



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J 603/15

TRANSPORT AND ALLIED WORKERS

UNION OF SOUTH AFRICA

Applicant

And

ALGOA BUS COMPANY (PTY) LTD

First Respondent

**THE SHERIFF OF THE HIGH AND LOWER COURT,
(PORT ELIZABETH SOUTH)**

Second Respondent

**THE SHERIFF OF THE HIGH COURT
(JOHANNESBURG CENTRAL)**

Third Respondent

**SOUTH AFRICAN TRANSPORT AND
ALLIED WORKERS UNION**

Fourth Respondent

**TRANSPORT, ACTION, RETAIL AND
GENERAL WORKERS UNION**

Fifth Respondent

Heard: 26 March 2015

Delivered: 27 March 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] The applicant brought this application before the court on an urgent basis in terms of which it sought *inter alia*, a *rule nisi* staying the execution of a default judgment issued by this Court dated 31 October 2014, pending the outcome of the applicant's application for rescission dated 17 March 2015. The applicant further sought an order declaring the warrant of execution against its property issued by the Registrar of this Court on 3 March 2015, the inventory issued by the Second Respondent dated 4 March 2015, and the notice in terms of Rule 45 (12) dated 10 March 2015 to be declared null and void, and to be set aside.

Background to the application:

- [2] Two strike actions were embarked upon by members of the Applicant (TAWUSA), the Fourth Respondent (SATAWU) and Fifth Respondent (THOR) in September 2011. A further strike action took place between 20 October 2011 and 10 November 2011. Emanating from these strike actions, the First Respondent then launched an application in terms of section 68 (1) (b) of the Labour Relations Act under case number P337/12. The First Respondent claimed an amount of R13 550 905.00 (Thirteen Million Five Hundred and Fifty Thousand Nine Hundred and Five Rand) against TAWUSA, SATAWU, THOR and a number of individuals identified in Annexures to the application, payable jointly and severally together with interest.
- [3] The application for the recovery of its losses was launched on 12 September 2012, and the First Respondent contends that the application was properly served on TAWUSA's premises in Port Elizabeth on 13 September 2012, and service affidavits were filed in that regard. The same application was also served on TAWUSA's individual members. Despite proper service, TAWUSA failed to file an opposition to the application. TAWUSA was reminded on 31 October 2012 that it had failed to file opposing papers and that the application would be placed on an unopposed roll. TAWUSA still failed to respond.
- [4] The matter was then scheduled to be heard on 11 October 2013, and a notice of set down was served on TAWUSA. SATAWU, had made two attempts to oppose the application, and on both occasions this Court had dismissed those

applications. Since neither TAWUSA nor THOR had opposed the application, the First Respondent obtained a default judgment on 31 October 2014 as delivered by the Honourable Cele J in the Port Elizabeth seat.

- [5] The default judgment has far-reaching implications in the light of the quantum ordered. SATAWU, TAWUSA and THOR were found to be jointly and severally indebted to the First Respondent in the amount of R10 350 000. 00 (Ten Million Three Hundred and Fifty Thousand Rand) plus interest. The individual respondents identified were also found to be jointly and severally indebted to the First Respondent for the share of R350 000.00 of the main amount. Further individuals also identified in a separate annexure were found to be jointly and severally liable and indebted to the First Respondent for a share of R10 000 000.00 of the main amount. The order required the three unions and the individuals identified to pay the amounts within 14 days of its issue.
- [6] On 27 November 2014, the First Respondent's attorneys of record addressed a letter to TAWUSA, SATAWU, and THOR to demand payment in terms of the default judgment failing which the First Respondent would execute on the judgment. The First Respondent demanded R3 425 850.00 (Three Million Four Hundred and twenty Five Thousand Eight Hundred and Fifty Rand), from TAWUSA, being its portion based on 33.1% representivity within the company at the time of the industrial actions. TAWUSA failed to respond to the demand. In the light of TAWUSA's failure to act on the matter, warrants of execution were issued out of the Port Elizabeth Court and forwarded to the Second and Third Respondents in Port Elizabeth and Johannesburg.
- [7] According to TAWUSA, the Warrant was served on it on 12 March 2015 by the Port Elizabeth sheriff. It was advised that the sheriff had taken possession of its incorporeal rights in one of its bank account with Standard Bank held at Port Elizabeth. A copy of the return of service was furnished in this regard.

