

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

JA58/00
CASE NO: J1889/00

In the matter between:

MIMMO'S FRANCHISING CC	1 st Appellant
MIMMO'S ROSEBANK CC	2 nd Appellant
MIMMO'S RANDBURG CC	3 rd Appellant
MIMMO'S WESTGATE CC	4 th Appellant

and

SPIRO, HARRY DAVID	1 st Respondent
COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION	2 nd Respondent
PHALA, M.E. N.O.	3 rd Respondent
MARIA TRINDADE TEIXEIRA JARDIM	4 th Respondent

JUDGMENT:

VAN REENEN AJA:

[1] This is an appeal, with the leave of this court, against a judgment of Molahleli AJ, delivered on 6 June 2001, dismissing with costs on an attorney and own client scale, an application in which first, second, third and fourth appellants sought the following relief against the respondents in the Labour Court, Johannesburg:

- “1. Condoning the non-compliance with the Rules of Court in this Application and granting the Applicants leave to bring this Application as a matter of urgency.
2. Rescinding the Award handed down by the Third Respondent in its entirety dated 18 December 1999.
- 3 Setting aside the Warrant of Execution issued under Case No. 6066/1999 against “Mimmo’s Pizzeria & Take Away” and executed against the Second, Third and Fourth Applicants. Such Warrant of Execution annexed hereto marked Annexure “WE”.
- 4 Directing the Deputy Sheriff to stay execution and in the interim pending a Final Order in respect hereof to rescind his attachment order and/or desist from removing the movable property of the Second, Third and Fourth Applicants **alternatively** directing the Deputy Sheriff to return any and/or all goods so removed, in the interim, and to restore same to the Second, Third and Fourth Applicants, pending finalization of this dispute.
5. Granting the First Applicant leave to oppose the First Respondent’s Application in terms of Section 158(1)(c) of the Act file (sic) under Case No: J547/00, and to within 10 (Ten) days hereof file its Answering Affidavit in opposition thereto.
6. Directing the First Respondent to pay the costs of this Application in the event of his opposing same on the scale as between Attorney

and Own Client.

7. Directing the Fourth Respondent to pay the costs, de boniis propriis, (sic) of this Application.
8. Directing the Second and Third Respondent's to pay the costs of this Application only in the event of them opposing same.
9. That an Interim Order in terms of paragraphs 2, 3 4 and 5 do issue and that a Rule Nisi be granted returnable on or before **Wednesday 24 May 2000** or upon anticipation of the return day aforesaid to the Applicants by the First and Fourth Respondents on **48 (forty eight)** hours notice.
10. That the Respondents be directed to file their Answering Affidavits if any in opposition to this Application on or before **Tuesday 16 May 2000** and that the Applicants file Replying Affidavits thereto on or before **Monday 22 May 2000**, failing which the Applicants may move for a Final Order herein.
11. Further and/or alternative relief."

[3] The application was set down for hearing on an urgent basis at 14h00 on 10 May 2000.

[4] Ms Jardim, the first respondent's attorney, who was cited as

the fourth respondent because she had allegedly “targeted” the second, third and fourth appellants’ businesses, attempted to argue the matter solely on the founding papers.

When Advocate La Grange, who represented first, second, third and fourth appellants objected to her referring to facts that had not been dealt with in the founding papers, the learned judge conferred with the parties’ legal representatives in his chambers, who after “a brief facilitation” agreed that an order be made in the following terms:

- “1. The parties agree that the first applicant should pay an amount of R20 000 into the trust account of Bowman Gilfillan attorneys by noon on the 11 May 2000. The first respondent will inform the attorneys for the applicants who the contact person at Bowman Gilfillan is by 10h00 on 11 May 2000.
2. The first and fourth respondent are to file their answering affidavits in this matter on or before 17H00 on Monday 2000.
3. The applicants are to file their replying affidavits on or before 17H00 on Thursday 18 May 2000.
4. This matter must be set down for hearing on an urgent basis on Monday 22 May 2000 10H00. In this regard it is recorded that the 1st and 4th

respondent do not waive their rights to challenge the urgency.

5. Pending the final determination of this application any or all writs of execution and/or attachments and/or removals by the Sheriff be stayed.”

[5] As a result of that order and the undertaking to pay an amount of R20 000 into the trust account of Messrs Bowman Gilfillan the need for the granting of the interim relief in prayer 9 of the notice of motion fell away.

[6] The parties having complied with the provisions of the order as regards the filing of answering- and replying affidavits, the application was heard on 22 May 2000.

