THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable

Case No. P03/25

In the matter between:

NEW HEIGHTS 1275 CC t/a
ST THOMAS PRIVATE SCHOOL **Applicant**

and

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION **First Respondent**

ELIZABETH TOM *N.O.* **Second Respondent**

MARIA CATHARINA RHEEDER **Third Respondent**

Heard: 28 & 29 January 2025
Delivered: 30 January 2025
This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date of hand-down is deemed to be 30 January 2025.

JUDGMENT

MAKHURA, J

[1] More than 35 months ago on 24 February 2022, the second respondent (commissioner), appointed as an arbitrator under the auspices of the first respondent (CCMA) to arbitrate an unfair dismissal dispute between the applicant and the third respondent (employee) in these proceedings, issued an arbitration award in terms of which she declared the dismissal of the employee substantively unfair and ordered the applicant to pay her compensation equivalent to 12 months' remuneration, which equals to R134 820.00.

[2] The applicant then filed an application in terms of section 145 of the Labour Relations Act[1] (LRA) to review and set aside the award under case number PR63/22. It is common cause that the employee was not served with the review application in that the applicant's attorneys used an incorrect email address to serve the application on her. Although service by email was not prescribed in the now repealed Labour Court Rules which were applicable at the time of the review application, the practice of service by email was accepted and service was proved the same way as service by fax in terms of item 14.1.5 of the now repealed Practice Manual of the Labour Court of South Africa, April 2013. There was no telephonic confirmation by the applicant's attorneys of service of the review application by email nor was there any confirmation with her attorneys of record during the arbitration proceedings that the review application had been successfully served on them. If that was done, the current application would have been unnecessary and perhaps the review application could by now have been finalised.

[1] Act 66 of 1995, as amended.

[3] The applicant's current attorneys of record were not authorised to act in the review proceedings at the time the applicant elected to use their details to serve the employee.

[4] During October 2022 and after receipt of the certified award, the employee attempted to execute the award. The Sheriff, on the employee's instruction, attended the applicant's premises to execute the award. This prompted the applicant to pay an amount of R134 820.00 as security into its attorneys' trust account. Although the employee adopted the view that the furnishing of security did not stay the execution of the award, she however instructed the Sheriff to suspend execution of the award.

[5] Despite not being properly served, the employee instructed her attorneys of record to oppose the review application "*to protect [her] interest*" and raise the issue of non-service on her. An answering affidavit in this regard was served on 14 November 2022.

[6] On 22 November 2022, the review application, which was enrolled for hearing on unopposed motion roll for that day, was removed from the unopposed roll on the basis that it had become opposed. The application was again enrolled for hearing on 19 April 2023. On this date, the Court, per Prinsloo J, removed the matter from the roll and ordered further that:

> 'The applicant has to file a condonation application for the late filing of the review application in respect of service on the third respondent within 14 days of date of this order.'

[7] The applicant subsequently filed an application, not for condonation of the late service of the review application on the employee or late filing of the review application in respect of service on the employee as ordered by the Court on 19 April 2023, but for condoning the irregular service of the review application. The applicant's attorney, who deposed to the affidavit in the condonation for the irregular service application and the

current urgent application, explains why he opted for this type of application and the difficulties he faced:

'I had difficulty in drafting the application in support of the condonation application in that:

The application was not served out of time, the Third Respondent's issue was that it was served on her attorney.

If it is accepted that this constitutes non-service (which is denied), then it follows that the application was never served on the Applicant.

The court order in this instance was issued on 19th April 2023, at which stage it is common cause that the Third Respondent had been in possession of the papers since at latest the 21st October 2022.

It would have made no sense to serve the papers again on the Third Respondent (or her legal representative) as she had already been in possession of the documents for almost six (6) months. I have established that the Courts have held that requiring the Applicant to serve papers on a party who is already in possession of these papers would be "technical and frivolous".

In the light of the clear authorities the service on the Third Respondent ought to have been deemed valid, particularly since the Court has the discretion to condone the manner of service in each particular circumstance.'

[8] It is evident from the above that the applicant did not accept the order. However, it is important that this condonation application was required and ordered by the Court, not a suggested party to the application. The order of 19 April 2023 was not appealed, nor was there any variation application or a request for reasons for the order. Instead, faced with what he called the difficulties above, the applicant, through its attorneys, opted to adopt its own approach and file that which it was not ordered to file and disregarded to do that which it was ordered to do by this Court. The applicant filed an application to condone the irregular service.

[9] The review application was again enrolled for hearing on 9 May 2024 before Molotsi AJ. On 14 January 2025, the learned acting judge issued a judgment and order

in terms of which he dismissed the application for condonation of the irregular service, declared that the review application was not properly served on the employee and found that in the absence of a condonation application (as ordered by Prinsloo J), the Court has no jurisdiction to entertain the review application.

[10] The effect of the above judgment and order is that the review application is not before this Court. Alive to this, the employee demanded payment of her R132 820.00 plus interest and threatened to execute the award if no payment was received. This prompted this urgent application. The applicant seeks an order to stay the execution of the award pending the finalisation of the review application.

[11] On 27 January 2025, the applicant filed an application to condone "*the late filing of the review application in respect of service*" on the employee. This is the application which is brought allegedly in compliance with the order dated 19 April 2023. Inexplicably, the applicant, through its attorneys of record who allegedly had difficulties complying with the 19 April 2023 order, is now able to comply with the order.