Two Main Preliminary points:

- (a) *The place of hearing:*

- [8] As already stated, the main cause of action was instituted in the Port Elizabeth seat of this Court, which also granted the default award. The First Respondent contended that TAWUSA had failed to make out a sufficient case for this application to be heard at the seat of this Court in Johannesburg. It contended that TAWUSA's allegations of lack of funds whether genuine or not could not be the reason for launching application or any other form of proceedings in a court of choice.
- [9] In objecting to the choice of the court, the First Respondent pointed out that TAWUSA's members are still employed in Port Elizabeth; that the application for rescission launched by TAWUSA was pending before the Port Elizabeth seat, and that the actual file in both compensation proceedings and the rescission application are in the Port Elizabeth Court. The First Respondent also pointed out that the current application was interlocutory in nature, and it was improper to bring it at a different seat of the Court.
- [10] Section 165 (1) and (3) of the Labour Relations Act provides that this Court has jurisdiction in all the places of the province of the Republic, and further that its functions may be performed at any place in the Republic. In addressing the point raised by the First Respondent, the answer lies not only from the provisions of section 165 of the LRA themselves, but from an exposition of these provision given by Van Niekerk J in *BP Southern Africa (PTY) Ltd v The National Bargaining Council For the Chemical Industry*¹ who held that;
- "In my view, the LRA contemplates and establishes the Labour Court as a single Court with national jurisdiction, meaning that proceedings may be instituted at any of the Court's branches regardless of any 'connecting factors' that are relevant in the case of those Courts whose jurisdiction is more narrowly prescribed. Of course, if a party abuses the process of this Court, for example by choosing a venue simply to inconvenience other parties or to increase the costs of their defending any action, that is a matter that the Court can take into account in the exercise of its discretion in regard to costs. Alternatively, a party who takes issue with the branch office of the registrar at*

¹ CASE NO. J 841/09

which particular proceedings are initiated may apply to have the matter heard at a more convenient venue. For these reasons, the HG Botha v Whitey Bester judgment is with respect clearly wrong, and I do not intend to follow it.”
(References and citations omitted)

[11] Of course it is taken into account that there is merit in the First Respondent's contentions that considerations of convenience would have made it proper for this application to be launched in Port Elizabeth. I further agree that from a consideration of a proper administration of the matter and for the sake of consistency, it would have made sense to have had the matter heard in Port Elizabeth. There is however nothing in law that prevented TAWUSA from launching this application in Johannesburg, notwithstanding that it might be interlocutory in nature.

(b) *Urgency:*

[12] The First Respondent contended that this matter was a typical case of self created urgency, and should be struck off the roll with costs on that ground alone. To recap the sequence of events, the default judgment was granted on 31 October 2014; TAWUSA failed to oppose the main claim and respond to the set down notices. It further failed to respond to a letter of demand issued on 27 November 2014. On 12 March 2015 it was made aware of the warrant, and the fact that its incorporeal rights in one of its bank account have been taken possession of. This application was only brought before this court on 17 March 2015, and this was now after the sheriff had proceeded to attach TAWUSA's movable property.

[13] I am in agreement with the First Respondent's contention that TAWUSA has been tardy in dealing with matters that came before its attention, viz, the section 64 application, notices of set-down, the default judgment and letter of demand, and that it only acted once its bank account was attached.

[14] An applicant instituting an urgent application must justify the necessity to circumvent the ordinary time periods set out in the Rules of this Court. This much can be gleaned from Rule 8 of the Rules of this Court which provides that:

“(2) The affidavit in support of the application must also contain-

(a) the reasons for urgency and why urgent relief is necessary;

(b) the reasons why the requirements of the rules were not complied with, if that is the case ...”

