

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO. J 453/10

In the matter between:

AFRIGUARD (PTY) LTD

Applicant

and

SCMAWU obo T MANGANE & 4 OTHERS

1st Respondent

REGISTRAR OF THE LABOUR COURT N.O.

2nd Respondent

SHERIFF OF THE HIGH COURT, VEREENIGENG

4th Respondent

JUDGMENT

LAGRANGE J:

Introduction

- [1] This is the return day for an interim interdict staying the execution of four rates issued by the court pending the determination of an application for a declaratory order sought by the applicant company, Afriguard (Pty) Ltd. the various individual former employees of the company in favour of whom the writs of execution were

issued are opposing the application. When the matter was originally set down for determination on an urgent interim basis, it appears that there was no opposition to the application, but the matter is now opposed by the first respondent, the union, which acts on behalf of the five individual respondents.

The background to the writs of execution

- [2] There are five individual respondents. All of them had referred unfair dismissal disputes to the Commission for Conciliation, Mediation and Arbitration ('the CCMA') following their dismissals in August 2007. Save for the fifth individual respondent, settlement agreements were reached with all the other individuals. In the case of the fifth individual respondent the matter could not be resolved and resulted in an arbitration award in the employee's favour.
- [3] On 1 April 2008, the settlement agreements and the award were made orders of court, and writs were subsequently issued to enforce those orders. The applicant further claims that a number of subsequent writs of execution were issued on 27 May 2008 all in amounts higher than that agreed in the arbitration award, which were only executed on 3 August that year when the Sheriff effected attachments in terms of the warrants.
- [4] It was this that prompted the first urgent application to stay the warrants which the court acceded to on 8 September 2009. An interim order was granted to stay the warrants and a return day was originally set for 2 October 2009 but was extended to 19 November 2009, when the interim order was discharged. No reasons appear in the court file for the discharge of the order. The parties are at odds about the effect of the order discharging the rule.
- [5] It is not necessary for the purposes of this application to detail the amounts due in terms of the various writs except to say that the aggregate sum now claimed is in excess of R 100,000-00. The applicant is seeking a declaratory order to the effect that none of the individual respondents are entitled to any further relief arising from the

settlement agreements and the CCMA award which were the basis of the writs of execution and, in particular, any further payments in terms of the writs. The application for a declaratory was brought under a separate case number J2724/09 and was launched on or about 10 December 2009. The founding affidavit in the matter is specifically incorporated in the applicant's founding affidavit in this interlocutory application to stay the execution of the writs pending the determination of the main application. According to the applicant, the application for declaratory relief is not opposed, but the first respondent denies this.

- [6] Unavoidably, it is necessary to consider the merits of that application, without deciding them, in order to determine whether the rule should be confirmed or discharged. It must be stressed that in this matter the court is considering the merits only from the perspective of assessing whether or not the applicant has a reasonable prospect of success in that application.
- [7] Although there are common elements to the applicant's justification for not giving effect to the various writs, it would be convenient to deal with each claim separately.
- [8] The unfair dismissal dispute concerning the first individual respondent was settled at the CCMA. The most important terms of that settlement agreement were that the employee agreed to report for work at the applicant's head office on 4 November 2007 at 10h00, and the applicant would pay him backpay with a gross value of R 6,920-00 by 8 November 2007. The applicant claims that he never reported for work at the time specified or thereafter. It admits not paying the arrear backpay by the due date, but claims that it was paid by way of a cheque issued on 14 December 2007, which was collected on behalf of the employee on 17 January 2008. According to the face of a copy of a cheque made out in favour of the employee it would appear to have been banked on 30 January 2008.

- [9] In the case of the second and third individual respondents, both were dismissed on 14 August 2007 for misconduct, and a settlement agreement appears to have been concluded at the CCMA conciliation meeting on 26 November 2007. In terms of the agreement they were to be reinstated on 3 December that year and would receive two payments, one for unpaid salary, and the other for backpay in respect of their reinstatement. According to the applicant, neither of the employees reported for work on 3 December 2007, and it provides evidence of a note signed by the second individual respondent on 13 August 2008 in which she demanded her money and indicated she was attending a nursing school and would return when she finished the course in 2010. As in the former case, a copy of a cheque in favour of her and banked on the same date as the first individual respondent's payment was banked, is attached. The applicant alleges that the unpaid wages were paid by electronic transfer, but there is no clear extrinsic evidence of this.
- [10] The fourth individual respondent was also dismissed in early August 2007. A case of unfair dismissal was referred to the CCMA and a settlement agreement was conclude on 13 November 2007 in similar terms to those of the other individual respondents. There is evidence of a cheque being issued in favour of the employee but it was only issued in August 2009 and does not seem to have been banked, whereas in its founding affidavit the applicant claims that the payment was made on 30 November 2007. In this instance there appears to be a disjuncture between the claim made in the affidavit and the evidence of payment.
- [11] The fifth individual respondent appears to have been dismissed on the same date as the fifth respondent namely 5 August 2007. The fifth respondent's matter was set down for arbitration on the 7 November 2007 and in terms of the arbitration award the applicant was ordered to reinstate the sixth respondent. He was directed to report for duty on 7 December 2007. The applicant was further ordered to pay him backpay of approximately R8,300-00 within 21 days of the award. As in the other cases, the applicant claims the employee never reported for work and it claims to have paid out the backpay on 24 December 2007. Again, though there is a payment authorisation

bearing the date 24 December 2007, a cheque for the amount only appears to have been issued at the same time as the cheque for the fourth individual respondent in August 2009.