[7] The warrant of execution and the attachment that form the subject-matter of prayers 3 and 4 of the notice of motion respectively, are based on an arbitration award made in arbitration proceedings in terms of the provisions of the collective agreement pertaining to the Bargaining Council for the Restaurant Catering and Allied Trades (the bargaining council) which was made an order by the Labour Court under case No 6066/1999 on 4 April 2000, in terms of the provisions of section 158(1)(c) of the Labour

Relations Act, No 66 of 1995 (the Labour Relations Act).

[8] The award that forms the subject-matter of prayer 2 of the notice of motion was made by the third respondent on 18 October 1999 in an arbitration under the auspices of the Commission for Conciliation, Mediation and Arbitration (the CCMA) and was made an order by the Labour Court under case No J547/00 on 13 April 2000, in terms of the provisions of section 158(1)(c) of the Labour Relations Act. The proceedings in the Labour Court form the subject-matter of prayer 5 of the notice of motion.

[9] The Bargaining Council and the CCMA awards were made in the circumstances that are set out below.

[10] The first appellant, is the beneficial holder and owner of the trade mark and trade name Mimmo's Pizzeria and Take Away. The first appellant enters into franchise agreements with natural persons and legal entities in terms whereof they are entitled to use the trademarks, logos and marketing concepts devised by the first appellant in specified areas against the payment of royalties.

There are a number of franchised Mimmo's Pizzeria and Take Away operations in the Republic of South Africa.

[11] First respondent, who then was employed by another undertaking, was during June 1998 told that a vacancy existed for a senior manager at a Mimmo's Pizzeria and Take Away franchise shortly to be opened at Florida. He telephoned one Tassos Demetriades at the offices of the first appellant, and after a meeting at a restaurant at Village Walk, was appointed at a monthly salary of R8 500 with effect from 1 July 1998. The first respondent underwent training at Mimmo's Pizzeria and Take Away, Waterfront (Mimmo's Waterfront), and assumed duties at Mimmo's Pizzeria and Take Away, Florida (Mimmo's Florida), as from its official opening on 1 November 1998

[12] The first respondent was employed at Mimmo's Florida until 31 April 1999. Mr Domenico Cioffi and another person at a meeting at the first appellant's offices on 4 May 1999, advised him that his employment was being terminated and that he had to collect at Mimmo's Waterfront, on 20 May 1999, his salary for May

1999, and leave pay for the period 1 August 1998 to 30 April 1999, as well as a letter terminating his services. The first respondent duly took delivery of a cheque in an amount of R14 874,00 but when it was presented for payment it was dishonoured as payment had been countermanded by the drawer thereof.

[13] The first respondent referred the matter to the bargaining council on 20 July 1999, which, after unsuccessful conciliation, arbitrated the dispute in the absence of the party cited as respondent, namely, “Mimmo’s Pizzeria and Take Away, of 118 Sandton Drive, Sandton”, despite the fact that the secretary of the Bargaining Council, notified it of the date, time and venue of the arbitration hearing by means of a facsimile transmission.

[14] The arbitrator ordered “Mimmo’s” to pay “Spiro” (the first respondent) the following amounts by 30 September 1999 –

“1.	The salary for May 1999	R 8 500
2.	Leave pay for the period	
	1 August 1998 to 30 April 1999	<u>R 6 375</u>
	TOTAL	R14 875,00”

An endeavour on the part of one Sarah Kok of the Labour Resolve Consultancy, representing “Respondent Party: - Mimmo’s Pizzeria and Take Away” to have the award rescinded was unsuccessful.

- [15] After the Bargaining Council award had been made an order of the Labour Court, the respondent, on the basis of that order, sued out of the office of the registrar a writ of execution against Mimmo’s Pizzeria and Take Away, in terms whereof the sheriff for the districts of Roodepoort, Randburg and Johannesburg respectively, was directed to attach and take in execution the movable goods of Mimmo’s Pizzeria and Take Away “the above mentioned execution debtor of Shop 3 Westgate Shopping Centre, 120 Ontdekkers Road, Horizon, Roodepoort and 1 Regent Place, Cradock Avenue, Rosebank and further of Shop 227 Randburg Waterfront, Republic Road, Randburg” and cause same to be realized by public auction. The sheriff duly executed the writ on 4 April 2000 and attached movable assets to the value of R42 000 the property of Mimmo’s Westgate CC trading as Mimmo’s Pizzeria and Take Away Restaurant (Mimmo’s Westgate) at Shop 3, Westgate Shopping Centre, 120

Ontdekkers Road, Horison, Roodepoort.

[16] As the first respondent furthermore considered that his dismissal constituted an unfair labour practice, the dispute between him and “Mimmo’s Restaurant and Pizzeria” was referred to the CCMA. The CCMA arbitrated the matter in the absence of Mimmo’ Restaurant and Pizzeria, who failed to appear despite the fact that its been advised of the date and venue of the arbitration by means of a facsimile transmission. The Commissioner, after he had heard the evidence of the first respondent, made the following award on 18 December 1999:

“(a) That the respondent pay the applicant R59 500 for procedural and substantive unfairness calculated at the monthly salary of R8 500 from the date of dismissal being the 4 May 1999 and the last day of the hearing 17 December 1999.

