



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: J11/12

In the matter between:

TAS APPOINTMENTS & MANAGEMENT SERVICES

Applicant

and

NKOSIKHONA MAVUSO & 10 OTHERS

First Respondents

THE SHERIFF – JOHANNESBURG CENTRAL

Second Respondent

COMMISSION for CONCILIATION, MEDIATION AND

ARBITRATION

Third Respondent

COMMISSIONER WYNAND STAPELBERG

Fourth Respondent

Heard: 2 February 2012

Delivered: 20 February 2012

Summary: Subsequent to being granted an order to stay the execution of a writ pending the finalisation of a review application, the applicant's review application was dismissed owing to its inordinate delay in its prosecution. The extent of the delay for no valid reason tilts the balance of convenience in favour of the first respondents and justifies the refusal of a similar application to afford the applicant an opportunity to pursue the same review application.

JUDGMENT

LALLIE J

1]In this application, the applicant seeks an urgent interim order for the stay of the writ of execution dated 9 December 2011, pending the filing and finalisation of a rescission application dismissing its review application.

2]The applicant seeks a further order that in the event of the above order being granted, the writ of execution be further stayed, pending the determination of a review application under case number JR1295/10, which was submitted on 12 July 2010.

3]The application is opposed by the first respondents.

The facts

4]The facts of this application are generally not in dispute and are briefly as set out below.

5]The applicant dismissed the first respondents in November 2009. The first respondents challenged their dismissal at the third respondent. In an arbitration

award dated 5 May 2010, the fourth respondent found the dismissal of the first respondents unfair and ordered their reinstatement and payment of money equivalent to five months' remuneration to each of the first respondents.

6]A writ of execution was issued against the applicant in favour of the first respondents to satisfy the payment of the sum of R108 571.50 due to the first respondents in terms of the arbitration award.

7]On or about 12 July 2010, the applicant launched an application to review the arbitration award. On 20 July 2010, the writ of execution was stayed, pending the filing and finalisation of the rescission and review applications. Owing to the applicant's excessive delay in prosecuting the review application, the first respondents moved an application in terms of Rule 11 of the Labour Court Rules on or about 16 September 2011 for the dismissal of the review application. The dismissal of the review application was unopposed and on 7 December 2011 the applicant's review application was dismissed

8]On 9 December 2011 a writ of execution was issued for the attachment of the bank account of the applicant for the payment of the money due to the first respondents in terms of the arbitration award in the global amount of R108 571.50 and the second respondent's costs in the sum of R1 268.14. The applicant reacted by launching an urgent application on 18 January 2012 for the stay of the execution of the writ issued on 9 December 2011, pending the determination of the review application under case number JR1295/2010 filed on 12 July 2010. That application was dismissed, with costs, mainly because the review application had already been finalised when it was dismissed on 7 December 2011.

The urgent application:

9]In the present application, the applicant seeks an urgent interdict to stay the writ issued on 9 December 2011, pending the filing and finalisation of a rescission

application of an order dismissing its review application. Should such application be granted, the applicant seeks an order to further stay the execution of the writ, pending the finalisation of the review application it launched on 12 July 2010.

Special Pleas

10]The first respondents raised two Special Pleas. The first is *res judicata*. They submit that this matter is *res judicata* as this is a second application the applicant is launching under the very same case number. They further submit that the application was dismissed on its merits on 19 January 2012. On that basis the first respondents sought to have this application dismissed, with costs.

11]The Plea of *res judicata* is available when final judgment has been given in proceedings between the same parties, on the same cause of action and for the same relief.¹

12]On 19 January 2012, the applicant sought the stay of the execution of the writ, pending the finalisation of a review application. In the present application, the applicant seeks different relief; it seeks the stay of the execution of the writ, pending the filing and finalisation of a rescission application and in the event of that Order being granted, the applicant seeks a further stay of the execution of the writ, pending the finalisation of the review application it launched on 12 July 2010.

13]The relief the applicant seeks is materially different from the one it sought in the urgent application launched in January 2012. The rescission of the order dismissing the applicant's review application did not form part of the urgent application which was launched by the applicant in January 2012. The Special Plea of *res judicata* is therefore dismissed.

¹ See: *Fidelity Guard Holdings (Pty) Ltd v PUWU and Others* [1998] 10 BLLR 995 (LAC).

14]The second Special Plea raised by the first respondents is the absence of an underlying *causa*. I will deal with this argument simultaneously with the requirement that the applicant needs to have a right to be protected before its application can be granted as they cover similar principles. The basis of the argument is that the relief sought by the applicant is not capable for being granted as the applicant's review application was disposed of when it was dismissed on 7 December 2011. The first respondents further argued that the execution of the writ cannot be stayed, pending a rescission application which is not even before Court.

