

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: J 1673/19

In the matter between:

DALEEN VAN WYK OCCUPATIONAL

THERAPIST (PTY) LTD

First Applicant

DALEEN VAN WYK

Second Applicant

and

ANITA SINCLAIR

First Respondent

MARTIE ELIZABETH VENTER

Second Respondent

ALEXANDRA MULLER

Third Respondent

MELISSA DE BEER

Fourth Respondent

THE REGISTRAR OF THE LABOUR COURT

Fifth Respondent

THE SHERIFF OF THE HIGH COURT, PRETORIA EAST

Sixth Respondent

Heard: 6 August 2019 (Order Granted)

Reasons for Order: 03 March 2020

REASONS FOR THE ORDER

TLHOTLHALEMAJE, J

[1] On 1 August 2019, the first and second applicants approached the Court on an urgent basis to seek an order staying the enforcement of arbitration

awards and sale of execution issued under case number GATW15494-18 and GATW14024-18 in favour of the first to fourth respondents.

- [2] The matter was set down for a hearing on 6 August 2019. On the same date that the application was launched, a notice of withdrawal in respect of the first applicant, as well as the withdrawal of its attorneys of record was filed and served. The application was opposed by the first – fourth respondents. At the conclusion of the hearing of the matter, an order was issued in terms of which the application was struck off the roll on account of lack of urgency. The second applicant was further ordered to pay the costs of the application. What follows below are reasons for that order.
- [3] The second applicant is an Occupational Therapist and Director of the first applicant. The first – fourth respondents were employed by the first applicant in different capacities. The first – third respondent had referred a constructive dismissal dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) under case number GATW15494 – 18. An arbitration award was issued on 29 January 2019 in the absence of the first or second applicants, in terms of which an order of compensation in varying amounts was issued in their favour. In terms of the award, the amounts due were payable on no later than 28 February 2019.
- [4] The fourth respondent had separately referred an alleged constructive dismissal dispute to the CCMA under case number GATW14024-18. Both the first and second applicants failed to attend the arbitration proceedings, and an award was issued in favour of the fourth respondent, in terms of which she was also awarded a compensation amount.
- [5] The two arbitration awards in favour of the first – fourth respondents were certified in terms of section 143 of the Labour Relations Act (LRA)¹ on 16 and 18 March 2019 respectively. A Notice of Attachment in Execution was subsequently issued on 18 April 2019.

¹ Act 66 of 1995 (as amended)

- [6] On 18 July 2019, a notice was issued by the sixth respondent (Sheriff) confirming that a sale of execution was to take place on 6 August 2019. On or about 22 July 2019, the second applicant launched an application for rescission/variation at the CCMA in respect of the two awards issued in default against her in her personal capacity.
- [7] In these proceedings, the first – fourth respondents raised two central preliminary points which if successful, would dispose of the matter. The first related to a lack of *locus standi* on the part of the second applicant to pursue the application in the name of or on behalf of the first applicant. The second related to whether the second applicant had satisfied the requirements of urgency.
- [8] In regards to a lack of *locus standi* on the part of the second applicant to bring this application as a director of the first applicant, it was common cause that the first applicant was at the time that the matter was heard, already under liquidation. An affidavit deposed to by Mr Adriaan Willem van Rooyen, the joint liquidator of the first applicant, was attached to the answering affidavit. Van Rooyen further confirmed that he had not given any permission nor instruction for the institution of any litigation in the name of the first applicant, as the powers of the liquidators were not extended by an order of a competent court in that regard. It was submitted that in those circumstances, and to the extent that this application was neither with the blessing of the liquidators nor was it served on them, it could not be properly before the Court insofar as the first applicant was concerned.
- [9] This preliminary point was however disposed of when the application in respect of the first applicant was withdrawn. Further to the extent that the awards were issued against the second applicant in her personal capacity, I see no reason in law why the entire application should be considered not to be properly before the Court.
- [10] A second preliminary point however is what led to the matter being struck off the roll. In matters that are brought on an urgent basis before the Court, the starting point is a determination of whether a case has been made out for the

urgent intervention sought. The requirements of urgency in this Court as contemplated in Rule 8 of its Rules are well known². The applicant such as in this case is required to set out explicitly the circumstances and objective facts which it is contended renders the matter urgent. It is further trite that any self-created urgency will not constitute acceptable urgency, for the purposes of Rule 8 of the Rules of this Court to justify the determination of a matter on an urgent basis³. Aligned to that enquiry is a further need to explain in the founding affidavit, why substantial redress at a hearing in due course cannot be obtained⁴.

