REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J 2486/2012

PAN SOUTH AFRICAN LANGUAGE BOARD **Applicant**

And

ZIXOLISILE FENI **First Respondent**

THE SHERIFF OF THE HIGH COURT **Second Respondent**

ABSA BANK (PRETORIA) **Third Respondent**

Heard: **7 November 2013**

Order: **7 November 2013**

Full Reasons: **17 April 2014**

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] On 7 November 2013 being the return date, and having heard the application before Court, I had issued an order in the following terms;

1.1 The Applicant's application is dismissed.

1.2 The Rule Nisi issued by this Court on 1 November 2013 is discharged.

1.3 The Applicant is ordered to pay the costs of this application.

[2] I was not aware that the applicant had made a request for the reasons for the order until about 17 February 2014 when correspondence from its attorneys of record was forwarded to me in that regard. Hereunder follows the full reasons for the order.

Background to the application:

[3] Following his dismissal by the applicant, in June 2010, the First Respondent (Feni) obtained an award, on 7 November 2012, from the Commission For Conciliation, Mediation and Arbitration in terms of which the applicant was ordered to reinstate him by 3 December 2012 and to pay him arrear salary in the amount of R1 742 416. 57. The Applicant launched an application to review and set aside that award. That application was dismissed with costs by Molahlehi J on 26 July 2013, and the arbitration award was also made an order of court.

[4] Notwithstanding the court order, the Applicant still failed to comply with the arbitration award. This necessitated Feni to obtain a writ of execution authorising the second respondent (Sheriff) to freeze the Applicant's bank account held with the Third Respondent (ABSA).

[5] On 8 August 2013, the applicant approached the Court on an urgent basis to nullify the writ of execution. It appears that the parties were implored by the Court to find a resolution to the dispute. This had resulted in a settlement agreement which was made an order of Court. Feni was to report back for duty on 1 October 2012 and also be paid his arrear salary on that date. On 2 October 2013, an undertaking was made that Feni would be paid his area salary minus the necessary tax deduction. Feni agreed to such deductions being made.

[6] At some point, Feni received a salary advice in respect of amounts paid to him. However, two amounts totalling R74 300.00 were withheld, and certain

other amounts relating to increases from July 2010 to November 2012 were not included. Having made enquiries as to the reason these amounts were not included or deducted, he was informed that the deductions were made in respect of provident fund contributions and some other amounts deducted as a result of a previous High Court order. Be that as it may, further payments were made to Feni in respect of the arrear salary. As at 3 August 2013, not all amounts had been paid and the applicant had not acceded to Feni's requests to reverse the deductions. On 15 October 2013, Feni approached the Sheriff for execution of the writ. On 17 October 2013, the Sheriff attached the Applicant's bank account, and the Applicant filed this application on 1 November 2013.

[7] On 1 November 2013, Prinsloo AJ issued an interim order in the form of a *rule nisi*, in terms of which the execution of the writ was stayed pending the return date. The Sheriff was also directed not to release the funds to the Respondents until finalisation of the matter.

The Applicant's submissions:

[8] Piet Thokwana, the applicant's Head of Human Resources deposed to the founding affidavit in terms of which he contended that the purpose of this application was to rescind the writ of execution granted on 17 October 2013. In the applicant's Notice of Motion, it sought an order declaring the writ issued in the amount of R873 063.23 to be null and void. The application is brought in terms of Uniform Rule 45A[1].In the same vein, Thokwana conceded that the writ was not based on any judgment as the applicant had complied with the award granted by the court. He further contended that the writ was issued by mistake by the Registrar as there was no order or judgment in the amount in the writ. He further alleged that a Mr. Gabo Dintshane from the office of the Registrar's office confirmed that the writ was issued by mistake and that he (Dintshane) would instruct the second respondent to withdraw the writ. As a result Thokwana contended that it was not necessary to bring an application

[1] Rule 45A provides as follows: "The court may suspend the execution of any order for such period as it may deem fit."

in terms of Uniform Rule 45A in that as he contemptuously referred to it, the writ issued by the Registrar of this court was 'a mere scrap of paper'.

[9] Thokwana further submitted that on 22 October 2013, Johanna Leso, the applicant's legal officer was allegedly instructed to conduct an investigation at this court as to how Feni had obtained a writ under case number JR2627/12 on 17 October 2013 and whether there were any supporting documents to substantiate the amount claimed as per the writ. The Registrar of the court could not allegedly trace the file. A follow up meeting with the Registrar could not establish the whereabouts of the file and no court order could be found.

