

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD IN BRAAMFONTEIN)

CASE NO J 720/08

In the matter between

RHAM EQUIPMENT (PTY) LTD

APPLICANT

AND

NEVILLE LLOYD

1ST RESPONDENT

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

2ND RESPONDENT

THE SHERIFF, KEMPTON PARK SOUGHT

3RD RESPONDENT

JUDGMENT

AC BASSON, J

Order

[1] On 24 April 2008 this court made an order staying the warrant of execution issued against the Applicant by the Labour Court under case number GAJB686/2006 in respect of the award granted in favour of the 1st Respondent against the Applicant for the sum of R 60 000.00 together with interest and costs which the 1st Respondent recovered under case number GAJB6868/2006 by arbitration award issued by a Commissioner dated 20 June 2006 which was certified in terms of section 143(3) of Act 66 of 1995 by the Senior Commissioner. An order was also granted uplifting the 3rd Respondents attachment of a John Deere 6068PF 250 6 cylinder engine the property of the Applicant. No order as to costs was made.

[2] The Respondent requested reasons for the order. Herewith brief reasons.

Reasons

[3] This is was an application for a stay of a writ of execution issued from this Court under case number GAJB6868/2006 pending the finalization of the Applicant's application for review of an arbitration award granted by the Second Respondent (hereinafter referred to as "the Commissioner").

[4] On 17 March 2008 the Applicant's representative caused a letter in response to the First Respondent's application in terms of section 143 of the LRA confirming the receipt of the First Respondent's notice in terms of section 143 of the LRA on 4 March 2008. In terms of this letter an undertaking was sought from the First Respondent that the First Respondent would stay the enforcement of the award pending the determination of the review application filed under case number JR1697/2006 in the Labour Court. However, pursuant to this letter the representatives of the First Respondent addressed a letter to the Third Respondent (hereinafter referred to as "the Sheriff") instructing him to *inter alia* attach and remove the Applicant's property. Pursuant to the First Respondent's instruction to the Sheriff, the Sheriff attended the premises of the Applicant with the view of attaching certain property of the Applicant. In order to limit costs and to assist the Sheriff the Applicant offered to deliver to the Sheriff an engine to the value of approximately R 100 000.00. The said John Deere engine was delivered to the Sheriff.

Relevant background

[5] On 20 June 2006 Commissioner Lynch (hereinafter referred to as "the Commissioner") delivered an award in favour of the First Respondent in terms of which the Commissioner held that the dismissal of the First Respondent was substantively and

procedurally unfair. The Applicant was ordered to pay the First Respondent compensation in the amount of R 60 000.00.

[6] It is common cause that pursuant to this award, the Applicant launched a review before this Court setting aside the award made by the Commissioner. In compliance with Rule 7A(6) of the Rules of the Labour Court, the Applicant delivered to the First Respondent's representative a copy of the record of the proceedings. The Applicant also delivered a notice in terms of Rule 7A(6) dated 17 November 2006 stating that the Applicant stands by its Notice of Motion. The Court official stamp on this notice confirms that it was filed with the Labour Court on 22 April 2006. It is common cause that to date the First Respondent has not complied with the provisions of Rule 7A(9) of the Rules by not delivering an affidavit in answer to the allegations made by the Applicant in its review application.

[7] The Applicant correctly submits in its founding affidavit that this Court will not consider the merits of the Applicant's case with regard to the dispute underlying the warrant of execution and that the Court will only take into account the *causa* for the warrant of execution in dispute. Notwithstanding this fact, the Applicant nonetheless submits that it has a reasonable prospect of success especially in light of the fact that the First Respondent has to date not delivered an opposing

affidavit to the Application for review. The Applicant submits in its papers that the First Respondent had advised two co-employees that it had resigned and that he had also tendered his written resignation. Pursuant to tendering his resignation, the First Respondent later withdrew his resignation. Notwithstanding this fact that the Commissioner concluded that the First Respondent was dismissed. It is this award that is currently the subject of a pending review application.

