IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: J 2127/19

In the matter between:

JOE SINGH GROUP OF COMPANIES **Applicant**

And

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

COMMISSIONER KENEILWE MOLWELANG *N.O* **Second Respondent**

SCHALK WILLEM KRUGEL **Third Respondent**

Heard: **31 October 2019**

Delivered: **1 November 2019**

JUDGMENT

TLHOTLHALEMAJE, J

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Introduction:

[1] With this urgent application, the applicant seeks what can loosely be referred to as *'One-Stop-Shop'* interim/final relief in the following terms;

"1. …

2. That the Execution Process embarked on by the Third Respondent pending the Finalisation of the Main Review Application be declared Unlawful, and accordingly set aside.

3. That the Third Respondent be, furthermore, restrained and Interdicted from embarking upon any further Execution Process pending the finalisation of the Main Review Application.

4. That the Main Review be reinstated after it was *"deemed to be withdrawn"* in terms of Rule 7A (5) of the Rules of the Labour Court of South Africa (Sic)

5. Condonation for the late filing of the record of proceedings before the CCMA after a full and proper reconstruction thereof be granted.

6. That the Applicant's supplementary affidavit in the Review Application is to be filed within Twenty-One (21) Court days of the filing of the Reconstructed CCMA Record.

7. In the event of an inability to reconstruct the CCMA record within 45 days of this Order being handed down, the matter is to be referred back to the First Respondent for a hearing de novo before a different Commissioner.

8. …

[2] Clearly prayers 2 – 3 are of an interim nature, whilst prayers 4 – 7 are of a final nature. The third respondent (Krugel), opposed the application on a variety of grounds, primary of which was that it lacked urgency. In the end however, he seeks that the application be dismissed.

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[3] The background and timeline to this application, to the extent that it is averred by Krugel is as follows;

3.1 An arbitration award, following a referral of an unfair dismissal dispute was issued in favour of Krugel on 30 September 2018. In terms of the award, the applicant was ordered to pay to Krugel, an amount of R540.000.00 as compensation and an award of costs.

3.2 A demand for payment in accordance with the award made by Krugel's attorneys of record (Brandmuller) on 8 October 2018 went unanswered.

3.3 Krugel on 29 October 2018 made an application to have the award certified and enforced, and the award was duly certified on 12 December 2018. The certified award was then sent to the Sheriff for service, and upon such service, the applicant indicated intention to launch review proceedings, which it then did on 20 December 2018. The application was filed in Court on 21 December 2018.

3.4 A Notice in terms of Rule 7A(3) read with Rule 7A(2)(b) of the Rules of this Court is dated 20 December 2018 and was served by the Commission for Conciliation Mediation and Arbitration (CCMA) on the applicant and Brandmuller.

3.5 In correspondence from Brandmuller dated 19 March 2019, the applicant was advised that the review application was deemed to have been withdrawn as a record of arbitration proceedings had still not been filed and served. There appears to have been no response to this correspondence.

3.6 On 4 April 2019, Brandmuller again forwarded the enforcement of the award to the Sheriff. The Sheriff was advised that he could not proceed with enforcement in the light of the pending review application.

3.7 On 11 June 2019, the applicant filed and served the record of arbitration proceedings. Two days later, Brandmuller advised the

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applicant that the record could not be accepted as it was filed outside of the time frames and further since the review application had not been reinstated.

3.8 On 16 July 2019, Brandmuller again directed the Sheriff to act in enforcing the arbitration award. On 13 August 2019, the applicant through its attorneys of record advised Brandmuller that the transcribed record of arbitration proceedings was incomplete. In a response dated 15 August 2019, Brandmuller advised that this Court ought to be approached for an order condoning the late filing of the record failing which the review application remained lapsed, and that the Sheriff was again instructed to proceed with execution.

3.9 The Sheriff effected attachment on 27 September 2019. This urgent application was served on Brandmuller on 21 October 2019 and filed the following day.

[4] The applicant in its replying affidavit disputes the accuracy of the above summarised timeline. This is despite correspondence being attached as annexures to the substantiate that timeline. It merely contends that Krugel loses sight of the fact that the urgency claimed stems from the fact that if it (applicant) sits back and does nothing, he will proceed and seek to execute the arbitration award despite not having obtained an order in terms of Rule 11 of the Rules of this Court declaring the review application to have been withdrawn, and further that he had adopted an obstructive posture against it insofar as the reconstruction of the arbitration record is concerned. I will deal with this contentions at a later stage of this judgment.