[10] Thokwana submitted that Feni was paid his monies awarded in terms of the arbitration award and the court order totalling an amount of R2 266 858.75, and that certain tax and provident fund deductions were made in terms of the tax and pension fund laws. The writ of execution was obtained in the amount of R873 063.23. Thokwana contended that this amount was not mentioned anywhere in the court order, and that notices of taxation were received and the matter was set-down for 18 November 2013 under case numbers JR2627/12 and JR308/13, in respect of amounts that are nowhere near the amount mentioned in the writ. It was contended that the amount of R873 063.23 is unsubstantiated, and it is not known how or on what basis the Registrar issued the writ. To this end, it was submitted that the writ was obtained unlawfully, or alternatively in error hence a meeting was scheduled with the Registrar to instruct the second respondent to withdraw the writ.

Feni's response:

[11] Feni raised two preliminary points which are relevant for the purposes of consideration of this application. The first was that the Registrar was not cited even though the applicant sought the court to declare null and void a writ which was issued by the Registrar. It was contended that in view of the allegations made against the Registrar, she should have been cited.

[12] Secondly, it was submitted that the interim order sought by the applicant was ill-conceived and bad in law in that the applicant did not seek to stay the writ

pending the challenge against its validity as it should do by way of a review to set the writ aside.

[13] In regards to the writ obtained, Feni submitted that following the dismissal of the applicant's review application on 26 July 2013, and after the applicant refused to pay him in terms of the award, he obtained a writ of execution authorising the second respondent to freeze the applicant's bank account held by the third respondent. On 8 August 2013, the applicant approached the court to nullify the writ of execution. However, when the applicant conceded that it owed him money, the court had refused to grant it relief. The parties were implored by the court to find settlement. They had reached settlement, and the agreement was made an order of court.

[14] Notwithstanding the court order that Feni be reinstated and paid his arrear salary on or before 1 October 2013, the applicant failed to do so and was accordingly in contempt of court. On 1 October 2013, Feni had still not been paid. On 2 October 2013, Thokwana had informed Feni that the applicant would deduct tax from his salary before paying him. Feni had agreed in writing to the amount being taxed. Notwithstanding the agreement, Feni was still not paid. At some point he had received a salary advice and had discovered that not only was tax deducted from his arrear salary, but the applicant had also withheld two amounts totalling R743 000.00 and the increases from July 2010 to November 2012. Feni had raised concerns about the deductions and was informed that the deductions were in respect of provident fund and other amounts allegedly paid before in terms of a court order.

[15] Feni further submitted that the deductions were not authorised as he was not a member of a provident fund at the time as he had withdrawn from the fund in June 2010 after his dismissal. He was nevertheless paid some amounts in August 2012 which were not taxed except amounts in respect July 2010 to May 2013. He was also re-registered as a member of the provident fund and a new employee in October 2013. To this end, he submitted that since he was paid until May 2013, there was no basis for the applicant to make any deductions in respect of the provident fund, and that any deductions in that regard should have been from end of October 2013. Despite requests to

reverse the deductions, this has not happened. Despite undertakings by the applicant's Zwane to reverse the deductions, this has still not materialised. Zwane had through his secretary, informed him that the matter was to be addressed at the applicant's Exco on 15 October 2013.

[16] Feni obtained a writ on 17 October 2013 but did not immediately serve it on the second respondent. It was only on 19 October 2013 that he approached the sheriff to execute that writ.

[17] The applicant's replying affidavit was curiously deposed to by its Corporate Legal Manager, Leso Moeder, who basically reiterated that that the purpose of this application was to rescind the writ of execution granted on 17 October 2013 under case number JR2627/12 by the Registrar of this court. She also alleged that Feni had obtained the writ through "dubious means" as he did not make out a case for the money allegedly owed to him. She also confirmed that Feni was paid R2 231 925.31, but that certain tax and provident fund deductions were made in terms of the tax and pension fund laws. She also stated that although the writ of execution was obtained in the amount of R873 063.23, this amount was not mentioned in any judgment or court order.