[15] Whether a matter is urgent involves two considerations. The first is whether the reasons that makes the matter urgent, have been set out and secondly whether the applicant seeking relief will not obtain substantial relief at a later stage. In all instances where urgency is alleged, the applicant must satisfy the Court that indeed the application is urgent. Thus, it is required of the applicant to adequately set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary. As Moshwana AJ aptly put it in *Vermaak v Taung Local Municipality*²;

“The consideration of the first requirement being why is the relief necessary today and not tomorrow, requires a Court to be placed in a position where the Court must appreciate that if it does not issue a relief as a matter of urgency, something is likely to happen. By way of an example if the Court were not to issue an injunction, some unlawful act is likely to happen at a particular stage and at a particular date”.

[16] It is equally trite that an Applicant is not entitled to rely on urgency that is self-created when seeking a deviation from the rules³. In *National Police Service Union and others v National Negotiating Forum and others*⁴, this court held the view that the latitude extended to parties to dispense with the rules of the court in circumstances of urgency is not be available to parties who are dilatory to the point where their very inactivity is the cause of the harm on which they rely on to seek relief.

[17] The reasons advanced on behalf of TAWUSA as to why the matter is urgent are far from convincing. On its version, it became aware of the default judgment in November 2014. An allegation is made in the founding affidavit

² (JR315/13) [2013] ZALCJHB 43 (12 March 2013) at para 12

³ *Jiba v Minister: Department of Justice and Constitutional Development and Others* (2010) 31 ILJ 112 (LC) at para 18.

⁴ (1999) 20 ILJ 1081 (LC) para [39]

that instructions were issued to its attorneys of record on an unspecified date to obtain a copy of the order from the court's file. The file was received by the attorney on 25 November 2014 and counsel briefed on or about 27 November 2014 to obtain advice. The primary reason TAWUSA could not act swiftly was that it did not have sufficient funds to allow counsel to travel to Port Elizabeth with witnesses, and it could only obtain funds in January 2015.

[18] During argument I pointed out to Adv Wilke on behalf of TAWUSA that an allegation of lack of funds was not an excuse for tardiness and lack of due haste in dealing with such an important matter. TAWUSA on its own version has about 8000 members nationally with branches and local offices in various provinces. This is a fully registered union which is a party to at least four National Bargaining Councils and was fully aware of the consequences of the default judgment. If it cannot afford to instruct attorneys or counsel in instances where a judgment debt against it could collapse it completely, one wonders what type of service it can possibly render to its unfortunate members.

[19] It was further common cause that correspondence was exchanged between the parties' attorneys of record after the default judgment was obtained. TAWUSA's attorneys of record sent correspondence to those of the First Respondent advising that an e-mail was received from Standard Bank in Johannesburg on 23 March 2015 indicating that the stop on TAWUSA's account has since been uplifted and accordingly, the urgency in TAWUSA's application for a stay of the writ was since removed by the upliftment of the stop on TAWUSA's account. In the light of the urgency having fallen away, TAWUSA had requested that the First Respondent should consent to the release of its furniture from attachment. In the same letter, the attorneys further proposed that this application be postponed to the ordinary roll and that it be transferred to the Port Elizabeth seat of this Court.

[20] On 24 March 2015, the First Respondent's attorneys of record responded and pointed out that no instructions had been issued to the sheriff to uplift the warrants against TAWUSA's bank account, and that the upliftment was unlawful. It was further indicated that counsel had been instructed to prepare

opposing the application before the court. TAWUSA's attorneys were further advised to withdraw the application in the event it was believed that the upliftment of the stop on the account had been effected, and to provide proof in that regards failing which the First Respondent would proceed with its opposition.

