REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: J 1807/2015

In the matter between:

MBS TRANSPORT CC	**APPLICANT**
And	
SOUTH AFRICAN MUNICIPAL WORKERS UNION (SAMWU)	**FIRST RESPONDENT**
MS C SEBUDI	**SECOND RESPONDENT**
HELEN HLATSHWAKO N.O	**THIRD RESPONDENT**
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL (SALGBC)	**FOURTH RESPONDENT**

Date heard: 10 July 2015

Date delivered: 06 November 2015

Summary: **Permission to file the explanatory and confirmatory affidavits. Review- the Commissioner did not take into consideration of fairness and did not act reasonably in her heavy-handed approach**.

JUDGMENT

Phatshoane AJ

[1] In the recent past there has been a growing number of applications to this Court to stay writs termed "enforcement of award" issued by the Commission for Conciliation Mediation and Arbitration (the CCMA). These two unopposed applications: *MBS Transport CC vs CCMA and Three Others* (the MBS Application) and *Bheka Management Services vs Kekana and Two Others* (the Bheka application) are in point. They came before me in the Urgent Court of 08 and 10 September 2015. They concern the stay of the writs in execution of the arbitration awards made by the CCMA, pending the review of those awards by this Court in terms of s 145 of the Labour Relations Act, 66 of 1995, (the LRA).

[2] In the MBS application a *rule nisi* is sought calling upon the CCMA and its assigned commissioner, the employee in whose favour the award had been issued, and the Sheriff to show cause on the return date why the "enforcement award" dated 22 April 2015 should not be stayed pending the review and setting aside of the award. In the Bheka application a final order to stay the enforcement of the award is sought. In addition, the applicant brought an application that it be absolved from furnishing security in terms of ss 145(7) and 145(8) of the LRA.

[3] The brief factual milieu in respect of the MBS application is as follows. On 23 April 2015 the CCMA issued an award in favour of Mr Dustin Julius, the third respondent, for the payment of compensation in the amount of R59 200.00 (fifty nine thousand two hundred rand) for his unfair dismissal by MBS Transport CC, the applicant. On 03 July 2015 MBS filed an application to review the award in issue under Case No JR 1208-15. Messrs M.B Tshabangu, for Mr Julius, instructed the sheriff on 07 August 2015 to attach and take in execution the movable goods of MBS. On the strength of the enforcement award issued

by the CCMA under case No GATW79/15, the Sheriff attached the goods on 31 August 2015. MBS sought an undertaking from Messrs Tshabangu to hold over the execution process pending the final determination of the review proceedings. The request for an undertaking came to naught.

[4] MBS explained that the position is untenable because, at any given moment, Mr Julius could cause the sheriff to remove its good merely on his say-so. In respect of the status of the review application MBS stated that on 27 July 2015 the CCMA informed it that the record of proceedings had been dispatched to the Registrar of this Court. The record is still being transcribed at this stage with a view to prosecuting the review application.

[5] The summary of the factual background in the Bheka application is as follows. Following a claim for the alleged unfair dismissal by Mr Jonathan Kekana, the first respondent, against Bheka Management Services, the applicant, the CCMA issued an award on 19 June 2015 in terms of which Mr Kekana was retrospectively reinstated and awarded an arrear amount of R11 600.00 as compensation. On 03 August 2015 the CCMA issued an "enforcement award" under case No: GAEK1491-15 in terms of which the sheriff was instructed to attach and take into execution the movable property of Bheka and realise, by public auction, the sum of R11 600.00 together with interest thereon. The sheriff executed the writ on 20 August 2015. Bheka filed an application to review the arbitration award on 25 August 2015, thus within the statutory time-limit.

[6] These twin applications raise an important question whether this Court has jurisdiction to stay the writs issued by the CCMA. If it does, then *cadit quaestio.* If not, then what are litigants, faced with the "enforcement award" or writs issued by the CCMA, pending the determination of review application, to do in order to vindicate their rights. This question was not anticipated by counsel. They were hamstrung in that they had not researched the issue to support their submissions with authority, understandably because the issue may be considered a *res nova*.