The legal framework:

[18] Since the applicant seeks a declaratory, section 158 (1) (iv) of the Labour Relations Act empowers the court to grant such orders. In *National Employers' Association of South Africa v Minister of Labour*[2] Van Niekerk J stated as follows:

> 'Section 158(1) (a) (v) empowers this Court to make declaratory orders. Neither the LRA nor the Rules of this Court prescribe the circumstances in which an order may be made. Section 19(1)(a)(iii) of the Supreme Court Act 59 of 1959, entitles the High Court, in its discretion, and at the instance of an interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential on the termination. The granting of a declaratory order is dependent on the judicial exercise by the Court of its discretion, with

[2] [2012] 2 BLLR 198 (LC) at paras 17-18

due regard to the circumstances of the matter before it. (Reference omitted) Section 19(1) of the Supreme Court Act establishes a two-stage approach - the first leg of the enquiry is concerned with whether the applicant has an interest in an existing, future or a contingent right or obligation; the second is whether or not the order should be granted.'

[19] Furthermore section 151 (2) of the Labour Relations Act also empowers the court to grant a stay of its orders. This section provides that;

> 'The Labour Court is a superior court that has authority, inherent powers and standing, in relation to matters within its jurisdiction, equal to that which a court of a provincial division of the Supreme Court has in relation to the matters under its jurisdiction.'

[20] A court will generally grant a stay of execution where real and substantial justice requires it or where injustice would otherwise be done. The court has a discretion that must be exercised judicially, which is further based on the facts before it.[3] The discretion that the court enjoys is a wide one[4].

[21] In general a Court will grant a stay of execution were 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[5].

[22] In endorsing the principle of "real and substantial justice", Wagley J (as he then was) further stated the following in *Tony Gois t/a Shakespeare's Pub v Van Zyl & Others*[6];

> 'An application for a rescission, review or variation of an award qualifies as an attack on the *causa* underlying the award. "Where an application for a rescission or review or variation of an award is pending, there is a possibility that the *causa* underlying the writ may ultimately be removed'

[3] *Santam Ltd v Norman & Another* 1996 (3) SA 502 (C) 505 E-F
[4] *Robor (Pty) Ltd. (Tube Division) v Joubert NO &* Others (2009) 30 ILJ 2779 (LC) See also *Bartmann AAC & Bartmann MME t/a Khaya Ibhubesi v De Lange CLG & another* (Case No: J 441/09)
[5] *Whitfiled v Van Aarde* 1993 (1) SA 332 (E) at 337 G.
[6] (2003) 24 ILJ3202 (LC) at para 36

Evaluation:

[23] One of the grounds on which a stay of execution is regularly sought in this Court is that there is a pending attack on the underlying *causa* giving rise to the judgement debt, whether arising from an order of this Court or an arbitration award made in the CCMA or a bargaining council, and enforceable by reason of the provisions of section 143(1) of the LRA.

[24] In this case, it was common cause that there is no pending attack on the underlying *causa* giving rise to the judgment debt. The question that arises is: on what basis, given that there is no application for rescission or variation of judgment or any order, would a Court exercise a discretion to grant the application?

[25] The applicant approached the court on an urgent basis with a view of declaring the writ null and void. The only basis on which the writ of execution is currently sought to be nullified is that it was obtained by "dubious means". In this regard, Thokwana contended that the writ was not based on any judgment. At first, he contended that the writ was issued by mistake by the Registrar of this court as there is no order or judgment awarding an amount of R873 063.23 to Feni. He further relied on information from a Mr. Gabo Dintshane from the Registrar's office that a mistake was made, and that he (Dintshane) will instruct the second respondent to withdraw the writ as soon as he could find the court file.

[26] Notwithstanding the "alleged mistake" and allegations against Dintshane, there is no confirmatory affidavit from Dintshane to corroborate the alleged mistake. Secondly, other than the 'alleged mistake', Thokwane, supported by Moeder in the replying affidavit have alleged that the writ was obtained by "dubious means". This is notwithstanding the fact that Feni filed an affidavit in support of the writ. It is not clear now as to whether there was a "mistake" or whether the writ was issued by ''dubious means''. Be that as it may, serious allegations have been made against a Registrar of this court, and in essence the integrity of the office of the Registrar is being questioned. However, no

attempts were made to cite the Registrar in order to enable him to answer to any allegations against him or his office.

