IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

CASE NO: P519/17

In the matter between

SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION	**Applicant**
and	
ALGOA BUS COMPANY (PTY) LTD	**First Respondent**
THE SHERIFF PORT ELIZABETH	**Second Respondent**
STANDARD BANK OF SOUTH AFRICA	**Third Respondent**
TRANSPORT AND ALLIED WORKERS UNION OF SOUTH AFRICA	**Fourth Respondent**
TRANSPORT, ACTION, RETAIL AND GENERAL WORKERS UNION	**Fifth Respondent**

Heard: 3 November 2017

Delivered: 6 November 2017

Summary: An application to stay the execution of a writ may not be granted in the absence of an underlying *causa* which is the subject matter of an ongoing dispute between the parties.

JUDGMENT

Lallie, J

Introduction

[1] The applicant launched this urgent application for an order mainly in the following terms:

"2. An order that the warrant of execution dated 06 September 2017 and the notice of attachment dated 07 September 2017 under case number P337/12 be set aside or stayed pending appeal application under case number PA 14/2017.

3. An order that the warrant of execution dated 24 October 2017 and the notice of attachment dated 25 October 2017 under case number P337/12 be set aside, alternatively be stayed pending appeal application under case number PA 14/2017.

4 Ordering the Second Respondent to immediately uplift any attachment made as a result of the above writs of execution and to reimburse the Applicant any monies paid into the Second Respondent's trust account due to the aforementioned attachments".

The application is opposed by the first respondent which, *inter alia*, challenged the urgency of the application on the grounds that the first attachment was effected on 20 September 2017 and the application launched on 2 November 2017. Having considered the arguments on behalf of the parties on urgency, I accept the applicant's argument that the attachment of its second bank account on 25 October 2017 and the nature of the relief the applicant seeks rendered the application urgent.

[2] The factual background to this application is that employees of the first respondent, including members of the applicant, fourth and fifth respondents participated in strike action in September and October 2011. Resulting from the conduct of the striking employees, the first respondent sought a compensation order in terms of section 68 (1) (b) of the Labour Relations Act 66 of 1995 (the LRA) against the applicant, the fourth and fifth respondents and some employees. The applicant's attempt to oppose the application was thwarted by the late filing of its answering affidavit. On 31 October 2014, the first respondent obtained, in default, an order in which, *inter alia*, the applicant, fourth and fifth respondents were found jointly and severally indebted to the first respondent in the amount of R10,350,000 (ten million Rand) plus interest and costs. The applicant filed an application for leave to appeal against the default judgement. As it was filed late, an application to condone the lateness was also filed. The condonation application was dismissed. The applicant filed an application for leave to appeal against the dismissal of the condonation application. That application was dismissed. On 6 September and 24 October 2017, the first respondent caused writs of execution in respect of the order of 31 October 2014 to be issued. On 20 September and 25 October 2017, the applicant's two bank accounts were attached by the second respondent in terms of the writs of execution. The applicant instructed its erstwhile attorneys to file a petition to the Labour Appeal Court against the dismissal of the applications and realised only when its first bank account was attached that the instructions were never acted upon. Pursuant to the attachment of the applicant's second bank account, the applicant brought the application at hand to either set aside or stay the writs of execution authorising the attachments and concomitant relief.

[3] The grounds the applicant sought to rely on are that the attachments violated its incorporeal rights as it is unable to conduct transactions through the attached bank accounts. Amongst the obligations the applicant is unable to meet, is payment of the salaries and benefits of its employees. The non-

payment constitutes a violation of section 32 of the Basic Conditions of Employment Act 75 of 1997 (BCEA). It is unable to pay legal representatives who represent its members involved in disputes with employers. The applicant submitted that it will lose membership owing to its inability to fulfill the obligation to act on behalf of its members. A further consequence of the attachment of the bank accounts is that the applicant is unable to comply with the order of this Court of 15 September 2017 which requires the applicant to convene a central executive committee conference to fill the vacant positions of its first and second president. The applicant also runs the risk of being evicted from the offices it rents in different provinces owing to its inability to pay rent. Its very existence is in jeopardy as it is unable to pay its creditors which provide electricity, telephones and printers.

[4] A further ground the applicant seeks to rely on is a pending appeal launched by the fourth respondent against the judgement of 31 October 2014. The fourth respondent is amongst the respondents held jointly and severally liable for the payment of the ten million Rand to the first respondent. After the order of 31 October 2014 had been granted, the fourth respondent filed an application for its rescission. As the rescission application was filed late, the respondent applied for its condonation. The condonation application was dismissed and the fourth respondent successfully applied for leave to appeal against the dismissal. The applicant submitted that the appeal is pending at the Labour Appeal Court under case number PA 14/2017. The applicant is of the view that the fourth respondent’s appeal has practical implications on the applicant and that if the first respondent recovers the total amount of the judgement debt against the applicant, the application at hand will be rendered academic. The applicant further argued that it should be able to access its bank accounts until the finalisation of the appeal. A further consequence of the fourth respondent’s appeal is that the operation of the order of 31 October 2014 would be suspended or stayed pending its finalisation. The applicant expressed the view that the underlying *causa* of the judgement debt in the matter at hand is disputed in the appeal. The order of 31 October 2014 may therefore not be executed until the appeal is dismissed unless the court granting leave to appeal permits execution. Execution has not been permitted.

