned judge concluded that it was apparent from the award that the arbitrator had intended his order to be made against the appellant personally. It was never suggested in the application before Basson J that the arbitrator’s intention was not expressed in the terms of the award, not in any event, in my view, the terms of the award do not justify the inference which the Court sought to draw. On the contrary, the fact that the arbitrator referred to the appellant interchangeably as the owner of the business, and the owner of the “company,” suggests that he never pertinently directed his attention to that issue, probably because he was never called upon to do so.

[26] Nevertheless, in my view the learned judge was correct to refuse that relief, albeit on other grounds, and in that respect the appeal must fail.

[27] In my view the same cannot be said for refusing the second part of the relief that was sought. I have already indicated that, properly construed, Basson J ordered Macs Computer Shop to pay to the first respondent the amount stipulated in the award, which did not authorise the issue of a writ against the appellant. In the circumstances, the writ was invalid, and an order ought to have been made to that effect.

[28] I must emphasise that the first respondent is not without a remedy for the dilemma in which he finds himself. If those are proper grounds upon which the appellant is liable to satisfy the terms of the order that was made against the firm, the first respondent’s proper course is to seek a declaration to that effect. On the other hand, if the close corporation has

dissipated assets in order to avoid the consequences of the award, then the first respondent's proper course is to utilize the various remedies that are provided by the common law and the Insolvency Act to recover those assets. However, he may not cause a writ to be issued other than in the terms that have been authorized by a court.

[29] As far as the costs are concerned, both in this court and in the court below, the appellant's dilatoriness throughout this matter, together with his misconception of his own remedies, has contributed in no small measure to the necessity for the application to have been made at all, and for the necessity of the consequent appeal. In my view it would be just and equitable that no order should be made with regard to the costs of the proceedings in either court.

Accordingly the appeal is upheld to the extent that the order of the court a quo is set aside and the following is substituted in its stead:

"The writ of execution issued on 23 February 1999 is declared to be invalid and is set aside. Save as aforesaid, the application is dismissed. No order is made with regard to the costs of the application."

No order is made with regard to the costs of the appeal.

R.W. NUGENT
ACTING JUDGE OF APPEAL

R.M.M. ZONDO
JUDGE PRESIDENT

C.R. NICHOLSON

JUDGE OF APPEAL

For the appellant: Mr A. de Vos, Appellant's Attorney
Cape Town.

For the Respondent: In person

Date of Hearing: 13 June 2000

Date of Judgment: 14 June 2000