[27] The Registrar of the court is an officer of this court appointed in terms of section 155 (1) (a) of the Labour Relations Act. Any aspersions cast on his office or any allegations of impropriety levelled against his office are taken seriously by this court as these impact on the smooth and effective running of this court. When it is baldly alleged that an official document such as a writ of execution is a "mere scrap of paper" which was obtained through "dubious means" from the office of the Registrar, that writ cannot merely be set aside on that allegation without the office of the Registrar being afforded an opportunity to either confirm or deny the allegations. Furthermore, it is not within the powers of the office of the Registrar to issue writs and then withdraw them willy-nilly. If Dintshane had made such an undertaking as alleged by Thokwane, this is a matter that needs serious investigation. There is thus no reason proffered for not citing the Registrar in the light of the interest that her office has in this application. To this end, the preliminary point raised by Feni is upheld.

[28] The matter however is not disposed of merely on that preliminary issue. A court will generally grant a stay of execution where real and substantial justice requires it or where injustice would otherwise be done. It was common cause that the underlying *causa* that led to the judgment debt is an order of this court in terms of which *inter alia*, the applicant's application for review was dismissed, and the arbitration award made at the CCMA was made an order of court. Furthermore, the parties entered into a settlement agreement which was made an order of court on 8 August 2012[7]. In essence, the applicant has not attacked the *causa* underlying the writ.

[29] On the whole, it appears that the applicant has resigned itself to complying with the court order. The court order of Malindi AJ of 8 October 2013 does not indicate an amount or quantum payable to Feni and rightly so as the parties appear to have omitted to include that crucial aspect in the settlement agreement which was made an order of court. In these circumstances, I fail to

[7] The Court order of Malindi AJ is erroneously dated 08 August 2012

appreciate what or where injustice will be done if the applicant is obliged to make payments, which on its own version it has admitted it needs to make.

[30] It appears that the parties' dispute surrounds the exact amount payable to Feni. This issue had necessitated the court to intervene and implore them to find a resolution on 8 August 2013, which they did. The court cannot be burdened with the same application involving the same parties. One of the considerations in granting a stay of execution is the interest that all parties have in securing finality. In this regard, as things stand, only the amount claimed in the writ has been attached by the second respondent, and this is the amount that is the subject of disagreement. The applicant has remedies in terms of section 34 of the Basic Conditions of Employment Act where it is of the view that there is a need to make any deductions to payments to be made to Feni.

[31] Feni had correctly submitted that this application was ill-conceived and is bad in law. The court cannot simply set aside a writ in the absence of an attack of the *causa* underlying the writ. Nothing prevented the applicant from approaching this court for an interim order pending the finalisation of an application to vary the court order in terms of section 165 of the LRA. However, no such application was lodged. Instead, the applicant approached the court with serious allegations against the office of the Registrar, coupled with hearsay allegations regarding the conduct of the officials of the office of the Registrar. It was further in the light of these factors that a cost order was deemed appropriate.

[32] In *Polyoak (Pty) Ltd v Chemical Workers Industrial Union & others*[8], Brassey AJ held as follows in regards to matters before the court on the return day;

> "It is trite that on the return day, the court must be satisfied that a proper case has been made out for each facet of the relief sought………"

[33] I am not satisfied that the applicant has made out a proper case for a declaratory to be granted, nor am I satisfied that real and substantial justice requires a stay in execution of the writ. It was in the light of these

[8] (1999) 20 ILJ 329 (LC) at 395 para B

circumstances that the order under paragraph 1 of this judgment was issued. Other than that order, it is my view that the office of the Registrar should conduct investigations into this matter, and to file a report accordingly. To this end, the order issued on 7 November 2013 is amended to read as follows

Order:

1. The Applicant's application is dismissed.

2. The Rule Nisi issued by this Court on 1 November 2013 is discharged.

3. The Applicant is ordered to pay the costs of this application.

4. The office of the Registrar is directed to conduct investigations into allegations made by Thokwane of the applicant in his founding affidavit in respect of the writ issued on 17 October 2013 and attached to the founding affidavit marked Annexure "PAT 1."

5. The Registrar is directed to file a report in respect of the above directive and to submit same to the Judge President of this Court by no later than 30 May 2014.

Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant:	Adv. TJ Makgathe
Instructed by:	Raborifi Attorneys
For the first respondent:	Adv. DZ Kela
Instructed by:	Faku Attorneys