[5] In opposing the application, the first consideration is that Krugel raised a preliminary point to the effect that the founding affidavit and the application as a whole was defective on account of the affidavit not being in compliance with the provisions of the Regulations issued in terms of Section 10 of the Justices of Peace and Commissioner of Oaths Act.[1] The basis of this objection was that the deponent did not sign the affidavit before the Commissioner of Oaths.

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[1] Act 16 of 1963

Annexure 'K1' to the answering affidavit, which is exactly the same page as with the application before the Court, illustrates that the last page of the founding affidavit was not signed and dated by the deponent, whilst a Commissioner of Oaths had signed, dated and affixed his/her stamp. The founding affidavit filed with the Court however is signed but not dated by the deponent, even though it is commissioned.

[6] The applicant through the deponent to the founding affidavit, Ramesh Singh, explained the defect as being due to the fact that the Commissioner of Oaths could not have commissioned an unsigned affidavit as alleged, and that annexure 'K1' to Krugel's answering affidavit was merely the last page of a duplicate affidavit which was erroneously filed with the application. He further explained that he has since ensured that a correctly attested affidavit was before the Court.

[7] The procedure for the attestation of oaths is set out in the regulations which are of delegated legislation. The regulations are directory only, and it has also been held that where an affidavit has not been properly attested, it may still be valid provided there has been substantial compliance with the formalities in such a way as to give effect to the purpose of the legislation. In the end, a Court has a discretion to refuse or to receive an affidavit attested otherwise than in accordance with the regulations[2].

[8] In this case, clearly there is an anomaly which the applicant attempted to explain. First, it is unexplained how the duplicate copy referred to was in any event commissioned without the deponent having signed it, and secondly, even the so-called correctly attested affidavit which the applicant relies on is not dated by the deponent. Significant with the applicant's approach is that having failed to notice that the initial affidavit filed and served was not properly commissioned, it had without even seeking an indulgence, simply filed what it deemed to be a corrected version when attending to the indexing and pagination on 30 October 2019. The issue however is that to the extent that is

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[2] See *S v Munn* 1973 (3) 734 (NC) at 737H; *S v Msibi* 1974 (4) 821 (T); *Lohrman v Vaal Ontwikkelingsmaatskappy* 1979 ALL SA 416 (T) at 423

necessary, it can be accepted that the 'corrected affidavit' is in substantial compliance with the provisions of the regulations.

[9] The applicant however still has another hurdle to surmount. This relates to whether this application, in the light of the timeline summarised elsewhere in this judgment, deserves the urgent attention of this Court. The principles applicable to urgent applications, and more particularly in this Court flowing from the provisions of Rule 8 of the Rules of this Court[3] are trite. An applicant instituting an urgent application must justify the necessity to circumvent the ordinary time periods set out in the Rules of this Court, and is therefore required to set out explicitly the circumstances and objective facts which it contends renders the matter urgent. Of equal importance is that an applicant must further explain and demonstrate why it is said that it cannot obtain substantial redress at a hearing in due course. Further considerations as to whether a matter should be accorded any urgency is whether the urgency claimed is not self-created, and the expedition exercised when approaching the Court.

[10] The grounds upon which the applicant alleges urgency are that;

10.1 Despite Krugel being advised during the course of August 2019 of the fact that the applicant's attorneys of record sought to reconstruct the record of arbitration proceedings, Brandmuller viewed such attempts at reconstructing the record as opportunistic and had threatened to proceed with the execution of the award.

10.2 The arbitration award was never made an order of this Court and Krugel has not obtained an order in terms of Rule 11 of the Rules of this Court declaring the review to have been withdrawn.

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[3] **8 Urgent relief**

(1) A party that applies for urgent relief must file an application that complies with the requirements of rules 7(1), 7(2), 7(3) and, if applicable, 7(7).

(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; and

(c) if a party brings an application in a shorter period than that provided for in terms of section 68(2) of the Act, the party must provide reasons why a shorter period of notice should be permitted.

10.3 The Sheriff attended to the premises of the applicant on 4 October 2019 with the purpose of attaching movable property, and had proceeded to make an inventory in the form of a truck worth a lot more than what was reflected in the inventory.

10.4 The applicant's attorneys of record had proceeded in their attempts to reconstruct the record, and Krugel or Brandmuller had refused to cooperate in any reconstruction process.

10.5 On 17 October 2019 the Sheriff again attended to the premises of the applicant with a view of effecting attachment of assets indicated in the inventory, and has indicated intention to come back to remove the assets.

