REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

CASE NO: J1260/14

In the matter between:

SOLARTRICITY (PTY) LTD, A DIVISION OF THE DALY MORGAN GROUP	**Applicant**
and	
ENRICO ERNESTO BELTRAMO	**First Respondent**
THE SHERIFF	**Second Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Third Respondent**

HEARD: 27 MAY 2014

Delivered: 29 May 2014

Summary: (Stay of writ – balance of convenience decisive despite poor merits – common identity of party in writ and party whose assets attached not in doubt).

JUDGMENT

LAGRANGE, J

Introduction

[1] The applicant in this matter has brought an application to stay the writ of execution issued by the court on 13 May 2014 pending the outcome of a review application under case number JR1168/12.

[2] On 23 February 2012 the first respondent, Mr Beltramo, had obtained a default award in his favour against an entity identified only as the Daly Morgan Group, an unincorporated entity ('DMG'). The same entity applied to rescind the default award, but the rescission application was dismissed on 3 April 2012.

[3] Notice of the set down of the arbitration hearing on 13 February 2012 had been sent to the DMG on 10 January 2012. On 8 February 2012, the DMG had applied for a postponement of the arbitration that the application was unsuccessful and a notice that the application for postponement had been dismissed was sent to the DMG at 07H17 on 13 February 2012, the date of the arbitration, which was due to commence at 13H00. No one appeared to represent the employer party. The reason DMG says it did not attend was that it was unaware of the communication of the refusal of the postponement and therefore did not know the arbitration hearing would proceed on that day. The deponent to the affidavit in the rescission application also claimed that the employer had a *bona fide* defence to the applicant's claim because it contended there was no dismissal of the applicant, but that he had repudiated his employment contract. Moreover, she contended that the postponement application was based on legitimate grounds and ought to have succeeded.

[4] The arbitrator did not accept that the applicant had a good reason for not attending the arbitration proceeding, especially since it had not received confirmation that the application for postponement had been successful. Under those circumstances the respondent ought to have attended the proceedings. The arbitrator also noted that the application for

postponement was late and was not supported by an affidavit. A factor taken into account by the arbitrator was that after the arbitration date had past the applicant appeared to have made no effort to find out what the status of the matter was until it received the default award on 24 February 2012. The affidavits filed in support of the applicant’s subsequent application to rescind the arbitration award, were deposed to by an official of the employer’s organisation, CTL Management Forum, which appeared on behalf of the employer party. She confirmed that the parties in the rescission application were the same as the parties cited in the default award. In other words, the representation that the DMG was a legal entity which could initiate proceedings such as the rescission application, and have an award made against it in the default arbitration proceedings was perpetuated.

[5] In the review proceedings, DMG for the first time revealed a more definite corporate personality, now citing itself as “Solartricity (Pty) Ltd a Division of the DMG”. It is noteworthy that Solartricity(Pty) Ltd proceeded on the basis it had *locus standi* as the respondent in the rescission ruling to bring the review application even though the respondent had only been cited as DMG in those proceedings.

[6] The review proceedings were initiated in May 2012. On 5 August 2013, the first respondent filed an application under Rule 11 to dismiss the review application, though it would seem the applicant had belatedly filed its supplementary affidavit only in February or March 2013, even though the record of proceedings had been lodged with the registrar by the CCMA in May the year before, approximately 10 months earlier. There is no evidence in the court file containing the review application of proof of service of the record of the arbitration proceedings on the first respondent. Curiously there is also a discrepancy between the date of the court stamp on the Rule 7A(8)(b) notice in the review application bundle (dated 18 March 2013) and that of the court stamp (22 February 2013) appearing on the copy of the notice which was forwarded to the first respondent when it demanded evidence of the notice. Moreover, not only is there no evidence of service of the abovementioned items on the first respondent, but in fact the first respondent launched its application to dismiss the review in the

main on the basis it had not received the Rule 7A(8)(b) notice, nor the record of the proceedings. Neither the review application nor the dismissal application have been set down, and Mr Donaldson, the CTL Management Forum representative in court, submitted that as it was the practice for the Registrar to set matters down, the applicant bore no responsibility for not attempting to finalise the review application by requesting it be set down for a hearing.