It was also argued on behalf of the applicant that a writ of execution is stayed where real and substantial justice requires or where injustice would otherwise result. It is in the interests of justice, so went the argument, that the writs of execution be either set aside or stayed.

[5] The first respondent denied that the applicant has made out a case for the setting aside of the writs of execution. Amongst the reasons for opposition is that the underlying *causa* of the judgement debt cannot be said to be disputed by the applicant. A further ground is that the applicant has failed to disclose its financial position as it did not prove that it cannot meet its obligations with funds other than those in the attached bank accounts. It was argued on behalf of the first respondent that its interests as a judgement creditor have to be taken into account in determining whether it is in the interests of justice to have the writs of execution stayed.

[6] Writs of execution may be set aside if they have been obtained improperly. It is not the applicant's case that the writs of execution were not properly obtained. An order setting the writs of execution aside may not be granted in the absence of the averment that they were improperly obtained. In *Gois t/a Shakespear's Pub v Zan Zyl & others*[1] the general principles of granting a stay of the writ of execution were 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

[1] (2003) 24 ILJ 2302 (LC) at para 37

(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 soul enquiry is simply whether the causa is in dispute".

[7] The applicant submitted that an injustice will result if the writs of execution are not stayed. The main reason for the submission is that the applicant will grind to a halt in that it will not be able to rent premises from which it operates in different provinces, pay its staff and suppliers. Refuting the allegation, the first respondent submitted that the applicant, as the author of its own inconvenience, may not rely on its failure to take the necessary steps which would have prevented the issuing of the writs of execution. The first respondent served its application in terms of section 68 (1)(b) of the LRA on the applicant. The applicant filed its answering affidavit long after it was due and applied for condonation. The condonation application was unsuccessful and the application was heard on an unopposed basis and a default judgement was granted in favour of the first respondent against the applicant and other parties. In an attempt to have the default judgement overturned, the applicant applied, out of time, for leave to appeal and sought condonation for its late filing. The condonation application could not succeed because, amongst other reasons, the applicant sought an incompetent order. Leave to appeal against a default judgement may not be granted is orders granted in default may be rescinded by the courts which granted. They are not final orders. An order has to be final before it can be appealed against. The applicant should have applied for rescission of the default judgement but failed to do so. The first respondent has been waiting for the applicant to pay the judgement debt since it was granted on 31 October 2014. The applicant

has itself to blame for the failure to file the answering affidavit within the required time. It is also responsible for its further failure to apply for rescission of the default judgement. It has itself to blame for following an incorrect procedure in attempting to have the default judgement overturned. When the interests of justice of both parties are considered they point to the conclusion that injustice will result if the execution of the writs is stayed.

[8] The applicant submitted that it will suffer irreparable harm if execution is not stayed because the attachment of its two bank accounts has resulted in its inability to pay employees, creditors and suppliers. It is left unable to operate and it faces the risk of losing membership and deregistration as a trade union. The applicant has failed to prove that it will suffer irreparable because it did not disclose its financial position. No evidence was presented to prove that it does not have other bank accounts or investments. Even if I accept the applicant's argument that its financial position is implied in the averments that it is unable to fulfil its financial obligations, irreparable harm on its own does not constitute grounds to have a writ of execution stayed. The relevant irreparable harm in applications to stay the execution is one which will result if there is a possibility that the underlying *causa* which is the subject matter of an ongoing dispute between the parties may ultimately be removed. There is no pending *lis* between the parties which the applicant may be successful in and stands to suffer irreparable harm should it be successful after the stay of the writ of execution is refused. The absence of the ongoing dispute between the parties on its own constitutes sufficient grounds for the refusal of an application to stay the writ of execution. It is common cause that there is no ongoing dispute between the parties. The application for leave to appeal which was brought by the fourth respondent is not a *causa* between the applicant and the first respondent. The application can, in the circumstances, not succeed.

[9] The first respondent sought a costs order against the applicant. I am not convinced that it would be appropriate to grant it as I am convinced that notwithstanding the weaknesses in the applicant's case, the applicant's conduct of approaching this court for relief was not unreasonable.

[10] In the premises, the following order is made:

10.1 The application is dismissed.

10.2 No order is made as to costs.

Z Lallie

Judge of the Labour Court of South Africa

<u>Appearances</u>:

For the Applicant: Mr Daniel Majare of Majare Attoneys

For the First Respondent: Advocate John Grogan

Instructed by: Joubert Galpin Searle