10.6 Krugel is angry and hellbent on causing the applicant irreparable harm and was going to proceed and execute.

[11] Krugel in his answering affidavit contends that the urgency claimed in this case is self-created. He seeks that the application be dismissed. His contentions clearly have merit. Other than the urgency being self-created, the application ought to be dismissed on account of the *prima facie* right not having been established, as there is no pending underlying *causa,*[4] which underpins a determination of whether a stay of execution should or should not be granted. My conclusions in this regard are fortified by the following considerations;

11.1 As early as December 2018, the award was certified, which ordinarily meant that there were dire implications for the applicant, especially after the Sheriff made it aware of the intention to proceed with execution during that period. Before then, no attempt had been made to launch review proceedings and when the applicant ultimately did, that application was outside of the statutory six weeks' period. It is appreciated that the application for condonation was incorporated in

[4] See *Transport and Allied Workers Union of South Africa v Algoa Bus Company (Pty) Ltd and Others* [2015] 7 BLLR 738 (LC); (2015) 36 ILJ 2148 (LC) at paragraphs 25 - 27

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that review application. Be that as it may, that condonation still needs to be determined.

11.2 Upon the review application having been launched, and prior to the record of arbitration proceedings being filed, the applicant was advised in March 2019 that its review application was deemed to have been withdrawn, and it is at that point that it becomes apparent that the urgency claimed is self-created, particularly insofar as prayer 4 is sought.

11.3 The applicant appears to seek to downplay the importance and binding nature of the provisions of the Practice Manual of this Court. Clause 11.2.3 of this Manual are applicable in instances where a record of arbitration proceedings has not been timeously filed in circumstances where the record was made available to the parties.[5] In this case, the applicant simply seeks to blame Krugel for the fact that the transcribed record was either filed out of time or that it is still in an incomplete state.

11.4 In line with the provisions of clause 11 of the Practice Manual, all that was required of the applicant, to the extent that it had realised that the filing of the record was long over-due, was to first, seek an indulgence from Krugel for an extension within which to file the record. Where that consent was not granted, or where even the record was incomplete,

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[5] Clause 11.2 of the 2013 Practice Manual of the Labour Court reads as follows:

"11.2.1 Once the registrar has notified an applicant in terms of Rule 7A (5) that a record has been received and may be uplifted, the applicant must collect the record within seven days.

11.2.2 For the purposes of Rule 7A (6), records must be filed within 60 days of the date on which the applicant is advised by the registrar that the record has been received.

11.2.3 If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been given. If consent is refused, the applicant may, on notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time. The application must be accompanied by proof of service on all other parties, and answering and replying affidavits may be filed within the time limits prescribed by Rule 7. The Judge President will then allocate the file to a judge for a ruling, to be made in chambers, on any extension of time that the respondent should be afforded to file the record."

the applicant ought to have approached the Judge President of this Court to seek an extension or even a directive.

11.5 To the extent that the applicant failed to take any of these steps, it cannot base its urgency on the fact that Krugel was 'obstructionist' as it alleges. There was no obligation on Krugel to agree to any reconstruction of the record process initiated by the applicant in the absence of an order or directive from this Court. The contentions that the applicant sought to resolve the issue amicably with Krugel prior to approaching the Judge President is indeed lame in the extreme.

11.6 Further to the extent that the applicant did not avail itself to the above provisions, the review application remained deemed withdrawn, (irrespective of whether it was '*moribund* or in ICU' as the applicant's counsel referred to it), which meant that it could only again be properly before the Court once an application for a reinstatement together with an application for condonation for the late filing was launched and granted[6]. These conclusions clearly have ramifications for the orders sought under prayers 2 and 3 in the Notice of Motion, in that in the absence of a pending review application before the Court (*i.e.*, a pending *underlying causa*), there can be no basis upon which to grant any stay of enforcement or execution of the arbitration award.

11.7 Equally so, there was no need for Krugel, contrary to the submissions made on behalf of the applicant, to first have had the review application dismissed in terms of a Rule 11 application before he could seek to enforce the arbitration award. In *CCMA v MBS Transport CC and Others, CCMA v Bheka Management Services (Pty) Ltd and Others,*[7] it was held that a certified arbitration award may be enforced in the same

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[6] See *Sol Plaatjie Local Municipality v South African Local Government Bargaining Council and Others* (PR192/15) [2017] ZALCPE 11 (13 June 2017) at para 27

[7] [2016] ZALAC 34; [2016] 10 BLLR 999 (LAC); (2016) 37 ILJ 2793 (LAC) at para 39, where it was held;

> "The CCMA does not issue writs in the conventional way. The certified award is the equivalent of a Labour Court order in respect of which a writ has been issued. The certified award is therefore not only assumed to be an order of the Labour Court but it must also be assumed that a writ was issued in respect of that order. The certified award is therefore the writ…"

way that it would be if it was an order of the Labour Court in respect of which a writ was issued.