(b) The above amount to be paid in four (4) equal instalments within 14 days after receipt of the award. The first instalment is due and payable on or before the 30 January 1999 and the balance on or before the 15 of every consecutive month.”

[17] Despite the fact that Mimmo’s Pizzeria and Take Away was cited as the respondent in the application to the Labour Court to make the CCMA award an order of court, the respondent,

in the award that was made an order of court, was cited as “Mimmo’s Restuarant (sic) and “Pizzeira (sic)”.

[18] The learned judge in his judgment dealt individually with the relief that flows from the CCMA and the bargaining council awards.

[19] In the case of the relief pertaining to the CCMA award he found that

- a) as urgency was based thereon that fourth respondent advised the appellants on 17 April 2000 that judgment had been taken against an entity cited as Mimmo’s Pizzeria and Take Away in an amount of R59 500, and no reason was provided for the lodging of the application only on 10 May 2000, no case for urgency had been made out; and
- b) the Labour Court possessed the power to rescind CCMA arbitration awards only if a commissioner has failed, when called upon to do so, to exercise the powers with which he or she has been imbued by section 144 of the Labour Relations Act, when called upon to do so.

[20] In the case of the relief pertaining to the Bargaining Council award he found that

- a) as the value of the assets of the fourth appellant that had been attached exceeded the amount of the first respondent's claim and there was no basis upon which the sheriff could have attached any goods on the second and third appellants' premises, the papers before him did not disclose a satisfactory basis why they were "part of this application";
- b) the appellants did not satisfy the test for urgency in that they delayed taking steps to protect their alleged rights from the time the sheriff attached fourth appellant's assets to the time that he notified them of his intention to remove same i.e. the period 4 April 2000 to 8 April 2000, whilst they knew that first respondent contended that his claims lay against first appellant and that he was entitled to levy execution against the fourth appellant's assets;
- c) that the respondent by levying execution was enforcing a right derived from the bargaining council award; that whatever rights the appellants sought to protect could

not override the first respondent's said right; and that unless and until the bargaining council award and the court order were rescinded or set aside the first respondent was entitled to enforce the order by means of execution; and

- d) that no satisfactory explanation was provided by the appellants for not having instituted interpleader proceedings.

[21] The learned judge dismissed the application with costs on an attorney and client scale "in the light of the above".

[22] The precise basis on which the learned judge dismissed the application is not clear. If he did so on the basis of an absence of urgency there was no need to have dealt with issues that touched on the merits of the application and vice versa.

The relief flowing from the CCMA award:

[23] Labour Court Rule 20 allows the institution of proceedings,

inter alia, against a firm i.e. a business carried on by a body corporate under a separate name, without alleging the identity of the owner(s) thereof. It is clear from a careful perusal of the papers before the court **a quo** that none of the appellants carried on business under the name of Mimmo's Restaurant and Pizzeria. The inference is inescapable that the citation of Mimmo's Restaurant and Pizzeria as the respondent in the CCMA proceedings was an erroneous rendition of the firm name common to all Mimmo's Pizzeria and Take Away franchised operations. That inference is based on the fact that the respective claims that formed the subject-matter of the bargaining council- and CCMA awards were intended to be enforced against a single entity namely "Mimmo's Head Office now cited as First Appellant," which, in the first-mentioned proceedings and the application brought under case No J 547/00, was cited as Mimmo's Pizzeria and Take Away. As judgments of courts remain binding until varied, corrected or set aside (See: **Behrman v Sideris and Another** 1950(2) SA 366 (T) at 370; **Richard Goldman Finance (Pty) Ltd v Elmtree Finance**

& Investment Co (Pty) Ltd 1977(2) SA 624 (W) at 626 C)

the relief claimed in prayers 2 and 5 of the notice of motion had to be decided on the basis that the CCMA award was made against a judgment debtor whose identity does not coincide with the trade name common to the appellants. Accordingly, until a substantive application for the correction of the citation of the judgment debtor succeeds, the appellants lack **locus standi**, in that they do not have a direct and substantial interest in respect of relief claimed in paragraphs 2 and 5 of the notice of motion (See: **Jacobs en 'n Ander v Waks en Andere** 1992(1) SA 521 (A) at 534) so that the need to decide whether they are entitled to relief on an urgent basis, or whether the Labour Court has jurisdiction to rescind arbitration awards of the CCMA does not arise.

[24] In the circumstances the learned judge, in my view, justifiably, refused the relief sought in prayers 2 and 5 of the notice of motion and Advocate La Grange did not make any submissions to the contrary.