15]The first respondents sought to rely on the decision in *Tony Gois t/a Shakespeare's Pub v Van Zyl and Others*,² where it was held that an underlying cause must exist before an order staying execution could be granted. In the absence of the underlying *causa*, so the argument went, the applicant lacked the right capable of being protected by an interim order.

16]For an interim order to be granted the applicant needs only prove a *prima facie* right. The applicant seeks the stay of the writ of execution, pending the filing and finalisation of a rescission application.

17]The applicant has a right to apply for the rescission of the order dismissing its review application, even if that right is open to some doubt. The applicant's failure to file the rescission application before the current one does not negate that right.

18]I therefore disagree with the first respondents' contention that there is no underlying *causa*, because the rescission application to be launched constitutes an underlying *causa*. The applicant need only establish a *prima facie* right, though open to some doubt.³ In the circumstances, I find that the applicant has a right to be protected.

² [2003] 11 BLLR 1176 (LC).

³ *Webster v Mitchell* 1948 (1) SA 1186 (W).

19]Another requirement for the grant of urgent relief is that the balance of convenience must favour the applicant. The applicant submitted that the balance of convenience favours it as it will suffer prejudice should this application be refused. The prejudice the applicant relied on is that it will suffer irreparable financial harm.

20]The applicant further submitted that the payment of an amount due to the first respondents in terms of a writ with interest will place serious strain on its operating capital.

21]The first respondents denied that the balance of convenience favours the applicant mainly because the applicant squandered the fair opportunity it was afforded to challenge the arbitration award which resulted in the writ being issued.

22]The first respondents also submitted that the grant of this application may result in the applicant being unable to satisfy its obligations in terms of the arbitration award. The first respondents sought to rely on the following paragraph in the decision of *Ndauti v Kgami and Others*⁴:

[16] In determining the balance of convenience I am required to consider the prejudice to the applicant should this application be refused against the prejudice to the respondent if it is granted.'

23]Should this application be refused the applicant will suffer the prejudice of having to pay the amount of R108 571.50 to the first respondents, which they may be unable to refund should the applicant be successful in both the rescission application it intends launching and the review application which will be determined as a result of the success.

24]The prejudice the first respondents will suffer should this application be granted is that in addition to the 20 months they have already waited from the date the

⁴ 1948 (3) SA 27 (W).

arbitration award in their favour was granted, they will have to wait for the determination of both the rescission and the review applications. On 2 February 2012, the rescission application had not been filed and the hearing of the review application depends on the applicant's success in the rescission application.

25]The first respondents will be prejudiced by a further delay because an order was granted in favour of the applicant to stay the execution of the first writ on 20 July 2010, pending the finalisation of the application to have the arbitration award reviewed. Notwithstanding letters enquiring about the prosecution of the review application, the applicant failed to take the necessary steps to ensure that the review application was prosecuted within a reasonable time. The first respondents ultimately launched an application for the dismissal of the review application due to the inordinate delay in its prosecution. It was granted on 7 December 2011 and the writ which is the subject of this application was issued. Considering that the applicant was granted an opportunity to pursue the review application which it failed to seize for no valid reason, the first respondents will be prejudiced should this application be granted because they will be compelled to wait further for the implementation of the arbitration award while the applicant is granted a further opportunity to pursue its review application. The applicant raised the possibility of financial difficulties in its papers. Should that possibility become a reality, the applicant will be unable to pay the first respondents the money due to them in terms of the arbitration award and their success at the arbitration will be obliterated through no fault on their part. For these reasons the balance of convenience favours the first respondents.

26]I am satisfied that the applicant will suffer irreparable harm should this application be refused as the first respondents will be unable to reimburse the sum of R108 571.50, plus interest, should the applicant be successful in its rescission and review applications. I am further satisfied that the applicant has no alternative remedy. However, in determining whether this application should be granted its requisites should not be considered in isolation, but in conjunction with one

another.⁵

27]The applicant has itself to blame for being in a position of facing irreparable harm should this application be refused by its failure, for no valid reason, to prosecute its review application within reasonable time after the order to stay the execution of the first writ was granted.

[28] For these reasons, this application is dismissed. I found no reason for the costs not to follow the result.

[29] In the circumstances, I make the following order:

[29.1] The application is dismissed with costs.

M Z N LALLIE

Judge of the Labour Court:

⁵ In this regard see: *Olympic Passenger Services (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383 E – F.

APPEARANCES:

FOR THE APPLICANT:

Mr Jabangwane obo Tas Appointments &
Management Services

FOR THE FIRST RESPONDENTS:

Mr. Voyi of Ndumiso Voyi Inc.