[7] In its application to stay the writ of execution issued by the Registrar on 13 May 2013, the only basis relied on by the applicant for the relief, is the existence of the pending review application in which it argues it has excellent prospects of success. The deponent to the founding affidavit on this occasion is Mr J Kinkaid-Smith, who identifies himself as "the Financial Director of Solartricity (Pty) of the Daly Morgan Group." He further identifies the first respondent as an ex-employee of the Applicant, thereby confirming that even if DMG was the name by which the employer party was identified in the CCMA proceedings, the applicant was the juristic entity which employed him. In the rest of his affidavit, he clearly sees no distinction between the applicant in these proceedings and the respondent in the arbitration proceedings. They are to all intents and purposes treated as one and the same.

[8] Kinkaid-Smith further identifies the assets attached by execution of the writ as being property of the applicant. There is no hint in the affidavit, that the Sheriff had attached the property of the incorrect party, even though the writ directs the Sheriff to take into execution the moveable goods of The DMG. The reason I mention this is that when the application was heard, Mr Donaldson raised an argument for which no factual basis was laid in the founding papers, namely that the writ identified DMG as the party whose moveable goods should be attached, and the court should not allow execution of the writ in any event in view of this 'defect'. Indirectly, he was suggesting that the writ should be set aside as invalid.

[9] I debated the nature of the entity DMG with Mr Donaldson and asked how CTL Management Forum could act for DMG if it was not an identifiable

juristic person. The only explanation he offered was perhaps that the CTL representatives had slipped up in allowing this to happen.

[10] However, the puzzle would have been resolved if Mr Donaldson had drawn the court's attention to documentation which clarifies the matter. Thus, the applicant's letter of appointment which forms part of the record in the arbitration proceedings specifically states that he was offered a position in 'the Company' as a business developer and the company is identified as "THE DALY MORGAN GROUP", but the letter of appointment appears on a letterhead of Solartricity. The term 'DMG' is not unpacked in his letter of appointment but in the Confidentiality Agreement he signed as an employee party the other party to that agreement is referred to as:

> *"THE DALY MORGAN GROUP ("the Company") Which shall be understood <u>to include and apply to any</u> of the following Companies:....Solartricity (Pty) Ltd"*

(emphasis added)

[11] Thus the apparent distinction between the DALY MORGAN GROUP and the associated companies of which it is comprised, was clearly non-existent in the minds of the parties. The attachment of the property of the actual juristic entity Solartricity (Pty) Ltd in a writ of execution issued against DMG is entirely consistent with this understanding of the meaning of DMG's true juristic identity and on the face of it the attachment was not improper on account of goods of the wrong party being attached. Solartricity (Pty) Ltd was not confused by its citation as DMG in the arbitration. There is no reason for it to suggest there is some confusion now when its property is attached pursuant to a writ issued against DMG arising from the arbitration award.

[12] In any event, quite apart from the fact that this issue was not one the applicant was entitled to rely on based on its founding affidavit, the applicant ought to have brought an application to invalidate the writ, which is the correct procedure for raising such a challenge.[1]

[1] ***Mahomed v Ebraheim* 1911 CPD 29**

[13] In ***Gois t/a Shakespeare's Pub v Van Zyl And Others*** [2], Waglay J as he then was set out the general principles applicable to a stay in execution:

> *"[37] The general principles for the granting of a stay in execution may therefore be summarised as follows:*
>
> *(a) A court will grant a stay of execution where real and substantial justice requires it or where injustice would otherwise result.*
>
> *(b) The court will be guided by considering the factors usually applicable to interim interdicts, except where the applicant is not asserting a right, but attempting to avert injustice.*
>
> *(c) The court must be satisfied that:*
>
> *(i) the applicant has a well-grounded apprehension that the execution is taking place at the instance of the respondent(s); and*
>
> *(ii) irreparable harm will result if execution is not stayed and the applicant ultimately succeeds in establishing a clear right.*
>
> *(d) Irreparable harm will invariably result if there is a possibility that the underlying causa may ultimately be removed, ie where the underlying causa is the subject-matter of an ongoing dispute between the parties.*
>
> *(e) The court is not concerned with the merits of the underlying dispute - the sole enquiry is simply whether the causa is in dispute."*[3]

[14] Clearly, there is a possibility of the award being set aside, and there is a prospect the applicant may not be able to recover moneys paid out to the first respondent following a sale in execution of its property, but that is not the end of the matter. The order in this matter is sought pending the outcome of a review application, which has not been diligently prosecuted.

[15] The applicant delayed ten months in filing its supplementary affidavit, in circumstances where it was not necessary for it to wait for the production

[2] 2011 (1) SA 148 (LC)

[3] At 155-6

of a transcript of proceedings. Even worse, the applicant has proffered no answers to the allegations raised in the dismissal application to explain away the first respondent's claim that in fact he was not served with the record or the supplementary affidavit. The absence of any proof of service in the review application file makes this a matter of particular concern. Even if I assume that proper service of these documents had been made on the first respondent, why has the applicant made no effort to have the review application set down since March last year? If it had any real interest in pursuing the review application it would have requested the registrar to enrol the matter and would have filed opposing papers in the first respondent's dismissal application. It is telling in this regard that the applicant only contacted its attorneys of record in the review application to enquire about progress in the matter when the writ was served, nearly two years after the review was launched.

[16] In my view, this is one of those matters where the applicant has dragged its heels at best, or has positively tried to obstruct the conclusion of the review proceedings by not serving process on the first respondent. It has not diligently pursued the dispute which it claims is the reason the execution of the award should be delayed. In these circumstances, it is in no small way responsible for the situation it now finds itself in of potentially suffering irreparable harm. This court has recognised that where a party is seeking a stay of execution of a writ, it must demonstrate it has not been remiss in pursuing the remedy for which it seeks the stay. Where it has delayed the review procedure, it cannot simply escape execution of a writ because that process is incomplete mainly through its own fault.[4]

[17] However, although the first respondent claims to be emotionally and financially prejudiced by the delay in giving effect to the award, he has not demonstrated that he will suffer significant hardship caused by any further delay and the value of the award is to an extent preserved by the interest charges accruing on the debt, whereas the sale of productive assets in the

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[4] See also in this regard, ***Robor (Pty) Ltd (Tube Division) v Joubert & others*** **(2009) 30 *ILJ* 2779 (LC) and *TAS Appointment & Management Services v Mavuso & others*(2012) 33 *ILJ* 2196 (LC)**

amount of R 202, 000-00 might well hamper the applicant's business and there is no indication on the affidavits it will easily recover this. It is solely on the balance of convenience, when considering the relative prejudice the parties may suffer that I am inclined to refuse the applicant relief.

[18] However, when considering the question of costs, I am satisfied that the first respondent acted reasonably when seeking to execute the writ in the absence of any progress in the review application and his opposition was anything but frivolous. Moreover, the applicant has displayed a non-committal approach at best to pursuing the review application which necessitated this application and its success in the application is on a very limited ground. In the circumstances, I believe it is just and equitable for the applicant to pay the respondent's costs.

Order

[19] Accordingly, an order is made in the following terms:

19.1 The matter is dealt with as one of urgency.

19.2 The execution of the writ issued by this court on 13 May 2014 is stayed pending the outcome of the review application and dismissal application under case number JR 1168/11.

19.3 The applicant must pay the first respondent's costs.

19.4 Either party may request the Registrar of the Labour Court to enrol the applications mentioned in paragraph 19.2 above, on a prioritised basis, to be heard simultaneously.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: Q Donaldson of CTL Management Forum

FIRST RESPONDENT: P Verveen instructed by D Smith