- [8] The Applicant also submits in his founding affidavit that the replacement value of the engine exceeds the value that would be realized on an auction of the engine and that this will result in a loss for the Applicant that it will not be able to recouper should the Applicant's review be successful. It is further submitted by the Applicant that it will suffer irreparable harm should the Applicant be successful in its pending application. It is significant to point out that the First Respondent does not dispute the allegation made in the founding papers to the effect that the Applicant will suffer irreparable harm should the sale in execution proceed. The First Respondent also does not dispute the allegation that he will not in a position to repay the said amount in the event the Applicant being successful with the pending application.

Brief exposition of the legal principles

[9] In terms of the provisions of section 163 of the Labour Relations Act 1995 (hereinafter referred to as “the LRA”), it is provided that any decision, judgment or order of this Court may be served and executed as if it were a decision, judgment or order of the High Court of South Africa for purposes of execution. It therefore follows that once an order is made by this Court, it is deemed to have the attributes of an order of the High Court. This in turn implies that it would have the same effect and consequences as far as its execution is concerned. In terms of Rule 45A of the Uniform Rules of the High Court, the Court may suspend the execution of any order for such period as it may deem fit. This is a discretion that the Court must exercise and which must be exercised judicially. As a general rule, a Court will grant a stay of execution where real and substantial justice requires such a stay or, put otherwise, where injustice will otherwise be done. See *Strime v Strime* 1983 (4) SA 850 (C) 852 B¹ and *Bestbier v Jackson* 1986 (3) SA 482 (W) at 484.

¹ “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 (see *Williams v Carrick* 1938 TPD 147 at 162; *Graham v Graham* 1950 (1) SA 655 (T) at 658; *Cohen v Cohen* 1979 (3) SA 420 (R) at 423D - C). The Court will, generally speaking, grant a stay of execution where real and substantial justice requires such a stay or, put otherwise, where injustice would otherwise be done.”

[10] In general a Court will grant a stay of execution where the underlying *causa* of the judgment debt is being disputed or no longer exists, or when an attempt is made to use for ulterior purposes the machinery relating to the levying of execution (see *Le Roux v Yskor Landgoed (Edms) Bpk* 1984 (4) SA 252 (T) at 257²; *Whitfield v Van Aarde* 1993 (1) SA 332 (E) at 337 G.³).

[11] In *Gois t/a Shakespeare's Pub v Van Zyl & Others* (2003) 24 ILJ 3202 (LC) this Court has held that, in particular circumstances, the Court may, in the determination of the factors to be taken into account in the exercise of its discretion under this rule, borrow from the requirements for the granting of an interim interdict, namely that

² In *Le Roux v Yskor Landgoed (Edms) Bpk en andere* 1984 (4) SA 252 (T) at 257B-I, the Court held as follows: "Die algemene reël is dat 'n eksekusiëlsbrief tersyde gestel sal word as die lasbrief nie ondersteun of nie verder ondersteun word deur sy *causa* nie. Die *causa* is die skuld en die vonnis wat daarop verleen is. (Sien, in die algemeen *Herbstein en Van Winsen The Civil Practice of the Superior Courts in South Africa* 3de uitg op 644-645 en *Ras en andere v Sand River Citrus Estates (Pty) Ltd* 1972 (4) SA 504 (T) op 510E.) (a) Die uitvoering van die eksekusiëlsbrief kan dus opgeskort word as die skuld wat die vonnis ten grondslag lê aangeveg word deur die vonnisskuldenaar. Voorbeelde hiervan is waar eksekusie van 'n onderhoudsbevel opgehef word hangende 'n aksie of aansoek vir tersydestelling van die bevel of vermindering van die bedrag betaalbaar (*Williams v Carrick* 1938 TPD 147 en *Graham v Graham* 1950 (1) SA 655 (T)) of waar eksekusie van 'n kostebevel opgehef word hangende hersiening van die taksasie (*Stent & Pretoria Printing Works v Roos* 1909 TS 1054); (b) Die eksekusiëlsbrief kan tersyde gestel word: (i) as die skuld en vonnis gedelg word deur betaling, *compensatio*, *novatio*, *delegatio* of *cessio*. ... (ii) waar die vonnis nie seker is nie, vir sover dit slegs na die beslissing van 'n verdere regsprobleem of -probleme vasgestel kan word ... (iii) waar die lasbrief nie in ooreenstemming met die vonnis is nie. ... (iv) waar die vonnis waarop die lasbrief gebaseer is, tersyde gestel word ... (v) waar 'n verkeerde persoon daarin genoem word as gedingsparty ..."