11.8 Thus, the fact that Krugel seeks to enforce the award and that the Sheriff is ready to execute cannot on its own be a basis of urgency, if the applicant did nothing from the moment it became aware of the intention to enforce and execute. The urgency can only be determined by an assessment of any expeditious steps taken to mitigate any harm at the time. In this case, to the extent that the arbitration award was certified as early as 12 December 2018, a fact which the applicant was clearly aware of at the time, it follows that any attempt at staying the execution some 10 months later is clearly belated, and it therefore ought to be concluded that the urgency claimed is indeed self-created.

11.9 It nonetheless gets worse for the applicant, to the extent that a conclusion was reached that there is no live or proper review application before the Court. The provisions of section 145(7) of the Labour Relations Act (LRA) are such that the institution of review proceedings does not on its own suspend the operation of an arbitration award, unless the applicant furnishes security to the satisfaction of the Court in accordance with subsection (8). The issue of security was raised with the applicant's counsel in Court, and it was confirmed that indeed no such security was furnished.

11.10 A security in compliance with the provisions of section 145(7) of the LRA can be provided in the form of a payment into the Court's or the Sheriff's trust account. Further, the issuing of a security bond by a legal practitioner or a registered banking institution would also qualify as the requisite provision of security.[8] It is appreciated that there is no provision in section 145(7) of the LRA as to how the security should be furnished. However, the submission made on behalf of the applicant that it did not know how or where to furnish the requisite security does not avail it. All it needed to do was to enquire with the office of the

[8] *Rustenburg Local Municipality v South African Local Government Bargaining Council and Others* [2017] ZALCJHB 261; (2017) 38 ILJ 2596 (LC); [2017] 11 BLLR 1161 (LC) at para 18

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Registrar as to how to go about furnishing such security, rather than simply ignoring to do so.

[12] In the light of the above conclusions, it needs to be pointed out that other than prayers 2 and 3 in the Notice of Motion, the other prayers sought by the applicant are indeed extraordinary and demonstrates an abuse of this Court's processes. I have referred to these prayers as *'one-shop-stop'* for the simple reason that in the end, despite all the minefields that the review application has to surmount, and the conclusions reached as to why a stay of execution cannot be granted, what the applicant ultimately seeks is a final order which will dispose of all those hurdles, and eventually end with the matter being remitted back to the CCMA.

[13] The above approach cannot be countenanced in circumstances where no urgency was established whatsoever in regards to why the deemed withdrawn review application ought to be reinstated in circumstances where the applicant did nothing since 19 March 2019, after it was advised of that deemed withdrawal. It is not clear from the papers as to when the applicant knew that the transcribed record was incomplete. However, to the extent that the record was filed in June 2019, and where the clear provisions of the Practice Manual were completely ignored, an attempt to have the late filing of that record be condoned on an urgent basis clearly constitutes an abuse of this Court's processes, and in particular, the urgent roll.

[14] In the end, to the extent that there is no underlying pending *causa*, the applicant has no basis for a claim of a clear or *prima facie* right. Furthermore, the irreparable harm that the applicant is to endure is clearly self-inflicted, and the balance of convenience cannot favour the granting of the orders sought in circumstances where the applicant had not done everything (and timeously so) in asserting its rights in respect of its review application. On the other end of the spectrum, Krugel is in possession of a favourable award which he is entitled to enforce in circumstances where the provisions of section 145 of the LRA and those of the Practice Manual of this Court were not been complied with.

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[15] It is my view that an applicant in urgent proceedings cannot in the face of imminent calamity, complain of a lack of alternative remedies, in circumstances where such remedies have always been at its disposal and where they were not properly utilised. As already indicated, the provisions of section 145 of the LRA and those of the Practice Manual have always been at the applicant's disposal, to ensure that the execution of the arbitration award was stayed. Krugel and the Sheriff are ready to execute simply because the applicant failed to utilise those remedies.

[16] Having had regard to the broad discretion conferred on this Court by the provisions of section 162 of the LRA, it is my view that the interests of law and fairness dictate that the Applicant be burdened with the costs of this application.

[17] Accordingly, the following order is made;

Order:

1. The Applicant's application is dismissed with costs.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: P.W Makhambeni, instructed by SMS Attorneys.

For the Third Respondent: AP Brandmullers of Brandmullers Attorneys

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