IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 1425/18

In the matter between

SERITI COAL (PROPRIETARY) LIMITED **Applicant**

and

NATIONAL UNION OF METALWORKERS

OBO KHOLISILE WILLIAM MOYAKE **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **Second Respondent**

COMMISSIONER SMITH *N.O* **Third Respondent**

SHERIFF OF SASOLBURG **Fourth Respondent**

Heard: **26 April 2018**

Delivered: **11 May 2018**

JUDGMENT

MAHOSI J

Introduction

[1] This is an urgent application for an order to set aside the writ of execution issued by the registrar of this Court on 13 April 2018 under case number GAJB20525-12 and to stay the execution thereof. The writ of execution is for the recovery of the loss of income resulting from the delay in the implementation of the reinstatement order. The delay is associated with the applicant's review and appeal process.

[2] The issue is whether the claim for a period between the date of the award and the actual date of implementation is covered by reinstatement. If not, whether the writ issued by the registrar to recover such a claim is defective.

[3] I am of the view that the matter ought to be dealt with as one of urgency.

Material background facts

[4] The first respondent's member (Mr Moyake) was employed by the applicant in December 2007 and was dismissed on 27 June 2012. At the time of his dismissal, Mr Moyake occupied the position of an Engineering Assistant, and he was earning a basic salary of R10 287.79 per month. Mr. Moyake was dismissed after being found guilty of charges relating to breach of the applicant's Golden Safety Rules.

[5] Aggrieved by his dismissal, Mr Moyake referred an unfair dismissal dispute to the second respondent (CCMA). The dispute was conciliated unsuccessfully and it was then referred to arbitration. On 15 April 2013, the third respondent (the arbitrator) issued an arbitration award in terms of which the following order was made:

> '25. The dismissal was substantively unfair.
>
> 26. The respondent, New Vaal Colliers must reinstate the applicant, Mr. Moyake to his former position, on the same terms and conditions that

existed prior to the dismissal, without the loss in benefits or years of service.

27. The applicant must report again for duty on 2nd May 2013. I make no order regarding back pay as the applicant's hands aren't entirely clean in this instance either.'

[6] On 18 June 2013, the applicant instituted an application before this Court under case number JR 1263/2013 to review and set aside the award. The review application was dismissed on 18 May 2017 by Judge Cele. The applicant's application for leave to appeal application was also dismissed. The Labour Appeal Court also dismissed the applicant's petition on 6 December 2017. It is common cause that Mr. Moyake reported for duty in January 2018.

[7] On 09 February 2018 the employee's representatives (NUM) sent a correspondence to the employer's attorneys requesting the employer to pay the employee his back pay and lost remuneration for 57 months. On a letter dated 14 February 2018, the applicant's attorneys indicated that the loss of income for the period between 2 May 2013 and January 2018 does not fall within the scope of the award but instead arose out of the employment contract, which had been revived by the reinstatement order in the award.

[8] On 15 February 2018, NUM sent a letter to the applicant's attorneys indicating that unless the employer proposes alternative amount to the NUM's calculation of the amounts allegedly owed to Mr Monyake, NUM will bring an application to certify the arbitration award in order to recover the amount through a writ of execution. On 05 March 2018, the applicant sent a letter to NUM indicating that a claim arising from the date of the award does not fall within the scope of the award but constitutes a separate civil contractual claim.

[9] On 13 March 2018, NUM brought an application to certify the award in terms of section 143 of the LRA, the employer opposed the application on 23 March 2018. The employer reiterated the current legal position that the claim sought by NUM

could not be enforced through the award by way of a writ as such a claim does not fall within the scope of the award.

[10] On 24 April 2016, the deputy sheriff attended the premises of the employer with a ruling dated 11 April 2018. It is apparent that the writ had been certified by the CCMA on 11 April 2018. The Deputy Sheriff requested the applicant to pay an amount of R 1 350 830.00, failing which he will execute the writ. The assets listed in the inventory cannot be encumbered or sold by the applicant as they are under judicial attachment.