[7] In light of the appreciable urgency manifest in the suspension of the writs, I made an order in terms of which the writs of execution were stayed pending

this judgment. Section 143 of the LRA sets out the statutory framework in respect of the effect and the enforcement of arbitration awards. It provides:

"143 Effect of arbitration awards

(1) An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued, unless it is an advisory arbitration award.
(2) If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975), unless the award provides otherwise.
(3) An arbitration award may only be enforced in terms of subsection (1) if the director has certified that the arbitration award is an award contemplated in subsection (1).
(4) If a party fails to comply with an arbitration award certified in terms of subsection (3) that orders the performance of an act, other than the payment of an amount of money, any other party to the award may, without further order, enforce it by way of contempt proceedings instituted in the Labour Court.
(5) Despite subsection (1), an arbitration award in terms of which a party is required to pay an amount of money must be treated for the purpose of enforcing or executing that award as if it were an order of the Magistrate's Court.
(6) Subsections (1), (4) and (5), as amended by the Labour Relations Amendment Act, 2014, takes effect on the date of commencement of the Labour Relations Amendment Act, 2014, and applies to an arbitration award issued after such commencement date." (my emphasis)

[8] The settled practice that obtained over the years has been that the writs of execution in respect of the arbitration awards made by the CCMA were issued by the Registrar of this Court prior to their execution by the sheriffs of this Court. The Labour Court has in terms of s 145(3)[1] judiciously exercised its discretion to stay these writs in instances where there had been a pending review which may lead to the underlying *causa* for the issuing of a writ being removed. In the wake of the 2014 amendments to s 143 of the LRA the

[1] Section 145(3) provides that: "The Labour Court may stay the enforcement of the award pending its decision."

situation has somewhat changed. At present the CCMA issues writs or the "enforcement awards" in respect of its own arbitration awards.

[9] In general, the Court has a wide discretion to stay the writs of execution of its own orders. Any decision, judgment or order of the Labour Court may be served and executed as if it were a decision, judgment or order of the High Court[2]. The certification of an award by a director of the CCMA in terms of s 143(3) does not convert the award into an order of the Labour Court[3]. If this was the position it follows that the powers of the Court to review the award would have been stymied because the decisions of this Court are not subject to any review. What is clear from the language of s 143 is that the award of the CCMA may be enforced ***as if it were*** an order of the Labour Court provided a writ has been issued in respect thereof[4].

[10] Section 143(5), which provides that an arbitration award in terms of which a party is required to pay an amount of money must be treated, for the purpose of enforcing or executing that award, as if it were an order of the Magistrates' Court is not a model of clarity. This is so because the section does not expressly set out how the enforcement or execution of the award *as **if it were*** an order of the Magistrates' Court is to be carried out.

[11] In terms of Rule 40 (2) of the Rules for the conduct of proceedings before the CCMA, published under GN R223 in GG 38572 on 17 March 2015, any arbitration award that has been certified in terms of s 143 of the LRA that orders the payment of an amount of money may be enforced by execution against the property of the employer party by the Sheriff of the Court in the Magisterial district where the employer party resides, or conducts business. If the award orders the performance of an act other than the payment of money it may be enforced by way of contempt proceedings instituted in the Labour Court.

[12] Clause 19.1.8 of the CCMA's Practice and Procedure Manual, 7th Edition, issued in November 2014 stipulates:

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[2] See s 163 of the LRA read with Rule 26 of Rules for the conduct of proceedings in the Labour Court as promulgated by GN 1665 in GG 17495 of 14 October 1996.
[3] See *Gois t/a Shakespeare's Pub v Van Zyl & others* (2003) 24 ILJ 2302 (LC) at 2308 para 19.
[4] See s 143(1) of the LRA.

"19.1.8 Once an award is certified, it can be executed upon delivery to the Sheriff. In terms of the LRAA of 2014 there is no need to approach the Labour Court for a writ to be issued first. An award ordering the performance of any other act, once certified is to be enforced by way of contempt proceedings instituted in the Labour Court."

Clause 19.4 thereof provides:

"19.4 How is an award to be enforced?

19.4.1 Once the award has been certified or made an order of the Labour Court and the other party still fails to comply with the award/order, the applicant may request the sheriff to execute.

19.4.2 The applicant may require the sheriff to attach property belonging to the other party and, if necessary, to sell it in execution. The sheriff's fees will however be for the applicant's account.

[13] On the plain reading of s 143 and Rule 40 of the CCMA, it is apparent that the CCMA has not been statutorily assigned the authority to issue writs. To the extent that the practice manual suggests that once an award is certified, it can be executed upon delivery to the Sheriff, without a writ having been issued by this Court, the stipulation must be *ultra vires*. The sheriffs are appointed by the Minister of Justice and Correctional Services for the lower or superior courts[5]. They perform functions within the area of jurisdiction of those courts for which they have been appointed by or under any law.[6]

[14] It has been held in a long line of authorities that the CCMA is not a court of law[7]. Brassey, Employment and Labour Law: Commentary on the Labour Relations Act Vol 3 (Juta & Co Ltd Kenwyn 2006) at A7-1-A7-2 states the following on the status of the CCMA:

"Unlike the Labour Court, it enjoys none of the status of a court of law and so has no judicial authority within the contemplation of the Constitution. It is an administrative tribunal in the same way as the industrial court was and, being an organ of state under s 239 of the Constitution, is directly bound by the Bill of Rights. It is also subject to the basic values and principles governing public administration."