- [21] On 24 March 2015 TAWUSA's attorneys reiterated that the hold on its bank account was indeed uplifted and furnished proof of an e-mail received from Standard Bank, but that the immediate urgency as regards the attachment would only fall away once the First Respondent gave an undertaking not to further resuscitate that attachment pending the outcome of a SATAWU appeal lodged in the Port Elizabeth Court.
- [22] Since no undertaking was given, TAWUSA hold the view that it was apparent from the facts of this matter that the Sheriffs in the Port Elizabeth and Johannesburg will not await the judgment of this Court in the rescission application and will proceed with the removal and sale in execution unless the relief prayed for in this application was granted without delay.
- [23] Notwithstanding the fact that even if the hold on TAWUSA's account may or may not have been uplifted, the fact of the matter is that these conflicting messages or uncertainty still cannot form the basis of urgency albeit TAWUSA might deem it urgent. TAWUSA to a large extent had not given an explicit account of the reason that the matter should be treated as urgent, nor has it shown that it treated the matter with the urgency it deserves to secure the Court's indulgence.
- [24] Ordinarily, given the above facts and considerations, this matter should therefore be struck off the roll. The circumstances of this case however are not ordinary, in the light of the devastating implications should the judgment debt be ultimately executed. It is in this regard that the question of alternative relief comes into the picture. The interests of justice and other important intervening factors in respect of the whole claim as shall be illustrated below dictate that this matter be treated as urgent even though it is not.

The legal framework in respect of stay of writ of execution:

- [25] In *Chillibush Communications (Pty) Ltd v Michelle Gericke & others*⁵ Molahlehi J had lamented over various types and categories of cases that are regularly before this court wherein parties seek to stay writs of execution. One of these instances is where a party does nothing in the form of challenging the award or default judgment but waits until steps are taken to have the award or default judgment enforced. The first time that a party reacts in these types of cases is when the Sheriff arrives at its premises to attach property to realize the debt arising from the arbitration award or default judgment. TAWUSA's case falls squarely in this category.
- [26] In *Chillibush*, Molahlehi J also summarised the approach of this court in dealing with applications to stay a writ of execution pending a review or rescission application in the following terms;

*'In terms of section 145(3) of the LRA, the Court has the discretion to stay the enforcement of the arbitration award pending the outcome of the review application. This discretion which is very wide has to be exercised judicially taking account certain factors. The most important consideration in the exercise of the discretion is whether there is a pending underlying cause of action arising the arbitration award or in certain instances arising from the Court order. There is a wide range of factors which the Court will take into account in considering whether or not to order a stay of the execution of an arbitration award, the most important of which is whether the interest of justice supports the stay of execution pending the finalization of the review or rescission application.'*⁶

The factors which the Court will take into account are:

- a) *Whether the stay of the writ based on the underlying causa was timeously filed,*
- b) *The existence of prospects of success in the review or rescission application;*
- c) *The interest of all parties in securing finality;*

⁵ (2010) 31 ILJ 1350 (LC)

⁶ At para 18

- d) *The cost of the delay in finalising the matter to all the parties;*
- e) *the cost to all parties of instituting or opposing further proceedings;*
- f) *The risk of injustice being done to the less powerful party to the dispute.*⁷

[27] In *Gois t/a Shakespeare's Pub v van Zyl & Others*⁸, it was held that this court will favourably consider granting the stay of execution when “*real and substantial justice requires such a stay or, put differently, where injustice would otherwise result*”. Waglay J (as he then was) added that in exercising its discretion to grant a stay of execution, a court is not required to take the merits of the underlying attack on the *causa* of the writ into account. It is sufficient that there must be a possibility that the *causa* underlying the writ may ultimately be removed. An applicant is accordingly not required to satisfy the court of the existence of prospects of success in the principal dispute; and further that an application for a rescission, review or variation of an award qualifies as an attack on the *causa* underlying the award.

[28] The approaches in *Gois* and *Robor*, were considered by Ngcukaitobi AJ in *City of Johannesburg v South African Municipal Workers Union obo Motaung and Others*⁹, who held that the two approaches might appear to be at odds with each other on the issue of the relevance of prospects of success in the underlying challenge to the *causa* of a writ, but were in fact reconcilable. I am in agreement with Ngcukaitobi AJ that that these approaches are not necessarily irreconcilable and are instead compatible with each other, as the principle permeating in both is the need to take into account the interests of justice.

[29] I do not intent to deal with all the other aspects of the merits of this application as raised and argued given the limited time within which to deliver this judgment. In particular however, I pointed out to Adv Wilke during arguments that any contentions and allegations surrounding the motives for seeking execution against TAWUSA are purely speculative and not borne out by any

⁷ In reference to *Robor (Pty) Ltd (Tube Division) v Joubert and Others* (2009) 30 ILJ 2779 (LC) at para 16.

