



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 2845/13

In the matter between -

TADYN TRADING CC t/a TADYN CONSULTING SERVICES Applicant

And

STEINER YVONNE First Respondent

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION Second Respondent**

**THE SHERIFF
KEMPTON PARK NORTH /TEMBISA/ MIDRAND Third Respondent**

Date heard: 19 December 2013

Date delivered: 07 January 2014

Summary: Application to stay writ of execution. The enquiry to conduct is whether substantial justice requires the granting or refusal of the stay of the writ. The applicant having failed to file the record on time, deemed to have withdrawn the review application in terms of the Practice Manual. Practice Manual silent on condonation. Application for

condonation in the event of non compliance should be inferred. The legal force and effect of the Practice Manual considered.

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application in terms of section 158 [1] of the Labour Relations Act,¹ in terms of which the applicant seeks an order to stay the execution of the writ issued pursuant the arbitration award made under case number GAJB 32999-12. In terms of the arbitration award the dismissal of the first respondent was found to have been both procedurally and substantively unfair. It was for that reason that the Commissioner awarded compensation in the amount of R204 000 (Two hundred and four thousand rand).

Background facts

[2] The first respondent was prior to the termination of her employment contract employed by the applicant and was for that purpose assigned to perform her duties at the First National Bank (the FNB). It is common cause that the fixed term contract between the parties which commenced after the extension during July 2011 was to expire on 31 January 2013. The FNB had a service level agreement with the applicant.

[3] It is apparent that towards the end of the fixed term contract the FNB embarked on a restructuring process and accordingly indicated its

¹ Act 66 of 1995

intention not to renew its service level agreement with the applicant. It is also apparent that it was for this reason that the FNB instructed the first respondent to leave its premises. Thereafter the employee did not report for work. She viewed the instruction to leave the premises of the FNB as a dismissal and accordingly referred a dispute concerning an alleged unfair dismissal to the second respondent the outcome of which, was as indicated earlier, being that the employee was dismissed and that dismissal was unfair.

- [4] The applicant being unhappy with the arbitration award instituted review proceedings. The arbitration award was issued on 11 March 2013 and the review application was filed on 24 April 2013. The record in terms of rule 7A of the Rules of the Court was made available to the applicant on 13 May 2013. It was uplifted on 16 May 2013 but was only served on the first respondent on 21 August 2013.
- [5] The employee on the other hand instructed the Sheriff to execute the arbitration award as the applicant had failed to honour the same. The initial instruction was incorrectly directed at the execution against the property of the applicant's attorney of record.

The issues

- [6] The first issue to consider in this application relates to urgency. The first respondent contends that the urgency is self-created because the applicant was aware of her intention to enforce the arbitration award as early as 3 September 2013 when she served the writ of execution on its attorneys of record.

- [7] The applicant on the other hand contends that it only became aware of the writ of execution on 6 December 2013 when it was served on it.
- [8] A proper assessment of the facts and circumstances of this case indicates that denying the applicant the stay the writ of execution would occasion an injustice. It is for this reason that that the matter is treated as one of urgency.
- [9] As concerning the merits of the application the question is whether substantial justice requires the granting of the stay of execution pending the outcome of the review application. The key consideration in this respect is whether the underlying *causa* of the judgment debt is being disputed or no longer exists. The first respondent in this respect contends in essence that there is no underlying dispute in existence because the applicant is deemed in terms of the Labour Court Practice Manual to have abandoned the review application. The applicant is deemed to have abandoned its review application due to the noncompliance with the provisions of clause 11.2.3 of the Practice Manual. Clause 11.2.3 of the Practice Manual provides:
- “If the Applicant fails to file a record within the prescribed period, the Applicant will be deemed to have withdrawn the Application, unless the Applicant has during that period requested the Respondent’s consent for the extension of time and consent has been given . . .”
- [10] Although the applicant does not dispute the force and effect of the practice directive, it contends that its value is limited to serving as a guideline. The force and effect of the practice directives which have

been introduced by the Heads of Courts in the various Courts received attention in *Greenberg v Khumalo*,² in which the Court per Potgieter AJ, dealing with the directive requiring an explanation for failure to appear at the roll call, held that:

“On my analysis the practice directive under discussion is procedurally incompetent, has no legal effect, and should not be applied either by the registrar or a Court to constitute a bar to ...the allocation of a date (enrolment) for the hearing of an application.”