The above comments by Brassey were endorsed in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC) at 54 para 86.

[5] See ss 2, 5, 6, 6A and 6B of the Sheriffs Act, 90 of 1986, as amended.
[6] See s 3(1) of the Sheriffs Act, 90 of 1986.
[7] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) at 2434 para 85; *Palaborwa Mining Co Ltd v Cheetham & others* (2008) 29 ILJ 306 (LAC) at 312 para 6.

[15] An application to set aside a writ can only be made to the Court that issued the writ.[8] Concomitantly, logic dictates that the application to stay the writ should similarly be made to the Court that issued the writ. The CCMA is a creature of statute and is not clothed with the jurisdiction to set aside or stay its own writs. This creates an anomalous situation in that the Labour Court has jurisdiction only in respect of such matters as are specifically assigned to it by the LRA and other statutes. More pertinently, s 157(1) of the LRA specifies matters over which the Labour Court has exclusive jurisdiction whereas s 157(2) confers upon it concurrent jurisdiction with the High Court in respect of the matters set out therein.

[16] A stay of a writ issued by the CCMA or by the Magistrates' Court falls outside the ambit of this Court's powers. Seen in this context, the litigants are non-suited to set aside the writs issued by the CCMA which are the subject of impending review proceedings before the Labour Court. Put differently, they are without any form of relief afforded to them. Clearly, this legal conundrum could not have been contemplated or intended by the Legislature. To my mind, clarification of the practical effect of s 143 is not a judicial task but a legislative competence in view of the fact that it may necessitate some public debate and possible amendments to the existing statutory scheme.

[17] This brings me to question whether, in the circumstances outlined, the litigants are completely barred from filing the applications to stay "enforcement award"/writs issued by the CCMA pending the envisaged review in this Court. In terms of s 171 of the Constitution all Courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation. In *SA Broadcasting Corp Ltd v National Director of Public Prosecutions & others* 2007 (1) SA 523 (CC) at 540B-D paras 36 and 37, the Constitutional Court pronounced as follows on the Courts' inherent power to protect and regulate their own processes:

'[36] The power recognised in s 173 is a key tool for courts to ensure their own independence and impartiality. It recognises that Courts have the inherent power to regulate and protect their own process. A primary purpose for the exercise of that

[8] See *Shandling v Southern Union Manufacturing* Co Ltd 1933 CPD 607

power must be to ensure that proceedings before courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in s 173 is that courts in exercising this power must take into account the interests of justice.

[37] When courts exercise the power to regulate their own process it is inevitable that that power will affect rights entrenched in Chapter 2 of the Constitution. A court must regulate the way proceedings are conducted and this will inevitably affect both the right to a fair trial (s 35 of the Constitution) and the right to have disputes resolved by courts (s 34). Courts are bound by the provisions of the Bill of Rights and therefore bear a duty to respect those rights. In exercising the power, therefore, they must take care to ensure that those rights are not unjustifiably attenuated.' (My emphasis)

[18] The powers of the Labour Court are set out in 158 of the LRA. Amongst these powers is to grant, *inter alia*, urgent interim relief and orders directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act.[9] Section 3 of the LRA commands an interpretation that gives effect to its primary objects, compliance with the Constitution and public international law obligations. One of the primary objects of the LRA is to give effect to and regulate the fundamental rights conferred by s 23 of the Constitution and to promote the effective resolution of labour disputes. Insofar as no specific power has been assigned to this Court in terms of s 158, to set aside writs issued by the CCMA, this could arguably be viewed to be a *casus omissus.* However, caution should be exercised not to import or surmise words in the statute which the Legislature has omitted.

[19] In *Stafford v Special Investigating Unit* 1999 (2) SA 130 (E) the Court held:

"…There is a presumption that the Legislature has dealt exhaustively with the subject of the enactment and that it is therefore not for the courts to supply omissions in the provisions of a statute … As a Court cannot act upon mere conjecture and speculate as to whether or not the Legislature might have overlooked something, it cannot supplement a statute by providing what it surmises the Legislature omitted. The Court therefore must give effect to what the Act says and not to what it thinks it ought to have said - see, for example, *Ex parte Slater, Walker Securities (SA) Ltd* 1974 (4) SA 657 (W) at 662. As a result, in the words of Maasdorp JA in *Union Government (Minister of Mines) v Thompson* 1919 AD 404 at 425, a *casus omissus* 'cannot be supplied by the

[9] See s 158(1)(a)(i)(iii)

Court, whose sole duty is to construe the Act as it stands'. That approach has been consistently followed in this country". –

[20] In *Rennie NO v Gordon and Another NNO* 1988 (1) SA 1 (A) at 22E–G the Court pronounced:

"Over the years our Courts have consistently adopted the view that words cannot be read into statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands (see eg *Germiston Municipality v Rand Cold Storage Co Ltd* 1913 TPD 530 at 539; *Taj Properties (Pty) Ltd v Bobat* 1952 (1) SA 723 (N) at 729E – H; *S v Van Rensburg* 1967 (2) SA 291 (C) at 294C – D; *The Firs Investments (Pty) Ltd v Johannesburg City Council* 1967 (3) SA 549 (W) at 557B – C; *DEP Investments (Pty) Ltd v City Council, Pietermaritzburg* 1975 (2) SA 261 (N) at 265G – H; *Hamman en 'n Ander v Algemene Komitee, Johannesburgse Effektebeurs, en 'n Ander* 1984 (2) SA 383 (W) at 391H)."

[21] I am of the view that the powers of the Court as circumscribed in s 158 of the LRA are clear and that effect can be given thereto without reading into the section. As already alluded to, the legal quagmire created by s 143 does not clothe the CCMA with the requisite jurisdiction to issue writs of execution. In the final analysis the proper course to follow is for litigants to issue the writs of execution in satisfaction of the arbitration awards in this Court.

[22] Returning to the applications. There appears to be no reason why the writs issued by the CCMA should be stayed pending review in circumstances where they are a nullity for lack of jurisdiction. They fall to be set aside.

[23] In the Bheka application an order was sought that it be absolved from furnishing security as required in terms of ss 145(7) and 145(8) of the LRA. The applicant explained that it is a small business with insufficient liquidity to satisfy the security bond in the amount of R69 600.00, equivalent to 24 months compensation. It explained that the payment of security will have a direct and material effect on its cash flow and ability to remain profitable. It further maintained that it will not be in a position to afford the payment of its own legal fees incidental to the prosecution of the review application if it is ordered to put up security.

[24] I share the remarks by Rabkin-Naicker J in *Free State Gambling and Liquor Authority vs Commission for Conciliation Mediation and Arbitration and Others*

Case No J773/15 handed down on 26 June 2015 that the Court has a discretion to order that the security be furnished or dispensed with. I am of the view that in exercising its discretion the Court should balance the competing interest of the parties. It has been held in several decisions of the Courts that labour disputes must be resolved and finalized expeditiously[10].

[25] As matters stand, it cannot be said that there are dilatory tactics at play in the prosecution of the review application. Regard being had to the circumstances outlined in its application Bheka appears to be an impecunious company. The amount of compensation as set out in an arbitration award earns interest from the date of the award at the rate prescribed from time to time in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 55 of 1975. This militates against any prejudice which the respondent employee may suffer should Bheka delay finalising the review.

[26] Nothing has been placed before me suggesting that should Bheka be unsuccessful in its application to review and set aside the award of the CCMA it would be unable to satisfy the award. In my view, dictates of equity and fairness would require that security be dispensed with. I can conceive of no prejudice.

[27] On the question of costs. I am of the view that it will not be in accordance with the requirements of the law and fairness that any of the respondents pay the costs of the applications because they did not oppose the relief sought. Therefore, no order as to costs would be made.

[28] In the result:

Order:

1. It is declared that the Commission for Conciliation Mediation and Arbitration (the CCMA) does not have jurisdiction to issue writs of execution in respect of the arbitration awards issued by it.

[10] *National Education, Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC) at 18 para 31*, National Union of Metal Workers of SA and Others v Fry's Metals (Pty) Ltd* 2005 (5) SA 433 (SCA) 448 at para 36

2. In respect of *MBS Transport CC v CCMA and others* Case No: J1807/15:

    2.1 That the writ of execution or the enforcement award dated 22 April 2015 issued under Case No GATW79-15 pursuant to s 143 of the Labour Relations Act, 66 of 1995, against the movable property of MBS Transport CC, be and is hereby set aside.

    2.2 No order is made as to costs.

3. In respect of *Bheka Management Services v Kekana and others* Case No: J1706/15:

    3.1 That the writ of execution or the enforcement award dated 03 August 2015 issued under Case No GAEK1491-15 pursuant to s 143 of the Labour Relations Act, 66 of 1995, against the movable property of Bheka Management Services be and is hereby set aside.

    3.2 That the application by Bheka Management Services (Pty) Ltd to be absolved from furnishing security succeeds.

    3.3 No order is made as to costs.

Phatshoane AJ

Acting Judge of the Labour Court of South Africa

<u>APPEARANCES FOR CASE NO: 1807/2015.</u>

For the Applicant: Mr MC Vermeulen

Instructed by: Vermuelen Attorneys

For the Respondent: No Appearances

APPEARANCES FOR CASE NO: 1706/2015.

For the Applicant: Mr R Atcheson

Instructed by: Lee & McAdam Attorneys

For the Respondent: No Appearances