



**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable  
Case no: J62/2017

In the matter between:

**EKURHULENI METROPOLITAN  
MUNICIPALITY**

**Applicant**

And

**SAMWU obo NOMATHEMBA NGAWA**

**First Respondent**

**THE SHERIFF, GERMISTON SOUTH.**

**Second Respondent**

**Heard: 01 February 2017**

**Delivered: 07 February 2017**

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**JUDGMENT**

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TLHOTLHALEMAJE, J

***Introduction:***

- [1] The Applicant approached the Court on an urgent basis to seek an order staying the Writ of Execution issued under case number GPD111505, and to further set aside the certificate of award issued in terms of the provisions of section 143 of the Labour Relations Act, pending the final determination of its rescission application launched at the SALGBC. The application is opposed.

***Background:***

- [2] The dispute between the parties dates back to 2010 after the amalgamation of the then Springs Town Council into Ekurhuleni Municipality. Following the transfer of contracts of employees in terms of the provisions of section 197 of the LRA, the First Respondent (Ngawe) as represented by SAMWU, lodged a placement dispute internally, claiming that she should have been placed at Clerk Grade 1 position with back-pay. Following an internal arbitration process, an award was issued on 21 April 2010 in terms of which it was found that Ngawe was entitled to the placement she sought. The internal arbitrator however declined to order back-pay on the basis that he had no jurisdiction to pronounce on the issue.
- [3] Five years later in November 2015, Ngawe lodged a further unfair labour practice dispute. The SALGBC, for unknown reasons allocated two case numbers to that dispute, viz GPD121506 and GPD111505. Both matters were set down for conciliation on 26 January 2016 before two different Commissioners. It is not clear as to the reason the Applicant or the First Respondents had not raised concerns at the time in view of the same dispute having been allocated two different numbers and being conciliated on the same day. In case number GPD121506, the Commissioner in a ruling issued on 15 February 2016 held that the Council lacked jurisdiction to determine the matter. The Commissioner in case number GPD111505 however issued a certificate of outcome, to enable the First Respondents to refer the matter for arbitration.
- [4] The dispute under case number GPD111505 having been referred for arbitration, it came before Commissioner Dawson on 29 June 2016, where both parties were presented. An award was issued on 1 August 2016, in terms of which Ngawe was granted R420 000.00 in back pay. Aggrieved with the award, the Applicant then filed an application for rescission on 22 August 2016. Answering and replying affidavits have since been filed in respect of that application. To date, the application has not been determined by the SALGBC.

- [5] The award issued on 1 August 2016 was certified by the CCMA in terms of the provisions of section 143 of the LRA on 13 December 2016, and SAMWU advised the Applicant to act on it failing which a sheriff would attach.

***Urgency:***

- [6] The Applicant launched this application on 20 January 2017. The deponent to the Applicant's founding affidavit, Xolani Nciza, its Manager-Collective Bargaining, averred that the application was urgent on the basis that the writ of execution came to his attention in the second week of January 2017, and that if the Respondents were not interdicted, it would be difficult for it to vindicate against third parties who would have purchased the movable goods in auction. It was further averred that the Applicant would suffer irreparable harm if the order was not granted, and that Ngawe would not be prejudiced as she was still gainfully employed, and could execute the writ in the event that the rescission application was dismissed.
- [7] The First Respondents on the other hand contended that the application was not urgent in view of the fact that the Applicant became aware of the intention to execute as early as 13 December 2016, and only brought this application on 20 January 2017. It was contended that the Applicant has not explained the delay in approaching the Court earlier if the matter was indeed urgent, nor had it explained its inaction in finalising the rescission application before the SALGBC. The First Respondents held the view that the urgency claimed in this matter was self-created, and that the application ought to be struck off the roll.
- [8] It is trite that an applicant seeking urgent relief as contemplated in Rule 8 of the Rules of this Court must adequately and in detail, set out in the founding affidavit, the reasons for the urgency, the circumstances which render the matter urgent, and the reasons why substantial redress cannot be obtained at a hearing in due cause. In determining urgency, a court will be guided by considerations of whether the reasons that make the matter urgent have been set out succinctly in the papers and secondly, whether the applicant seeking relief will not obtain a substantial relief at a later stage. Thus, the basis for

allowing parties to dispense with the Rules of Court relating to time periods is to prevent the occasioning of an injustice and involves the balancing of this consideration with that of the rights of parties to a considered opportunity to place their cases before the court<sup>1</sup>. It therefore follows that where the court is not satisfied that sufficient reasons have been given for the matter to be treated as one of urgency, the application ought to be struck off from the roll on that ground alone<sup>2</sup>.

- [9] In its paragraph 9 of the Founding Affidavit, and to the extent that it dealt with the issue of urgency, the Applicant stated that the letter of writ of execution was received around 14 January 2017, wherein the Respondents had threatened to attach the Applicant's property. The Applicant did not file a replying affidavit, and had merely filed a supplementary affidavit in which it was averred that having served this application on 23 January 2017 on the Respondent, the Second Respondent had nevertheless visited the premises of the Applicant with the intention to attach.
- [10] I accept in this case that to the extent that the Second Respondent had indicated its intentions to attach, and notwithstanding the fact that the Applicant had not explained in detail the reasons for the delay between 13 and 20 January 2017, the application ought to be accorded urgency. That delay in the light of the circumstances of this case cannot be of such a nature that the Applicant should be denied the right to a considered opportunity to place its case before this court.

