

BEGIN DEUR 'N "HEADER" TE MAAK

Sneller Verbatim/YvA

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J954/03

2003-08-08

In the matter between
CAROL'S HAIR BEAUTY GENETIC CC Applicant
and
JACOB MBATHA Respondent

J U D G M E N T

LANDMAN, J: Carol's Hair and Beauty Genetic CC have brought an application against Elizabeth Anna Mynhardt, the Bargaining Council for the Hairdressing and Cosmopology Trade Pretoria, Jacob Mbatha and the Sheriff, Wonderboom. The application is to stay a warrant of execution pending an application to rescind in a world made by the Bargaining Council. The Bargaining Council instituted proceedings in this court under a different case number, to have a compliance order issued by an Arbitrator for the payment of R9 693,65, made an order of court.

In the matter of *Bargaining Council for Hairdressing and Cosmopology Trade Pretoria v Smit Trading as Hair Mystique* 2002 (3) BLLR 218 LC, this court held that it was not competent for a

Bargaining Council to confer a power on this court to make such orders. In consequence of that decision, the Bargaining Council decided to withdraw all the matters from the role, including this matter which now serves before me.

The Council filed a notice of withdrawal in this matter, however the Council do not serve the notice of withdrawal upon Carol's Hair and Beauty as was required by rule 13. The Council, however, wrote to Carol's Hair and Beauty on 6 June 2002, confirming *inter alia* a telephonic conversation that it had withdrawn this application. It is common cause that this letter was received. Subsequently the Council instituted arbitration proceedings to claim the moneys which I have mentioned above.

Carol's Hair and Beauty, through its attorneys, adopted the view that the notice of withdrawal was defective and invalid, and that the matter was still pending. Carol's Hair and Beauty did not attend the arbitration proceedings, although they knew of it. The Arbitrator was informed that the Labour Court application had been withdrawn and he handed down an award for the amount in question. This award has been made an order of court and the sheriff proceeded to attach certain goods belonging to Carol's Hair and Beauty. Carol's Hair and Beauty launched an urgent application to stay the writ of execution, pending the rescission application. Today, 7 August is the extended return day of a rule *nisi* issued by this court.

The representatives of the parties were *ad idem* that this matter turns on the question of the validity of the notice of withdrawal. It was contended that if the notice of withdrawal was invalid, then the award was of no effect. I am of the view that the matter turns on another issue. In principle the counsel was at liberty to resort to compulsory arbitration to secure an award ordering the CC to pay the moneys to the first respondent.

It could do this without withdrawing the application which have been made in this court to claim those moneys. But if it did so, it could be met by the special plea of *lis pendens*. *Van Vincent and Others, The Civil Practise of the Supreme Court of South Africa*, fourth edition, says at page 474 to 475:

"*Lis pendens* is a special plea open to a defendant who contends that a suit between the same parties concerning a like thing and founded upon the same cause of action is pending in some other court."

And he then continues:

"The court reserves a discretion in the matter even if all the essentials of the plea are present, and may in spite of that fact 'consider whether it is more just and equitable or convenient that if it [the action against which the special plea is advanced] should be allowed to proceed'. It often happens that the court will decide that the *lis* which was first commenced should be the one to proceed, but this is not an immutable rule."

The CC did not raise this defence at the arbitration proceedings, indeed, it did not attend, or was not represented at the arbitration proceedings. It was therefore competent for the arbitrator to have made the award which he did. It therefore follows that the application should be refused.

My conclusion rest upon the assumption that the application had not been withdrawn. But as form must give weight to substance, it is clear that the application had been withdrawn. The letter of 6 June 2002 read together with the notice of withdrawal, filed with the registrar, admits of no other conclusion.

Whether the first and second respondents are liable for the costs of the applications which was withdrawn is not something with which I need trouble myself at this stage. In the premises therefore then the rule *nisi* is discharged with costs.

---o0o---