[12] Mr Thys, appearing for the employee, argued during the hearing that this Court has no jurisdiction to entertain the urgent application. He placed reliance on the judgment of this Court in *Member of the Executive Council, Department of Economic Development, Environmental Affairs and Tourism, Eastern Cape v Noncembu and others*[2]. This judgment does not advance Mr Thys' argument. It dealt with an urgent application to stay the writ of execution pending a review application that was not pending before the Court because it was deemed withdrawn. In *casu*, the Court declared, rightly or wrongly, on 14 January 2025 that the review application is not deemed withdrawn. In any event, this jurisdictional point was not pleaded. This Court has jurisdiction over applications for stay of execution.

[13] The applicant contends that the matter is urgent. The reasons for urgency are articulated as follows:

[2] (2023) 44 ILJ 2769 (LC); [2023] 11 BLLR 1213 (LC).

> 'The Third Respondent threatened to execute the writ in the event of the Applicant failing to pay her by close of business on the 16th January 2025. This was a mere two (2) days after the judgment was delivered. The Third respondent's legal representative made it clear that the third respondent would not agree to stay the writ and that any application to do so would be opposed.
>
> I consulted with members of the Applicant close corporation to advise them of the judgment and to take instructions regarding the further conduct of the matter. The Applicant seeks to exercise its rights in terms of the LRA by litigating the matter to finality. I was subsequently advised by the Applicant's representative that the Sheriff had attended at the school premises on Friday 17th January 2025 demanding to see the Principal. When the Sheriff was advised that the Principal was teaching in class, the Sheriff indicated that he would be returning on the morning of the 20th January 2025 to execute the award.
>
> In the event that the Sheriff makes an attachment the applicant will suffer irreparable harm, as there is little prospect of it being able to recover the capital and accrued interest from the Third Respondent.'

[14] The allegation regarding the Sheriff's attendance at the applicant's premises is inadmissible hearsay evidence in the absence of a confirmatory affidavit from the applicant and an application for their admission. This allegation is rejected.

[15] The applicant does not state why it did not comply with the 19 April 2023 order within the prescribed 14 days and why it intended to comply with it only now. There is no explanation, to the extent that the applicant had its fictitious legal difficulties in complying with the order, as it suggests, why it did not challenge the order on appeal rather than adopting its ill-considered and contemptuous legal stratagem. The applicant, despite the unambiguous wording of the 19 April 2023 court order, made a deliberate decision to pursue a remedy of its choice, not as ordered by this Court. Now that this election and choice has been found to be inappropriate and not in compliance with the order, it now elects to comply with what the Court ordered over 21 months ago. The fact that it has now elected to comply with the order demonstrates that it was never difficult

to comply with the order. The applicant must live with its 'informed' and 'considered' approach. This Court should not be hastened to come to the assistance of a reclacitrant litigant who deliberately made a choice to disregard its orders.

[16] As stated above, this condonation application, which was only filed on 27 January 2025, should have been filed in May 2023. It is more than 21 months outside the period prescribed by this Court. There is no condonation for the late delivery of this condonation application. Therefore, the same condonation application filed on 27 January 2025 is not properly before this Court. In the absence of a condonation application for the application for condonation of the late filing of the review application, the condonation application itself is not before this Court and the review application is still not properly before this Court. Ultimately, the application to stay the writ of execution pending a review application that is not properly before this Court is incompetent.

[17] In any event, the employee has, insofar as the applicant alleged irreparable harm and lack of substantial redress in due course, stated that she is married to her husband in community of property and that they "*own movable property that could be disposed of should recovery of capital and interest be necessary*". The employee has a costs order against the applicant. These factors should be sufficient to allay the applicant's fear that should it be successful in its quest of overturning the award in future or in this application in the normal course, it would not be able to recover its money, with interest from the employee.

[18] I am therefore not persuaded that the applicant has successfully established that the matter is urgent and that it has put forward the reasons why the relief should be granted now and why it cannot be afforded a substantial redress if the matter is heard in the normal course.[3] The application falls to be struck off the roll.

[3] See: Rule 38(2) of the Rules Regulating the Conduct of Proceedings of the Labour Court, GN4775a in GG 50608, 3 May 2024; *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2011] ZAGPJHC 196; 2011 JDR 1832 (GSJ) at para 6.

[19] Both Mr Le Roux for the applicant and Mr Thys for the employee argued that a punitive costs order is warranted. Section 162 of the LRA requires this Court to consider the requirements of law and fairness in its enquiry whether or not to award costs. The applicant has filed an affidavit with unsubstantiated or unconfirmed allegations in its motivation of urgency. The 18 page founding affidavit was answered with a 19 page affidavit and replied with a staggering 47 page affidavit. In its papers, the applicant dedicated a lot of effort on the issues that were determined by Molotsi AJ, which are irrelevant in these proceedings.

[20] The applicant was careless and contemptuous in its approach to the matter in that it disregarded this Court's order of 19 April 2023 and only sought to comply with it more than 21 months later and after its failed legal strategy. The strategy to file an application to condone irregular was unnecessary. It disregarded and undermined this Court's authority. The applicant had the audacity to seek a punitive costs order against an employee whose dismissal was found to be unfair and who is only seeking to assert her legal right and enjoy the fruit of the award. This application was launched because the applicant elected to defy the court order of 19 April 2023. The applicant must rise and fall by its election.

[21] The employee should not be out of pocket for opposing what I find to be a self-created urgent application seeking an incompetent order. For these reasons, the applicant must, as it sought against the employee, be ordered to pay the employee's punitive costs on scale B.

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

<u>Order</u>

1. The application is struck off the roll for lack of urgency.
2. The applicant is ordered to pay the third respondent's costs, including the costs of counsel, on scale B of the applicable scales.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr. F Le Roux
Instructed by:	Drake Flemmer & Orsmond (EL) Inc.
For the 3rd Respondent:	Mr. M Thys
Instructed by:	Butler Attorneys