



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: 2025-172308

In the matter between:

KELA SECURITIES (PTY) LTD

Applicant

and

VINCENT JOSEPH FREEMANTLE

First Respondent

THE SHERIFF, SANDTON SOUTH

Second Respondent

Heard: 2 October 2025

Order: 7 October 2025

This judgment is handed down electronically by circulation to the parties' legal representatives by email and/or uploading on *CaseLines*. The date of hand-down is deemed to be 7 October 2025.

JUDGMENT

MAKHURA, J

- [1] The applicant seeks relief on an urgent basis to stay the enforcement of the award pending the determination of the review application under case number JR2511/22. During his replying address, Mr Nyangiwe, representing the applicant, moved for an amendment of the notice of motion to add that the stay should also be granted pending the determination of the rescission application instituted under case number J691/23. The rescission application was filed on the morning of the hearing.
- [2] The first issue for determination is whether an arbitration award that has been made an order of this Court can still be a subject of the review application. If the answer is in the affirmative, then the Court should determine whether to stay the enforcement of the award pending the determination of the review application. If not, the second issue is whether to grant the application to amend the notice of motion. If the amendment is granted, the next issue is whether to stay the enforcement of the award pending the determination of the rescission application.
- [3] Having considered the issues raised in the application and the facts of the matter, I indicated at the commencement of the proceedings that I intended to exercise my discretion and deal with the matter on an urgent basis in the interest of justice. Mr Botha, who appeared for the employee, did not seriously object to and persuade the Court otherwise. The application is therefore considered and dealt with on an urgent basis.
- [4] The award that forms the subject of this dispute is a default award issued on 24 August 2022 by the Commission for Conciliation, Mediation and Arbitration (CCMA). The arbitrator, after declaring that the employee's resignation constituted constructive dismissal, awarded the employee R250 000.00 compensation, due and payable by 15 September 2022.
- [5] The applicant applied for the rescission of the default award. On 26 September 2022, the CCMA dismissed the rescission application. In her rescission ruling, the commissioner found that:

'The applicant's representative alleges that they were absent because they had an urgent submission to make at the JSE.

I have perused the emails between the applicant and JSE which were annexed to the application. Firstly, it is clear from the emails that the queries from the JSE started in June 2022. Secondly, on 5 August 2022 the JSE sent an email to the applicant that the report was viewed and requesting that the applicant responds by 11 August 2022, the date of the hearing.

Based on the above the applicant had ample time to arrange and ensure that there is a representative in attendance for the arbitration or at least apply for a postponement timeously.

Mr Kelatwang sent an email to the commission on 11 August 2022 requesting a postponement and misleading the commission to say the request is due to an unforeseen urgent matter, when the matter was foreseen.

The applicant has a duty to show that they have good prospects of succeeding in the main claim of dismissal, however, they only state that the employee resigned and is the one who caused their issues with the JSE. There is no prima facie case or defense shown in as far as the alleged constructive dismissal is concerned.'

- [6] The applicant served and filed its review application against the rescission ruling on 7 and 10 November 2022, respectively. The applicant also sought an order of substitution to the effect that the rescission application is granted.¹ The record of proceedings was furnished on 4 December 2022.
- [7] On 16 May 2023, the employee applied in terms of section 158(1)(c) of the Labour Relations Act² (LRA) to make the arbitration award an order of this Court. On 17 May 2023, the employee informed the applicant that the review application had lapsed on 8 May 2023 and confirmed that they had served and filed the section 158(1)(c) application and attached the duly filed application. In their

¹ The notice of motion erroneously seeks rescission of the rescission application.

² Act 66 of 1995, as amended.

response on 18 May 2023, the applicant's attorneys disputed that the review application had lapsed. Further, the applicant's attorneys stated that:

'We confirm that on Tuesday, 16 May 2023 you served on our offices your client's section 158 application, without the accompanying affidavit, however, we acknowledge receipt of the full application attached to your email.

It is our instruction to oppose the said application accordingly.'

- [8] Despite the applicant's contention that it would oppose the section 158(1)(c) application, it did not file the answering affidavit.
- [9] The applicant filed the record and supplementary affidavit on 12 June 2023. On 28 August 2023, the applicant filed an application for condonation of the late filing of its supplementary affidavit. The affidavit in support of this application confirms that the applicant was furnished with the record on 4 December 2022, and that the record was filed on 12 June 2023, which was outside the prescribed 60-day period in terms of clause 11.2.2 and 11.2.3 of the Practice Manual³. The result is that the review application is deemed withdrawn. In addition, the file was archived in terms of clause 16.1 of the Practice Manual, in that a period of six months from 10 November 2022 elapsed without any steps taken by the applicant.
- [10] The applicant's notice of motion in the condonation application only sought condonation insofar as its supplementary affidavit was filed late. The applicant did not seek condonation for the late delivery of the record, nor did it seek reinstatement of the withdrawn review application or retrieval of the file from the archives.
- [11] On 4 August 2023, the Registrar issued a notice of set down, enrolling the application in terms of section 158(1)(c) application for a hearing on 22 November 2023. The notice was addressed to both parties' attorneys. The

³ The Practice Manual of the Labour Court of South Africa, 2 April 2013 (repealed with effect from 16 July 2024).

employee alleged that the notice was sent to both parties. The applicant did not specifically dispute this allegation.