The relief flowing from the Bargaining Council award:

[25] It is not clear, but unnecessary to decide, whether the finding that the papers did not disclose a satisfactory basis why the second and third appellants were “part of the proceedings” was intended to signify a misjoinder or an absence of **locus standi**, in the sense referred to in paragraph 23 above.

[26] The writ of execution identifies the judgment debtor as Mimmo’s Pizzeria and Take Away of, Shop 3, Westgate Shopping Centre, 120 Ontdekkers Road, Horizon, Roodepoort, 1 Regent Place, Cradock Avenue, Rosebank, Shop 227, Randburg Waterfront, Republic Road, Randburg, which are the addresses of the premises where Mimmo’s_Westgate, Mimmo’s Rosebank CC (Mimmo’s Rosebank) and Mimmo’s Randburg CC (Mimmo’s Randburg) respectively carry on business. As second, third and fourth appellants trade under the style of Mimmo’s Pizzeria and Take Away they answer to the description of the judgment debtor in the writ of execution, and accordingly, despite the fact that the first respondent acknowledges that the writ of execution is not

based on any judgment obtained against them, second, third and fourth appellants were exposed to the consequences of execution namely, deprivation of property and impairment of reputation (See: **Xakana v Elliot Brothers (Queenstown) (Pty) Ltd** 1967(4) SA 724 (E) at 727 B – C). It is implicit in the first respondent's oft-repeated stance that he was employed and dismissed by "Mimmo's Head Office now cited as First Appellant" that the bargaining council award and the court order under case No 6066/1999 were purported to have been obtained against the first appellant. Despite that stance the first respondent failed to approach the court for a declarator to the effect that the first appellant is the owner of the firm Mimmo's Pizzeria and Take Away so as to enable it to levy execution against its assets (See: **Rees v Feldman** 1927 TPD 884 at 889; **M. Rauff (Pty) Ltd v Pietersburg Coal Agency** 1974(1) SA 811 (T); **Roamer Watch Co SA & Another v Textile Distributors also t/a MK Patel Wholesaler Merchants & Direct Importers** 1980(2) SA 254 (W) at 267 E – G). The first respondent, in disregard of their proven existence as separate corporate entities (See: **Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others**

1995(4) SA 790 (A) at 803 A – H), justifies execution against the assets of the second, third and fourth appellants on the basis that they are “head office stores” in that they are “owned and controlled” by the first appellant. That assertion is disputed by all the appellants. In view of the foregoing, the appellants, in my view, do have a substantial and direct legal interest in the issue whether the writ of execution should be set aside or not (See: **United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another** 1972(4) SA 409 (C) at 415 E – H) and, accordingly, the learned judge erred in having come to the conclusion that the papers before the court failed to disclose a satisfactory basis for the second and third appellants being parties to the application.

[27] Did the appellants make out a case for urgency in respect of the relief claimed in prayers 3 and 4 of the notice of motion?

[28] As paragraph 5 of the agreed order of 10 May 2000, did away with the need of making an order in terms of prayer 4 of the notice of motion, the enquiry into urgency is restricted to the relief

claimed in prayer 3 thereof.

[29] A party applying for relief on an urgent basis must in the founding papers set out the reasons for urgency; state why urgent relief is necessary; and also set out why the requirements of the rules of court have not been complied with, if that is the case (sub-rules 8(2)(a) and (b)). The purpose of those sub-rules is self-evident. Considerations of fairness dictate that litigious matters should be heard in more or less the sequence in which they have become ripe for hearing. If it were to be otherwise, it will bring about additional delays in the hearing of matters already awaiting their turn and result in self-evident unfairness and the potential for prejudice. Sub-rule 8(2) requires an applicant to place such facts before the court as would be sufficient to enable it to exercise a judicial discretion in regard to whether sufficient and satisfactory grounds have been shown to exist to justify giving the particular matter preference. Urgency usually entails a deviation from the forms, time-limits and procedures prescribed by the rules or a departure from the established sitting times of the court (Cf: **Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a**

Makin's Furniture Manufacturers) 1977(4) SA 135 (W) at 136 H). The factors that are usually taken into account in the exercise of such a discretion are a) any prejudice that an applicant might suffer if the application had to be dealt with in the ordinary course; b) any prejudice other parties awaiting the hearing of their matters might suffer if the particular application were to be given preference; and c) any prejudice that the respondent might suffer as a result of any deviation from the prescribed forms and procedures, the abridgement of any prescribed time-limits and an acceleration of the hearing (See: **IL & B Marcow Caterers (Pty) Ltd v Gretermans SA Ltd and Another: Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another** 1981(4) SA 108 (C) at 112 H – 113 A; 114 A – B). The provisions of Rule 8 clearly apply to all urgent applications, irrespective of whether the relief claimed is of an interim or final nature.