⁸ (2003) 24 ILJ 2302 (LC) at paragraphs 32 - 36

⁹ (J618/14) [2014] ZALCJHB 73 (19 March 2014) at para 28

evidence. Furthermore, I could not find any substance to the allegations that the warrants or writs were not lawfully obtained.

[30] It is however common cause that a rescission application has since been launched in respect of the default judgment, *albeit* this was done some four months after the judgment was granted. The rescission application may also be the underlying *causa* to attack the judgment and whether it will succeed or not is a matter for future determination.

[31] The basis for taking a different approach in this matter is that there are intervening and interlinked factors that should not be ignored in determining this application. The first is that the judgment debt was granted against the three unions, with each being jointly and severally liable for the main amount. THOR appears to have faded into obscurity and SATAWU has since launched an appeal in regards to its failed attempts to oppose the main cause of action that led to the default judgment. In the light of the warrants of execution having been issued against all the three unions, SATAWU has since obtained temporary reprieve through an order issued by this Court in Port Elizabeth under P337/2012 on 25 March 2015. Thus the writ of execution issued in favour of the First Respondent against SATAWU was stayed pending the determination of its appeal.

[32] It is accepted that TAWUSA's attack on the underlying *causa* was not made on time, and more pertinently, the application in that regard was not incorporated into this application contrary to TAWUSA's contentions. The difficulty however is that in the light of SATAWU's temporary reprieve and its pending leave to appeal against the whole judgment, it would be iniquitous not to grant TAWUSA reprieve in circumstances where essentially the underlying *causa* under attack by both unions *albeit* acting independently, is the same and arises from the same material facts.

[33] There is merit in the First Respondent's contentions that the fact that SATAWU obtained temporary reprieve was immaterial as the unions were jointly and severally liable. The consequences of the execution of the default judgment has huge implications for both unions and TAWUSA being the less

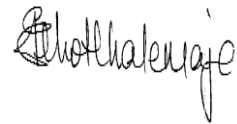
powerful party in this case, faces greater risks of injustice should it not be granted temporary reprieve. In my view therefore, the interests of justice, combined with quest for finality on this matter requires that a discretion be exercised in favour of TAWUSA. I am in agreement with Adv Fourie's submissions that a *rule nisi* would not serve any purpose at this stage since it is not known when the rescission application launched by TAWUSA will be determined by this Court.

- [34] It however needs to be stated that TAWUSA despite being granted reprieve has not come to Court with clean hands. In fact its approach to this whole matter has been characterised by pure indifference, incompetence and lack of care towards its membership and its very existence. It sought to portray itself as a victim in the very consequences of its inaction which could have been avoided. Other than all the other problems highlighted, the bringing of this application before the Court in Johannesburg is inexcusable and had caused great inconvenience to the First Respondent. It is apparent from correspondence exchanged between the parties' attorneys of record that TAWUSA could have launched this application in Port Elizabeth, but used this issue as a bargaining leverage. In the light of these factors, considerations of law and fairness dictate that TAWUSA should be burdened with the costs of this application on a punitive scale. Accordingly, the following order is made;

Order:

- i. The execution of this Court judgment dated 31 October 2014 under case number P337/12 is stayed pending the determination of the Applicant's rescission application dated 17 March 2015.
- ii. The attachment of the Applicant's bank account number 001 295 365 held with Standard bank is uplifted.
- iii. The Second and Third Respondents are ordered to release and return to the Applicant within 14 days of this order, any furniture and equipment rightfully belonging to the Applicant attached in accordance with warrants and writs issued.

- iv. All costs associated with and incidental to compliance with (iii) shall be borne by the Applicant.
- v. The Applicant is ordered to pay the costs of this application, inclusive of costs of one counsel and reasonable travelling costs incurred by the First Respondent's attorneys of record.
- vi. Any future determination of any matters under the present case number is to be dealt with by the Port Elizabeth seat of this Court.



Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv F Wilke

Instructed by: Lennon Moleele & Partners

For the First Respondent: Adv G Fourie

Instructed by : Joubert Galpin Searle Attorneys

LABOUR COURT