[11] The applicant submits that he has no alternative remedy in law but to bring this application. The sheriff indicated that the inventory can only be withdrawn and the execution of the writ can only be stayed if this application is brought. The applicant further submitted that the removal of the assets and the sale on auction will cause irreparable harm to the applicant and the business as one of the assets in the inventory is an ambulance used to transport the applicant's employees to hospital in an emergency. According to the applicant, there is no harm that will be suffered by NUM and Mr Moyake should this application be granted as the claim may be brought in terms of section 77 of BCEA since the claim arises from Moyake's employment contract and not the award.

[12] The applicant argued that the writ of execution was improperly issued by the registrar as the certification of the award was made in error. The basis of the applicant's argument was that it has fully complied with the award and that the first respondent's claim arises from a separate cause of action.

[13] The first respondent submitted that the applicant failed and refused to fully reinstate Mr Moyake to the same terms and conditions of employment as if he was never dismissed. The first respondent further submitted that the applicant must live with the risk it took by taking the matter on review because had it complied with the award it would not be in the situation it finds itself. The first respondent denied that the applicant will suffer any irreparable harm, paying a

debt or execution of writ does not cause harm more than to the person who is prejudiced by the failure to comply with the order.

Applicable law and analysis

[14] The applicant referred this Court to the judgment of *Coca-Cola Sabco (Pty) Ltd v Van Wyk*[1] to support its argument that reinstatement order only serves to revive the contract of employment and that an employee who tenders his or her service, while the employee is exercising its review and appeal remedies to exhaustion, does so in terms of the employment contract. In the said judgment, the Labour Appeal Court (LAC) held as follows:

> '[17] The money paid to an unfairly dismissed employee consequent to a retrospective reinstatement order is not compensation. Compensation and back-pay may only be granted in the alternative and are mutually exclusive. The back-pay ordered by the commissioner can therefore only refer to the period between the date of dismissal and the date of the order and does not entitle an employee, without more, to remuneration between the date of the award and the actual date of implementation. The Labour Relations Act does not cater for such relief.'

[15] The LAC further held as follows:

> '[28] When there is a delay in the implementation of the reinstatement award and the employer refuses to pay an employee money that may be due between the period of the award and the implementation thereof, the *lis* between them has not been judicially resolved. It is only after a contractual claim in the civil courts or under section 77 of the Basic Conditions of Employment Act has been instituted and pronounced upon that it can be said that the employer is a judgment debtor against whom a writ may be issued. The order of reinstatement is not a judgment dealing with the consequent damages for the breach of the contract.
>
> [29] The risk that an employer takes relating to the accumulated financial burden, caused by delays in the review and appeal process, has nothing to do

[1] [2015] 8 BLLR 774 (LAC)

> with the cause of action. The risk to the employer remains and the rewards to the employee would also be intact if the claim is prosecuted properly and timeously.
>
> [30] In summary, a reinstatement award does not cover the period between the award and its implementation. Should an employer refuse to pay an employee for the said period then the employee has a contractual claim - which is a totally different cause of action - against the employer.'

[16] In this case, the arbitrator ordered Mr. Moyake's reinstatement without back pay. It is clear that the writ is in respect of remuneration that is allegedly due to Mr. Moyake for a period between the date of the award and the actual date of implementation. This period is clearly not covered by reinstatement. Therefore, there is no underlying *causa* or judgment for the writ. It follows that the writ is defective and should be set aside.

[17] I have had regard to the issue of costs taking into account the requirements of law and equity, I believe this is a matter in which there should be no order as to costs.

[18] In the circumstances, I make the following order

<u>Order</u>

1. The writ of execution issued by the registrar of this Court on 13 April 2018 under case number GAJB20525-12 is set aside.

2. There is no order as to costs.

D Mahosi

Judge of the Labour Court of South Africa

Appearances:

For the Applicant	Advocate Van As
	Instructed by Cliffe Dekker Hofmeyer
For the Respondent	Mr Bongi Zwane (NUM Union Official)