- [12] On 22 November 2023, this Court granted the application in terms of section 158(1)(c) and declared the award an order of court. The order was sent to the applicant's attorneys on 19 January 2024.
- [13] On 5 February 2024, the applicant's attorneys requested the employee to "*defer the prosecution of the order pending the finalisation of the review application*" failing which, the applicant would apply for rescission of the court order. The employee's attorneys responded on 12 February 2024. The employee stated that the section 158(1)(c) application was served on 16 and 17 May 2023 and was never opposed. The letter further recorded that on 3 August 2023, the applicant was served with an index to the application and confirmed that the matter was enrolled for hearing on the unopposed motion roll. The employee's response to the request to stay the enforcement of the order was as follows:

'Our client is the only party being prejudiced herein, and we hold instructions, in the event of the review application not being enrolled and set down by 16 February 2024, that your offices be required to pay the costs of the application in the event of being dismissed due to the continued and designed delay in finalising the matter.

Please supply us with the updated index (as filed), as well as confirmation whom of your offices will ensure a prompt enrolment of the review and condonation applications.

If you fail to adhere to the aforesaid demands we will be duty bound to execute the current order, as it is clear that your client had been in continuous default of the time periods described by the Labour Court to prosecute the reviews application, which is for more than 14 months.'

- [14] The review application has not been enrolled for hearing. The applicant filed a supplementary affidavit showing that the Court has issued a directive for the review application to be enrolled on the opposed motion roll.

[15] The employee is now proceeding with the enforcement process. In opposing this urgent application, the employee submitted that the writ of execution was issued in respect of the court order of 22 November 2023, not the award. The employee submits that the award no longer exists. For this submission, the employee relies on the judgment of this Court in *Department of Home Affairs v Public Service Coordinating Bargaining Council & others*⁴ (*Department of Home Affairs*). In this judgment, the Court considered the legal principles on the effect of the award having been made an order of the Court on the pending review application as follows:

[7] The relevant principles are well-established. This court has long held that the fact of a pending review is not a bar to the court making any arbitration award that is sought to be reviewed and set aside an order of court (see *Ntshangane v Speciality Metals CC* (1998) 19 ILJ 584 (LC; [1998] 3 BLLR 305 (LC)). It is equally well-established though that where an arbitration award is made an order of court, that order is fatal to any pending application to review the award, if only because the arbitration award ceases to exist. In *Blue Marine (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2003) 24 ILJ 1528 (LC; [2003] 9 BLLR 853 (LC) Ndlovu AJ (as he then was) said the following at para 15:

'It is important to realize that once the award is made an order of the court the award, from which such order was made, falls away. In other words, the two instruments cannot co-exist alongside each other. Therefore, upon the award being made an order of the court, there can be no question again of an application for review, aimed at reviewing and setting aside the same award. By then, the award no longer exists. Any party who feels aggrieved by the award, can then only look for remedy to challenge the court order (derived from the award) and not the award.'

⁴ (2018) 39 ILJ 823 (LC); [2017] ZALCPE 24.

- [8] More recently, in *Gauteng Department of Education v Saunders: In re Saunders v Gauteng Department of Education & others* [2015] 12 BLLR 1187 (LAC), the Labour Appeal Court observed at para 32:

'It is trite that once an arbitration award has been made an order of court, it is no longer reviewable. The order is of final effect and is, therefore, appealable.'⁵ (Own emphasis)

- [16] From the above, it is clear that the award that the applicant seeks to review is no longer in existence. The award ceased to exist on 22 November 2023 when Tlhohlalema J made it an order of the Court. This is different to a certification of the award in terms of section 143(3) of the LRA, which does not make the award an order of court. Therefore, the review application has been overtaken and rendered moot by the granting of the application in terms of the section 158(1)(c) application. Accordingly, the review door was shut by the 22 November 2023 order, and this Court has effectively become *functus officio* in that, having made the award an order of court, the Court cannot later consider a review of the same award. The applicant's remedy is to challenge the order of 22 November 2023. Accordingly, the application to stay the enforcement of the award pending the determination of the review application is incompetent and falls to be dismissed.
- [17] The applicant's submission that the employee undertook not to enforce the award pending the determination is irrelevant and of no assistance. The employee's undertaking was conditional, and the conditions were not fulfilled. The undertaking lapsed on 16 February 2024. Regardless, the legal principle as articulated above is clear, and even if the undertaking was made, it could not triumph over the law. There is no review before this court, and therefore, such an undertaking is *pro non scripto*.
- [18] The next issue is to consider the amendment application to the notice of motion. The employee objected and opposed the application. It is trite that pleadings are made for the court and for a proper ventilation of the real issues, hence