[30] The learned judge's finding that the appellants failed to satisfy the test for urgent relief is predicated thereon that they failed to take steps to protect their rights from the time that the Sheriff attached fourth respondent's goods to the time his intention

of removing them manifested itself i.e. the period 4 April to 9 May 2000. In assessing the impact of such delay on the urgency of the matter the learned judge appears to have given substantial weight to the fact that first appellant knew from the time that the matter had been referred to the Bargaining Council, that first respondent contended that his claim lay against first appellant, and that fourth appellant, from the correspondence between its attorneys and the fourth respondent, knew that first respondent contended that fourth appellant was “owned and controlled” by first appellant.

[31] There are instances where courts have refused to exercise their discretion in favour of applicants who have been dilatory in bringing applications for the granting of relief on an urgent basis (See: **Schweizer-Reneke Vleis Maatskappy (Edms) Bpk v Die Minister van Landbou en Andere** 1972(1) SA 235 (T); **Twentieth Century Fox Film Corporation and Another v Anthony Black films (Pty) Ltd** 1982(3) SA 582 (W) at 586 A – D; **Zulu and Others v Van Rensburg and Others** 1996(4) SA 1236 (LCC) at 1243 D). It seems axiomatic that the length of the delay and the cogency of the explanation therefor will constitute

pivotal considerations in the exercise by a court of such a discretion.

[32] The learned judge held that an applicant who approaches a court for urgent relief should in his/her founding papers not only set out the “bases for urgency but also take the Court into its confidence by setting out all material facts relevant to its case”. The learned judge’s formulation of what should be set out in the founding papers, in my view, is not only more onerous than the requirements of rule 8(2) as regards urgency, and sub-rules 12(1) and (3) as regards the extension, abridgement and condonation of prescribed time-limits, but furthermore fails to make any mention of those considerations that should be taken into account by a court, in the exercise of its discretion whether to accord a matter preference or not, and are enumerated in paragraph 29 above.

[33] The enquiry into urgency must take place against the following factual matrix.

[34] Messrs Biccari Bollo Mariano, the first appellant’s attorneys,

in a facsimile transmission to the fourth respondent on 11 February 2000, conveyed its stance namely, that the first respondent's former employer was Mimmo's Florida. After the attachment of the fourth appellant's goods on 4 April 2000, its attorneys, Messrs Christelis Artemides, on 7 April 2000, advised the fourth respondent, by means of a facsimile transmission, that their client was not a party to the bargaining council proceedings on which the writ of execution was based; that fourth appellant did not have any contact with the first respondent; and that as there was no basis upon which the fourth appellant's assets could have been attached, proceedings for the setting aside of the writ would be launched unless fourth respondent undertook to discontinue the execution.

[35] Messrs Biccari, Bollo Mariano on the same date, by means of a facsimile transmission forwarded to fourth respondent, reiterated the first appellant's stance, namely, that the first respondent was employed by Mimmo's Florida and that the attachment of its assets was invalid and, furthermore, sought confirmation that, pending an application for the rescission of the

order underlying the writ, execution would not be proceeded with.

[36] The fourth respondent, by means of facsimile transmissions to Messrs Christelis Artemides and Biccari Bollo Mariano respectively, on 10 April 2000, gave an undertaking that pending receipt within three days of proof that fourth appellant was the owner of the attached goods; that first respondent was employed by Mimmo's Florida; and had nothing to do with the second, third and fourth appellants, her client reserved the right to proceed with the execution. The fourth respondent on 17 April 2000, forwarded facsimile transmissions to Messrs Christelis Artimides in which she stated that unless an affidavit dealing with the fourth respondent's ownership of the attached goods was received by 19 April 2000, she would instruct the sheriff to remove the attached goods. Messrs Biccari Bollo Mariano on 19 April 2000, in a facsimile transmission addressed to the fourth respondent, again repeated its contention that the first respondent had been employed by Mimmo's Florida and that first respondent was not entitled to "proceed to each and every Mimmo's franchise in South Africa ... for the purpose of executing in respect of your clients judgments,

which are specifically obtained in respect of your client's previous employment at Mimmo's Florida" and sought a written undertaking that her client would not execute against other franchisees, more in particular second and third appellant's, failing which, interdictory relief would be sought.