³ "In view of this conclusion it is not necessary to deal in detail with the further submission made on behalf of the respondent, namely that if a Court has a discretion to grant a stay of execution it only has such a discretion where the underlying *causa* of the judgment debt is being disputed or no longer exists."

the Applicant must show (i) that the right which is the subject of the main action and which he or she seeks to protect by reason of the interim relief is clear or if not clear, is *prima facie* established though open to some doubts; (ii) that if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the Applicant if the interim relief is not granted and he or she ultimately succeeds in the establishing of his or her right; (iii) that the balance of convenience favours the granting of interim relief; and (iv) that the Applicant has no other satisfactory relief. In this regard this Court held as follows:

"[32] Normally this court will favourably consider the stay of a writ of execution when real and substantial justice requires such a stay or, put differently, where injustice would otherwise result."

[33] In Erasmus v Sentraalwes Kooperasie Bpk [1997] All SA 303 (0) at 307D-H it was held that the requirements for an interim interdict could be taken into account in determining whether or not to grant a stay. This test was found not to be entirely appropriate especially where an applicant is not asserting a right but seeks an indulgence on the grounds that execution may result in an injustice. In Road Accident Fund v Strydom 2002 (1) SA 292 (C) 304E-H the court held that 'at the heart of the

enquiry relative to the exercise of the Court's discretion is whether it has been shown by the applicant that there is a well grounded apprehension of execution of the order taking place at the instance of respondent and of injustice being done to the applicant by way of irreparable harm being caused to applicant if execution is not suspended.

[34] Furthermore, in considering whether or not to exercise 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. In Strime v Strime 1983 (4) SA 850 (C) the applicant applied for a stay in execution pending the outcome of a variation of a maintenance order which he had sought. The court there said, 'whether or not the applicant is likely to succeed in obtaining a cancellation or variation of the maintenance order is not for this Court to determine. It would also be unwise to express my view because of the pending maintenance court application (at 852G-H).

[35] The above decision is in line with the finding in Le Roux v Yskor Landgoed (Edens) Bpk 1984 (4) SA 252 (T), to the effect that a stay of execution will be

granted where the underlying causa is the subject-matter of an ongoing dispute between the parties. It is therefore sufficient that there is a possibility that the causa underlying the writ may be ultimately removed. The applicant is therefore not required to satisfy this court as to his prospects of success in the principal dispute."

[12] The Court concluded therefore that when considering an application to stay an execution, this Court is not concerned with the merits of the underlying dispute: the sole enquiry is simply whether the *causa* is in dispute. In the *Gois*-matter, the Court decided to grant a stay of a writ of execution in that matter because --

"In the absence of the stay the rescission application will be rendered meaningless. The sale in execution would have proceeded and First Respondent obtained satisfaction of the amount of the award. The First Respondent is a man of straw and it is likely that Applicant will have no recourse against him. Effectively unless a stay of execution is granted, the Applicant will lose his right to dispute his indebtedness to the First Respondent and it will be futile to pursue the

rescission application once the sale in execution has taken place."

[13] I am in full agreement with the principles set out in the *Gois*-decision. Turning to the present matter, it is clear that the underlying *causa* exists and that a real and substantial injustice will result if the stay is not granted. It is also undisputed on the papers that, unless the stay of execution is granted, the Applicant will lose his right to dispute his indebtedness. It is furthermore also undisputed on the papers that the Respondent is a man of straw and that it is likely that the Applicant will have no resource against him should the sale in execution be allowed to proceed.

[14] In the event the application to stay the execution is granted.

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AC BASSON, J

Date of reasons: 13 June 2008