[11] I do not, with due respect agree with the above approach. The correct approach in my view, as to the force and effect of practice directives similar the one in issue is the one adopted in *Re: Several Matters on urgent roll*,³ in which the Court had to consider the force and effect of the provisions of the Practice Manual Chapter 9.24 of the South Gauteng High Court regarding the failure by the applicant to set out the explicit circumstances which rendered the matter urgent. The Court held that in law the Judge President was entitled to issue practice directives relating to the procedure of setting down matters on the roll.

[12] The applicant contends that consideration should be given to the fact that it has made application for condonation for the late filing of the record of the arbitration hearing.

[13] Although the Practice Manual makes no provision for condonation for non-compliance with the time frames provided therein, it was not disputed, correctly so, that application for condonation can be inferred.

² (2012) JOL 29170 ()

³ (20130 4 SA 549 (GSJ)

The prospects of success in as far as the condonation application is concerned have not been put in question.

[14] In general the key factor to take into account when considering an application for the stay of the enforcement of an arbitration award is the existence or otherwise of the underlying *causa* of the dispute. This includes the issue of whether the machinery of the stay of execution is being used for ulterior motive such as frustrating the respondent from enjoying the benefit derived from the arbitration award.⁴ In *Tony Gois 5 t/a Shakespeare's Pub v Van Zyl and Others*,⁵ the Court found that the applicant would not be able to challenge its indebtedness if the stay of the writ of execution was not granted. It was further found that it would be futile to pursue the rescission application if the stay of the execution of the writ was not stayed because the respondent was a man of straw who would not be in a position to repay the amount of indebtedness once the rescission application was successful.

[15] In the present instance the key aspect for consideration is the issue of the underlying *causa* which has to be weighed having regard to issues which the Commissioner in making his arbitration award had to take into account. In this respect the first issue which the Commissioner had to consider was whether the employee had been dismissed. In this respect the Commissioner records in his arbitration award that:

"35. It is further common cause that the respondent had not orally or in writing terminated the applicant's contract of employment. Despite this being the case the applicant

⁴ *Rham Equipment (Pty) Ltd v Neville Lloyd & Others* [2008] JOL 22012 (LC).

⁵ (2003) 24 ILJ 2302 (LC).

had not reported for duty nor did the respondent make any effort to enforce the contractual obligation. A factual question had arisen whether the applicant under such circumstances was dismissed.”

[16] The Commissioner concludes that the first respondent was dismissed on the bases that the conduct of the applicant “had created an inference that the applicant was dismissed.” Furthermore, the Commissioner found that the applicant could have assisted the first respondent in securing her employment by enforcing the notice of termination clause in its agreement with the FNB.

[17] The applicant’s review application, as appears on the papers before this Court, raises the issue of whether the CCMA had jurisdiction to entertain the dispute as was formulated by the first respondent. It is trite that the CCMA does not have the power to determine its jurisdiction.

[18] In my view the findings made by the Commissioner in relation to whether the first respondent was dismissed raises a serious question as to whether the objective facts are such that they support the view that the CCMA has jurisdiction. It may well be that the facts which do not necessarily appear on the pleadings for the purpose of this application may be revealed by the transcript of what transpired at the arbitration proceedings. Those facts may support the view that the CCMA does have jurisdiction to entertain the dispute. That is a matter to be determined by the review Court if condonation application for the late filing of the record is successful. As matters stand at this stage the

underlying dispute of whether the first respondent was dismissed remains unresolved.

[19] I need to pause and say that in my view, having regard to the explanation tendered for the delay of the filing of the record and the short period of 10 days delay, there are excellent prospects that the Court will grant condonation.

[20] In light of the above, I am of the view that the applicant's application stands to succeed. However, I do not find it to have been unreasonable for the first respondent to have opposed the application and therefore it would not be fair to allow costs to follow the results.

Order

[21] In the premises the following order is made:

1. The time limits prescribed by the rules of this Court are dispensed with and the matter is treated as urgent.
2. The writ of execution issued against the property of the applicant pursuant to the arbitration award made under case number GAJB 32999-12 is stayed pending the finalisation of the review application filed under case JR848-13.
3. There is no order as to costs.

Molahlehi J
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Lee and Mc Adam Attorneys.

For the First Respondent: Wright, Rose Innes Inc.

LABOUR COURT