[37] It is common cause that the fourth appellant's managing member Karel Hendrik Johannes Willemse (Mr Willemse) on 20 April 2000, deposed to an affidavit, drafted the previous day by the first appellant's attorney Mr Bollo for the specific intent and purpose of producing it to the sheriff, should he attempt to remove the attached goods, as the first appellant had been advised that in the event of there being competing claims to the attached goods, the sheriff is in law obliged to notify the judgment creditor and that a stay of the execution process would ensue. The fourth respondent on 20 April 2000, by means of a facsimile transmission addressed to Messrs Christelis Artemides, recorded that as no affidavit dealing with the fourth appellant's ownership of the attached goods had been received she was instructing the sheriff to remove them. That facsimile elicited a response by means of a

facsimile transmission dated 25 April 2000 to the effect that Mr Artemides would be back at office on 2 May 2000 after which the facsimile transmission of 20 April 2000 would receive attention. As there was no further response to the fourth respondent's facsimile transmission of 20 April 2000, she on 8 May 2000, instructed the sheriff to remove the attached goods.

[38] The catalyst for the application in the court **a quo** was that Mr Bollo was advised at 13h20 on 9 May 2000, that the sheriff, on the instructions of fourth respondent, intended to remove the property that had been attached on 4 April 2000. Mr Bollo spoke to Mr Jeremy Visagie (Mr Visagie) who was attending to the removal by telephone. He advised Mr Visagie that Mr Willemse was unavailable and undertook to forward a facsimile copy of his affidavit, jurat 20 April 2000. After the affidavit had been telefaxed to Mr Visagie, Mr Bollo telephonically obtained confirmation that he had received it and requested him to procure confirmation from fourth respondent that the removal would not be proceeded with. Mr Visagie telephoned Mr Bollo approximately ten minutes later and told him that fourth respondent insisted that the attached

goods be removed. Mr Bollo then telephoned Mr Visagie's superior at the offices of the sheriff, Roodepoort who advised him that the removal would not take place. Mr Bollo unsuccessfully attempted to communicate with fourth respondent to advise her of his intention to launch an urgent application for the rescission of the judgment on which the writ of execution was based and requested her to instruct the sheriff not to remove the attached goods pending the institution of such proceedings. Also Advocate La Grange, whose services were enlisted by Mr Bollo in order to convey the urgency of the matter to fourth respondent, did not succeed to communicate with her. Fourth respondent did not dispute her inaccessibility, but advanced feasible reasons for her unavailability until she at 11h45 on 10 May 2001, received notice that the application would be brought at 14h00.

[39] Save that it is apparent that Mr Artimides was absent from his office during the period 24 April 2000 to 2 May 2000, neither he nor Mr Bollo has proffered any explanation for the failure to have furnished Willemse's affidavit to the fourth respondent during the period 20 April 2000 to 9 May 2000. As the fourth respondent

allowed the fourth appellant until 19 April 2000 to furnish her with proof of its ownership of the attached goods, the period of inaction was from 20 April 2000 to 8 May 2000, and not 4 April 2000 to 9 May 2000, as held by the learned judge. The fourth appellant provided the first appellant's attorney with an affidavit which addressed its separate corporate existence; disavowed liability to the first respondent; and asserted its ownership of the attached goods. Having done so, the fourth appellant had no reason to anticipate any inaction on the part of Messrs Biccardi, Bollo Mariano as regards furnishing thereof to the fourth respondent. The cases in which it was held that there is a limit beyond which a litigant cannot escape the consequences of his attorney's lack of diligence, were decided in the context of litigants who, well-knowing that action had to be taken sat by passively without so much as directing any enquiries or reminder to the attorney in whose hands the matter was left (See: **Saloojee and Another NNO v Minister of Community Development** 1965(2) SA 135 (A) at 141 C – H; **Moraliswani v Mamili** 1989(4) SA 1 (A) at 10 B – D; **Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others** 1996(4) SA 411 (C) at 419 J – 420 C).

The present, in my view, is not such a case. As has been stated already, first appellant was advised that the production of the said affidavit would be sufficient to trigger interpleader proceedings and suspend the execution process.

[40] As far as compliance with the requirements of Rule 8(2) is concerned, the appellants clearly erred on the side of paucity, but it is clear from the papers that they attributed urgency to the “irreparable and unquantifiable damage” that would be done to the Mimmo’s Pizzeria and Take Away tradename and trademark, as well as the loss of clientele and goodwill, that would result if the second, third and fourth appellants’ business operations were to be forced to close because of the attachment and removal of their goods. Because no attachment of the assets of first, second and third appellants took place, the feared consequences in their case were based only on fourth respondents statement that she intended executing against the various franchise stores contracted to the first appellant, and accordingly, were less acute than in the case of the fourth appellant, as the goods reflected in the sheriff’s inventory, namely, 50 iron and wood tables, 200 wood and rattan

chairs, knives, forks and kitchen equipment such as a griller, a flatbed gas-burner and a fridge appear to be essential for the operation of a restaurant/take-away business. It is obvious that the prejudice the fourth appellant would have suffered, had the removal of the attached goods proceeded, would have been significant.