[11] A variety of factors emanating from the pleadings and submissions made in Court were taken into account in striking the matter off the roll on account of lack of urgency, including the following;

11.1 In the founding affidavit, no attempt was made whatsoever by the second applicant to demonstrate or set out objective facts as to in what manner this application deserved the urgent attention of the Court. The only issues raised were that there was a pending rescission application before the CCMA which had prospects of success; that an attachment had already been effected on the entire assets of the second applicant; that severe prejudice would be suffered if the application was not treated as urgent in that the applicants would be deprived of an opportunity to prosecute the rescission application; and that the granting of the order sought would prevent damages calculated in monetary value.

² **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.

³ See *Police and Prisons Civil Rights Union v Minister of Correctional Services and Another*, [2014] 5 BLLR 481(LC) at par [6]; *Workforce Group (Pty) Limited v National Textile Bargaining Council and Another*, [2011] 11 BLLR 1136 (LC) at par [13].

⁴ See *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2012] JOL 28244 (GSJ) (11/33767); [2011] ZAGPJHC 196 (23 September 2011) at para 6.

11.2 In *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite and Others*,⁵ it was held that the fact that the applicant wants to have the matter resolved urgently does not on its own render it urgent. The applicants' averments, in respect of why the matter ought to be treated as urgent are thin in detail and lacking in substance. The fact that a rescission application was launched cannot form the basis of urgency, especially in circumstances where that application was brought before the CCMA some four months since the awards were issued. In this regard, it is not even necessary to dwell into the submissions made on behalf of the first – fourth respondents in regards to the weak merits of that application.

11.3 To the extent that no objective facts were set out in the founding affidavit, the invariable conclusion as submitted on behalf of the first – fourth respondents, is that the urgency claimed was not established, and/or at worst, is self-created.

11.4 To the extent that urgent relief is sought, an applicant must satisfy the Court that the he/she acted with the necessary haste in addressing the source of the complaint. If ever there is any doubt about the self-created nature of the urgency claimed, one only needs to examine the history of this matter, which reveals that the second applicant's conduct throughout from when the arbitration awards were issued, was that of nonchalance, and a failure to act with due haste, until the sale of execution was advertised.

11.5 The sale of execution was scheduled to take place on 6 August 2019, and this application, despite its alleged urgency, was filed and served on 01 August 2019, setting it down on the date that the sale was to proceed.

11.6 The arbitration awards forming the subject of the sale of execution were issued in default in January and March 2019. This was in circumstances where there can be no doubt that the second applicant was fully aware of the set-down notices after they were personally

⁵ *Ibid*

delivered to her. To the extent that the second respondent wanted to raise a dispute in regards to the notice of set-down, on her own version as reflected in the rescission application, the first applicant had received the copies of the arbitration awards on 30 January 2019 and 5 March 2019. As to the reason a rescission of those awards was not sought at the time is unclear.

11.7 Those arbitration awards were then certified in March 2019, and an attachment was effected on 18 April 2019. It cannot therefore be correct that the second applicant only knew of the sale of execution on 18 July 2018 as she alleged in the replying affidavit. The Sheriff served copies of the certified awards on 18 April 2019, when an attachment was effected, and it was at that time that she ought to have approached the Court for a stay of execution, specifically after being warned by the Sheriff to do so in order to prevent the execution.

11.8 Subsequent to the attachment, the second applicant's first set of attorneys sought to have the dispute resolved by contacting the first-fourth respondents' attorneys of record. In that regard Acknowledgements of Debts were drafted by the second applicant's erstwhile attorneys of record for further discussions. Those discussions however faltered.

11.9 The sale of execution was advertised on 18 July 2019, and despite the Sheriff's earlier warnings in April 2019 when attachment was effected, the second applicant had still not deemed it prudent to approach the Court for an order to stay the execution.

[12] The essence of the above factors is that the conduct of the second applicant early as March 2019 when she became aware of the two arbitration awards obtained by default was that of lack of concern in the light of the consequences that were to flow from those awards and process of attachment. She failed to take any measures to mitigate the harm or prejudice she was now complaining of, if the application was not granted. She only woke up from her slumber when reality hit her after the sale of execution was advertised on 18 July 2019 by launching applications for rescission at the

CCMA on the same day the sale was advertised, and approaching this Court a few days later with this application. In these circumstances, and given the several opportunities the second applicant had rebuffed in order to mitigate any prejudice or harm arising out of the arbitration awards and their execution, the only invariable conclusion to be reached was that the urgency claimed was self-created.

[13] To this end, the Court cannot come to the assistance of an applicant where there is no evidence of maximum expedition on her part. It can therefore not be doubted that given the background to this application, any urgency that the second applicant claimed was indeed self-created, and it was under those considerations that the Court had issued its order on 6 August 2019.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

Ms C Bench of Steenkamp Van Niekerk
Attorneys

For the 1st – 4th Respondents:

Adv HF Geyer with Adv, JT Roos,
instructed by Roos van Dyk Attorneys