The main contentions of the parties

- [12] The first respondent contends that when the court finally declined to grant an order staying the writs that was the final pronouncement on their status and the applicant had no alternative but to comply with the original orders or to accept execution of the writs. The applicant claims that the learned judge presiding in the matter simply refused to confirm the rule because there were no pending proceedings for example to challenge the validity of writs themselves, which would have justified the execution of the writs being stayed until the outcome of those proceedings.
- [13] This application now seeks to stay the execution of the writs once again, but on this occasion pending the outcome of a declaratory order that the applicant has discharged its various obligations towards the individual respondents in terms of the settlement agreement and the award. The first respondent disputes the applicant's contention that it has not opposed the application for declaratory relief and attaches a copy of a registered postal slip bearing the address of the applicant's attorneys which appears to have been sent sometime after 10 December 2009, which is when the declaratory application was filed. Copies of the first respondent's opposing affidavits were not attached in this application. Consequently, in this hearing the first respondent has not placed before the court its response to the allegations in the applicant's account of the manner in which it claims to have discharged its various obligations under the settlement agreements and award.
- [14] Regrettably, this makes it difficult for the court in assessing the prospects of success of the applicant to consider if there is a serious dispute over the applicant's allegations. It means that the merits of the claim can only be assessed on the

applicant's own account. In the summary above, it is clear that there appears to be some problems with the extrinsic evidence offered in the form of supporting documents which relate to the claims of the fourth and fifth individual respondents. However, other than this, on the evidence of the founding affidavit and supporting documents appearing in the application for declaratory relief, which the applicant incorporated in its application for interim relief, I did not really have a contrary version before me. Owing to this, it must be said that the applicant has reasonable prospects of succeeding in demonstrating that it has discharged its obligations at least towards most, if not all of, the individual respondents.

[15] The remaining issue which must be addressed is whether the applicant is entitled to bring this further application for interim relief with the aim of staying the execution of the writs, after an application for a final order to this effect has been refused. The essential question this raises is whether a judgement in the main application pending before this court would have the effect of overturning the earlier decision on this court refusing to stay the execution of the writs and would be contrary to the principle of *res judicata*. This defence can be raised when a plaintiff demands the same thing on the same ground as it did in a previous case. The question is, has the same issue now before the court been finally disposed of in the first application?¹

[16] It is true that in this application the relief sought, albeit now only on an interim basis, would be the same as the previous one (the staying of the writs) and concerns the same subject matter (the same writs) and the same parties. However, the final relief sought in the pending application for a declaratory order is not the same.

[17] The judgment of my brother, Cele J, did not require him to make any decision on whether or not the applicant had discharged its obligations. That issue was not before him. In fact, when one considers the relief sought in that application, it was not

¹ See *National Sorghum Breweries (Pty) Ltd t/a Vivo Africa Breweries v International Liquor Distributors (Pty) Ltd* [2001] 1 All SA 417 (A) at 419, paras [2]–[3]

founded on any cause of action at all, which is doubtless why the learned judge finally dismissed it. To hold that Cele J's decision included a determination of the dispute whether or not the applicant had discharged the obligations underlying the writs would be wrong.

- [18] In the circumstances, since the application before me is only to stay the writs *pending* the determination of a dispute not previously considered by the court, and is not an application for final relief, I think it has to be considered in the light of the main application to which it relates. It is true that if the court ultimately finds that the applicant has discharged its obligations towards the individual respondents, the effect must be that the writs cannot be enforced, but then that will be a determination based on a proper cause of action which was not apparent in the original application to set the writs aside. It cannot be said that the cause of action on which the main application is based is the same, and the relief now sought regarding the writs is merely interlocutory in nature. Consequently, I am satisfied that the requirements of *res judicata* have not been met and that principle is not an obstacle to this application.

Conclusions

- [19] I am satisfied that the applicant has demonstrated a reasonable prospect of success in respect of most of the claims underlying the writs which have been issued and that because this is an application for interlocutory relief pending the outcome of a claim based on a new cause of action, the principle of *res judicata* does not prevent this application from being entertained.
- [20] On the question of costs, I believe that the applicant should have brought the main application when it initially sought to set aside the writs and its conduct of the litigation has been unnecessarily drawn out as a result. It has put the first respondent to unnecessary expense in this regard, and I believe it would not be equitable for the first respondent to bear the costs of opposing the interlocutory application.

Order

[21] In the light of the above a final order is made in the following terms:

[21.1] Pending the determination of the application for declaratory relief under case number J 2724/09 –

- a. the execution of all writs issued under case numbers J11/08, J12/08, J 13/08 and J 14/08 are stayed, and
- b. the attachment effected by the third respondent pursuant to the writs mentioned above is set aside.

[21.2] The applicant is ordered to pay the first respondent's costs of opposing this application.

[21.3] The registrar is directed to set down the application for declaratory relief under case number J 2724/09 on the opposed motion roll on an expedited basis.



**ROBERT LAGRANGE
JUDGE OF THE LABOUR COURT**

Date of hearing: 20 May 2010

Date of judgment: 29 March 2011

Appearances:

For the Applicant: R J C Orton of Snyman Attorneys Inc.

For the First Respondent: A Paile of Paile Attorneys