[41] As is apparent from the learned judge's statement to the effect that the outcome of the application would probably have been different, had the fourth appellant furnished Mr Willemse's affidavit "before the matter became urgent" or provided a satisfactory explanation for not having done so, that such failure was pivotal to his finding that the appellants had failed to make out a case for urgency. The learned judge appears to have lost sight thereof that the first appellant did not provide the affidavit because it was prepared for presentment to the sheriff when the attached goods were to be removed, so as to trigger the institution or interpleader proceedings, and the fourth appellant left the matter in the hands of the first appellant's attorney. Not only have adequate explanations been furnished for the failure to provide the affidavit

of Willemse, but the learned judge appears to have misconstrued the function thereof. As it is the first respondent's case that he is entitled to execute against the property of fourth appellant because it was "owned and controlled" by the first appellant, proof that the latter was the owner thereof does not appear to have been necessary, and, for the same reason, there is no room for the existence of adverse claims essential for the institution of interpleader proceedings (See: **Kamfer v Redhot Haulage (Pty) Ltd and Another** 1979(3) SA 1149 (W) at 1152 E).

[42] The learned judge, in my view, misdirected himself as regards the requirements of rule 8(2) in respect of the averments that must be made by an applicant in an urgent application; the criteria for a proper exercise by a court of its discretion in respect of urgency; a number of facts crucial to a proper exercise of a such discretion; and furthermore, erred in having held that second, third and fourth appellants failed to satisfy the test for urgent relief.

[43] The learned judge in my view also misdirected himself by having held that unless and until the Bargaining Council award and the court order were rescinded or set aside the first respondent

was entitled to enforce the order of the Labour Court by means of execution and, by implication, precluded the setting aside of the writ of execution issued under case No 6066/1999. The writ of execution that forms the subject-matter of prayer 3 of the notice of motion was issued in such a manner that, despite the fact that first respondent has not obtained judgment against any of them the second, third and fourth appellants fall within the description of the judgment debtor therein. Accordingly the validity or otherwise of the writ of execution is capable of adjudication independently of and without having to consider the propriety of the order on which it is based. The learned judge, having

formed the view that the first respondent was entitled to enforce execution unless and until the order of the Labour Court was rescinded or set aside, in my view, erroneously, precluded himself from considering the merits of the basis upon which the appellants assailed the writ of execution and in doing so, imposed a fetter on his judicial functions.

[44] The finding that no satisfactory explanation was given as to why interpleader proceedings were not instituted, was made in the

context that the availability of such relief constituted “an alternative remedy to the urgent relief”. I have already found that because of the absence adverse claims to the attached goods, the institution or interpleader proceedings could not be resorted to. Accordingly, the absence of a satisfactory explanation for not having invoked interpleader proceedings was irrelevant, and in the premises, the learned judge erred in having taken it into account, if in fact he did.

[45] In view of the above, I have come to the conclusion that the learned judge’s dismissing of the relief claimed in paragraph 3 of the notice of motion cannot be sustained, irrespective of which of the grounds in paragraph 20, it was based on.

[46] This court, having come to the conclusion that the judgment of the court **a quo** dismissing the relief sought in prayer 3 of the notice of motion cannot be upheld in terms of the provisions of section 174(b) of the Labour Relations Act, may make any order that the circumstances may require.

[47] As the relief that is being claimed in prayer 3 of the notice of

motion is of a final nature, any material disputes of fact must be resolved by applying the test enunciated in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984(3) SA 623 (A) at 634 E – G namely, that the relief sought can be granted only if the facts as stated by the respondents, together with the admitted facts in the appellants' affidavits, justify the granting thereof.

[48] The first respondent's case is that he was employed and dismissed by "Mimmo's Head Office now cited as First Appellant." Although the first appellant disputes that the first respondent was employed by it and avers that he was employed by Mimmo's Florida, the first respondent's version stands to be accepted for the purposes of deciding the relief that is being claimed. Even if the first respondent were employed by the first appellant, the Bargaining Council award and the writ of execution on which it is based, will be efficacious as against first appellant only if it carried on business under the name Mimmo's Pizzeria and Take Away, an aspect that has not been dealt with in the papers specifically. The letter terminating the first respondent's services (HDS 3) emanated from the first appellant's offices and was written on a letterhead

denoting its tradename and trademark namely, Mimmo's Pizzeria and Take Away. Those facts lend some support to the contention that the first respondent traded under such name. Even if it is assumed that the first appellant answers the description of the judgment debtor in the writ of execution (as would every other franchisee in the Republic of South Africa who trades under the name Mimmo's Pizzeria and Take Away), it is clear from the manner in which the writ of execution was formulated that it was intended to be executed against the assets of the second, third and fourth appellants and, accordingly, is unenforceable as against them (see: **Kaplan v The Union Government 1924 TPD 532 at 533; Sachs v Katz, 1955(1) SA 67 (T) at 72 F – G**).