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<sup>1</sup> See *National Police Services Union v National Commissioner of the National Police Services and Others* (1999) 20 ILJ 2408 (LC); *Commissioner For the South African Revenue Services v Hawker Air Services (Pty) Ltd and Another* Case no: 379/2005 at para 9 and *Vermaak v Taung Local Municipality* (JR315/13) [2013] ZALCJHB 43 (12 March 2013)

<sup>2</sup> See *Commissioner For the South African Revenue Services v Hawker Air Services (Pty) Ltd and Another* (supra) where it was held that:

"Urgency is a reason that may justify deviation from the times and forms the rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the rules of court permit a court (or a judge in chambers) to dispense with the forms and service usually required, and to dispose of it 'as to it seems meet' (Rule 6(12) (a)). This in effect permits an urgent applicant, subject to the court's control, to forge its own rules (See *Republikeinses Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972(1) SA 773 (A) 782A-783H) which must 'as far as practicable be in accordance with' the rules). Where the application lacks the requisite element or degree of urgency, the court can for that reason decline to exercise its powers under Rule 6(12) (a). The matter is then not properly on the court's roll, and it declines to hear it. The appropriate order is generally to strike the application from the roll. This enables the applicant to set the matter down again, on proper notice and compliance".

***The legal framework and evaluation:***

- [11] The legal principles surrounding applications for the stay of a writ are trite. The grounds upon which a Court may stay execution include that the underlying cause of action on which the judgement is based is under attack, and/or that execution is being sought for improper reasons. 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.
- [12] In the light of the above, an applicant is accordingly not required to satisfy the court of the existence of prospects of success in the principal dispute, as an application for a rescission, review or variation of an award qualifies as an attack on the *causa* underlying the award<sup>3</sup>. The court, in further exercising its discretion, will also consider whether the interest of justice supports the stay of execution pending the finalization of the review or rescission application<sup>4</sup>. Thus where an injustice would otherwise be done, the Court would be inclined to grant such a stay<sup>5</sup>.
- [13] In this case, it was common cause that there is a pending application for rescission before the SALBGC. Central to that application, *albeit* not before this court, is that Commissioner Dawson, despite it being brought to his attention, failed or omitted to decide on the jurisdictional issue raised during the arbitration proceedings held on 29 June 2016. The Applicant's contention was that had Commissioner Dawson done so, he would have concluded that he had no jurisdiction to arbitrate the dispute on the basis that it was either *res judicata*, or in the alternative, the dispute was filed out of time. These defences were also raised in the light of two conflicting decisions in respect of the same matter, with one Commissioner having determined that the SALGBC lacked jurisdiction to determine the dispute.
- [14] Commissioner Dawson's arbitration is thin in substance, and it is not indicated therein whether the issues of jurisdiction as raised by the Applicant in this case were properly dealt with. In essence, the award does not make any

<sup>33</sup> *Gois t/a Shakespeare's Pub v van Zyl & Others* (2003) 24 ILJ 2302 (LC) at paragraphs 32 - 36

<sup>4</sup> *Chillibush Communications (Pty) Ltd v Michelle Gericke & others* (2010) 31 ILJ 1350 (LC) at para 18

<sup>5</sup> *Road Accident Fund v Stydom* 2001 (1) SA 292 (C)

reference to these issues. I am satisfied on the facts and the papers before the court that there is a valid and pending application for rescission before the SALGBC. Furthermore, it would not be in the interest of justice not to grant the application in the light of the history of the dispute that led to the impugned award, and the fact that two different commissioners had dealt with the same dispute differently.

[15] It was further common cause that Ngawe was still gainfully employed by the Applicant. The dispute between the parties has a protracted history, and I am in agreement with submissions made on her behalf that she was entitled to finality on the matter and the fruits of her favourable award. Be that as it may, the amount of the award is not insignificant, and to the extent that after a consideration of the rescission application she may still benefit from that award, she stands to suffer no prejudice as that amount would be paid to her with due interest. On the other hand however, if the Second Respondent were to proceed and attach, and the Applicant's property was sold off on an auction, that property might not be recoverable, or at worst, the process of recovery might be arduous. Accordingly, the prejudice to be suffered by the Applicant if the application was not granted far outweighs that to be suffered by Ngawe, and the application therefore ought to be granted.

[16] In regards to the Applicant's prayer 3 of its notice of motion, in terms of which it sought the setting aside of the certified award, I am of the view that from the pleadings before the Court, no case has been made out in that respect, and furthermore, to grant the order as sought would be to pre-empt the determination of the rescission application pending before the SALGBC. I have further had regard to the requirements of law and fairness insofar as the issue of costs is concerned, and I am of the view that such an order is not warranted in this case.

**Order:**

1. The application to stay the execution of the Writ issued under case number GPD111505 pending the final determination of the rescission application before the SALGBC is granted.

2. There is no order as to costs.

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**Edwin Tlhotlhalemaje**

Judge of the Labour Court of South Africa.

**APPEARANCES:**

On behalf of the Applicant:

Adv. M. Tshivhase

Instructed by:

Mohamed Randera & Associates

On behalf of the First Respondent:

Mr J Gwebu of Madlela Gwebu Mashamba  
INC

LABOUR COURT