⁵ Ibid at paras 7 – 8.

applications for amendment would be granted if the proposed amendment is intended to raise the real issues between the parties.⁶ Ultimately, the Court has discretion, to be exercised judicially, to grant or refuse the amendment, unless the amendment is *mala fide* or cannot be granted without prejudicing the other party.⁷

- [19] These are motion proceedings where evidence has been presented in the form of affidavits. The application for amendment in this case is for a prayer in the notice of motion. The employee did not raise any prejudice. For this reason alone, I have decided to exercise my discretion and allow the amendment.
- [20] The question the Court must now answer is whether the applicant has made out a *prima facie* case for the stay of enforcement of the award pending the determination of the rescission application. The challenge faced by the applicant in this regard is that there is no single allegation made in the founding affidavit that a rescission application was made. No supplementary affidavit was filed to incorporate the rescission application into the current application. Mr Nyangiwe submitted that, these being urgent proceedings, the Court cannot ignore the fact that there is a rescission application, which he sought to hand a copy to the Court from the bar. In other words, the urgency of the application should permit a situation where the Court admits any document from the bar. This submission is untenable and unsustainable. Therefore, on the record before this Court, the applicant has failed to make out a case for stay pending a rescission application.
- [21] Even if I am wrong that the applicant failed to make out a case for the stay of enforcement pending a rescission application, the record before this Court shows that the applicant was not only served with the application in terms of section 158(1)(c), it was notified of the date of the hearing of that application and despite its earlier intention to oppose the application, it failed to oppose the application and again failed to attend Court on 22 November 2023. The applicant was

⁶ *Cross v Ferreira* 1950 (3) SA 443 (C) at 447B – D.

⁷ See: *Sibiya v SA Police Service* (2022) 43 ILJ 1805 (LAC) at para 29; *Molefe & other v SA Police Service* (2021) 42 ILJ 1240 (LC) at para 7; *Moolman v Estate Moolman and another* 1927 CPD 27.

served with the court order on 19 January 2024. The rescission application, which is now brought 21 months after it was served with the order, will first hinge on the condonation application. This rescission application, filed belatedly on the date of the hearing, could only have been prompted by the applicant's realisation that the award no longer exists. On the face of proper service of the section 158(1)(c) application, decision not to oppose the application, knowledge of the notice of set down, service of the court order on 19 January 2024 and the excessive delay in applying for rescission of the order, the rescission application, which hinges on a condonation application, has been seriously weakened.

[22] Another challenge facing the applicant is that even if the condonation application is granted, the question is going to be whether the Court should rescind the order when, on the record, the review application is withdrawn and the file archived. The applicant, on the record before the Court, did not seek the reinstatement of the review application. I accept that the applicant could still seek to amend the notice of motion; however, the current status is that the applicant did not seek reinstatement of the withdrawn review application or retrieval of the archived file. The review application itself, on the face of the commissioner's findings which I have set out above and the test applicable in that application, faces its own challenges. For the above reasons, I would still refuse to exercise my discretion in favour of granting a stay.

[23] The manner in which the applicant dealt with this matter from its inception has been dreadful. It elected not to attend the proceedings before the CCMA, failed to comply with the Practice Manual which necessitated a condonation and reinstatement and/or retrieval application which the applicant only applied for condonation, having elected not to oppose the application in terms of section 158(1)(c) and to attend the hearing, and after being notified of the order, the applicant elected to sit idle and only apply for rescission over 21 months after it was served with the order. For all the reasons above, the application stands to be dismissed.

[24] Both parties sought costs against each other. The applicant went to the extent of seeking costs *de bonis propriis* or costs on attorney and own client scale. The employee has sought costs on a punitive scale C. Both parties are *ad idem* that the successful party is entitled to costs on a higher scale. The legal position regarding the review of the award after the award was made an order Court is clear. The employee informed the applicant of the legal principle with reference to the judgment of the *Department of Home Affairs*. The applicant persisted with the application. The rescission application came a little too late to save the applicant from a cost order. For these reasons and the other reasons in this judgment, I am inclined to grant the parties' wish to issue costs on a punitive scale.

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

Order

1. The application is heard as one of urgency.
2. The application for amendment is granted with no order as to costs.
3. The application to stay the enforcement of the arbitration award is dismissed with costs on attorney and own client scale.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr L. Nyangiwe

Instructed by: Rams Attorneys

For the First Respondent: Mr G. Botha

c/o Gerhard Botha Attorneys

LABOUR COURT