[49] As already stated, the first respondent seeks to levy execution against the second, third and fourth appellants' assets on the basis that they are owned and controlled by the first appellant. That assertion disregards the provisions of section 29(1) of the Close Corporations Act, No. 69 of 1984 that no juristic person may directly or indirectly, through the instrumentality of a nominee or otherwise, hold a member's interest in a close

corporation. That such an assertion was made, however, is not unexpected as Mr Tasos Demetrides (who interviewed the first respondent before he was appointed) is a member not only of the first appellant but also the second, third and fourth appellants.

[50] The averment that second, third and fourth appellants are owned and controlled by the first appellant is denied. The high-water mark of the first respondent's case in that regard is that he had been told, during a telephone conversation with Raymond Friedman, an erstwhile co-employee at Mimmo's Florida, that Mimmo's Westgate, Mimmo's Waterfront, Mimmo's Rosebank and two other stores were "head office stores" and that a receptionist, one H. Steenkamp, confirmed that such stores were owned by "head office". First Appellant challenged those averments as constituting hearsay and further questioned the ability of those persons to have provided reliable information thereanent. No affidavits by Friedman and Steenkamp form part of the papers and no reasons were provided for such omissions. Failing an agreement as regards its admissibility, and in the absence of an evidentiary basis to enable the court to exercise its discretion to admit such hearsay evidence in accordance with the provisions of

section 3(1)(c) of the Law of Evidence Amendment Act, No 45 of 1988, the statements attributed to Friedman and Steenkamp have no evidential value and must be disregarded. If that is done the only juridical basis upon which the first respondent based his entitlement to levy execution against the assets of the first, second and third appellants falls away and no other basis permitting him to do so has been shown to exist. A writ of execution unsupported by a **causa** in the form of a judgment debt against the party against whose assets execution is enforced, lacks validity and may be set aside (See: **Ras en Andere v Sand River Citrus Estates (Pty) Ltd** 1972(4) SA 504 (T) at 510 E; **Le Roux v Yskor Landgoed (Edms) Bpk en Andere** 1984(4) SA 252 (T) at 257 B). That, in my view, is the position in the instant case.

[51] I accordingly incline to the view that the appellants were entitled to an order in terms of prayer 3 of the notice of motion.

[52] As the relief that is being claimed in prayer 4 of the notice of motion is an automatic consequence of the granting of the relief claimed in prayer 3, there is no need to make any order in that regard.

[53] The fourth respondent was joined as a party in these proceedings because she is alleged to have “targeted” certain Mimmo’s Pizzeria and Take Away franchise operations and that allegation served as the basis for a prayer for a costs order **de bonis propriis**. The fourth respondent, as appears from the communications that passed between her and the appellant’s and their attorneys, merely performed her professional duties with a degree of dedication that could easily be misperceived. In my view, any allegations of impropriety on the part of fourth respondent are unwarranted. Accordingly, no order for costs **de bonis propriis** or otherwise, is called for.

[54] As the issue in respect of which the appellants should have succeeded in the court **a quo** i.e. the relief claimed in prayer 3 of the notice of motion is distinct and severable from the issues in respect of which they failed (see: **Transvaal and Orange Free State Chamber of Mines v General Electric Co, 1967(2) SA 32 (T) at 72A – B**), i.e. the relief claimed in prayers 2 and 5 thereof, they, in my view, should be awarded only half their costs of suit

against the first respondent.

[55] Although the appeal was successful only in respect of the relief claimed in prayer 3 of the notice of motion, the appellants, in my view, have been substantially successful and should be awarded their costs of appeal.

[56] In my view

1) the appeal should succeed to the extent that the appellants are entitled to the relief claimed in prayer 3 of the notice of motion, together with the costs of the appeal and

2) the order of the court **a quo** should be deleted and substituted with the following:

“a) The relief claimed in prayers 2 and 5 of the notice of motion is refused.

b) The relief claimed in prayer 3 of the notice of motion is granted

c) First respondent is ordered to pay half of the applicants' costs of suit.”

D. VAN REENEN

ACTING JUDGE OF APPEAL

I agree. An order is made in terms of the order proposed by Van Reenen AJA.

RMM ZONDO

JUDGE PRESIDENT

I agree.

NP WILLIS

JUDGE OF APPEAL

Appearances:

For the appellants:

Adv O.J. La Grange instructed by Biccari, Bollo & Mariano

For the 1st and 4th Respondents:

Ms M.T.T. Jardim instructed by Mary Jardim Attorney

Date of Hearing: 8 NOVEMBER 2001

Date of Judgment: 29 MARCH 2002

Date of Judgment: