IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

Case No. J 1888/00

MIMMO'S FRANCHISING CC **1st Applicant**

MIMMO'S ROSEBANK CC **2nd Applicant**

3rd Applicant

MIMMO'S WESTGATE CC **4th Applicant**

AND

SPIRO, HARRY DAVID **1st Respondent**

Commission for Conciliation Mediation and Arbitration **2nd Respondent**

PHOLA, ME. NO **3rd Respondent**

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JUDGEMENT

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MOLAHLEHI AJ

Introduction

[1] The relief sought by the applicants in terms of the notice of motion is as follows:

"1. Condoning the non-compliance with the Rules of Court in this application and granting the applicants leave to bring this application as a matter of urgency.

2.Rescission of the Award handed down by the Third Respondent in its entirety dated 18 December 1999.

3.Setting aside the Warrant of Execution issued under case No 60666/99 against Mimmo's Pizzeria and Executed against the Second, Third and Fourth Applicants...

4.Directing the Deputy Sheriff to stay execution and in the interim pending a Final Order in respect hereof to

rescind his attachment order /desist from removing the movable property of the second, third and fourth Applicants.

5.Granting the First to the Fourth Applicants leave to oppose the first Respondent's Application in terms of Section 158(1)(c) of the Act filed under case No J547/00 and within 10 (ten) days hereof file its answering affidavit in opposition thereto."

[2] The applicants further prayed for costs on an attorney and own client scale in the event of the respondent opposing this application. As concerning the fourth respondent who is an attorney of record for the first respondent, the applicants prayed that cost be awarded against her **de bonis propriis**.

[3] On the first day of the hearing of this matter, the fourth respondent a practicing attorney, appeared on behalf of both the first respondent and herself. The fourth respondent indicated that she did not file the opposing affidavit as this application was served on her few minutes before the matter was heard in court. According to the founding affidavit the fourth respondent was cited because of her alleged "targeting"of the business of the applicants.

[4] When the fourth respondent sought to address the court in response to both the founding papers and the submission by Mr. Le Grange, the applicants counsel an objection was raised that the respondent sought to answer papers through oral evidence.

[5] Because of the difficulty posed by the above problem, I convened a meeting with the parties in chambers and after a brief discussion they agreed to an order on the following terms:

"Having heard the parties, it is ordered that:

1. The parties agree that the first applicant should pay an amount of R 20 000 into the trust account of Bowmans Gilfillan attorneys by noon on the 11 May 2000. The first respondent will inform the attorney for the applicants who the contact person at Bowman Gilfillan is by 10H00 on 11 May 2000.

2. The first and fourth respondents are to file their answering affidavits in this matter on or before 17H00 on Monday 2000.

3. The applicants are to file their replying affidavits on or before 17H00 on Thursday 18 May 2000.

4. This matter must be set down for hearing on an urgent basis on Monday 22 May 2000 at 10H00. In this regard it is recorded that the first and fourth respondents do not waive their rights to challenge the urgency.

5. Pending the final determination of this application any or all writs of execution and /or attachments and /or removals by the Sheriff be stayed.

6. The costs of 10 May 2000 be reserved."

[6] The matter came before me again on the 22 May 2000. At this stage the parties had filed their answering and replying affidavit respectively.

[7] The source of this application is essentially two arbitration awards, one issued by the Bargaining Council for the Restaurant, Catering and Allied Trades (Bargaining council award) on the 13 September 1999 and the other issued by the Commission for Mediation, Conciliation and Arbitration (CCMA award) on the 18 September 1999.

THE CCMA AWARD

[8] On 18 December 1998, the third respondent Commissioner of the CCMA, Phola issued an arbitration award in terms of which he found the dismissal of the respondent to be both substantively and procedurally unfair. It would appear that this award was made an order of court pursuant to an application launched by the first respondent in the Labour Court under Case Number J547/00. In terms of this order Mimmo's Pizzeria and Take Away (applicant) was ordered to pay the first respondent R59 500,00 for both substantive and procedural unfair dismissal.

[9] On the 5 April 2000, the first applicant filed a notice to oppose the said application. It would appear that the first applicant did not attend the hearing of this application and accordingly an order was granted in default. Mimmo's Pizzeria and Take Away is a trade name belonging to the first applicant.

[10] In dealing with the CCMA award, the founding affidavit at paragraph 11 states:

"This application is an application for inter alia the rescission of an award granted by the third

Respondent in his capacity as a Commissioner of the Second Respondent **...** ".

[11] The ground for urgency in as far as the CCMA award is concerned is stated in the founding affidavit as follows:

"The recission of the Third Respondent's award is further urgent because the Fourth advised the Applicants on the 17 April 2000 ... that she has obtained a judgement against the entity cited as Mimmo's Pizzeria & take Away in the sum of R59 500,00."

[12] There is no doubt in my mind that there is no basis for an urgent application in as far as the CCMA award is concerned. On the 17 April 2000 the first applicant was simply informed that the respondent had obtained judgement against it. If this was for any reason, no reason has been given as to why the first applicant waited until the 10 May 2000 to launch this application.

[13] I now proceed to deal with the issue of whether or not this court has jurisdiction to rescind the CCMA arbitration awards. It should also be noted as indicated earlier that the first applicant filed notice of opposition but never attended court when the application to make the CCMA award an order of court was heard.

[14] It was held in **Deutsche v Pinto and another (1997) 18 ILJ 1008 (LC)** by Landman AJ, as he then was, that the court could rescind an order of a tribunal subject to its jurisdiction at least on the ground of fraud. The rational for this is according to this decision found in the inherent jurisdiction of the court. This decision was followed by Wagley AJ, as he then was, in **Oosthuizen v Turbo Services Pretoria CC (1999) 10 BLLR 1088 (LC).** In this case the court, rescinded an arbitration award because it was obtained by giving fraudulent evidence to the arbitrator. Judge Wagley in intervening was, it would appear, influenced by the revolting facts and circumstances of the case.

[15] The CCMA commissioners have the power to rescind arbitration awards issued in terms of Section 144 of the Labour Relations (Act) which reads as follows:

"Any commissioner who has issued an arbitration award, acting of the commissioner's own accord or, on the application of any of the affected party may vary or rescind an arbitration award -

(a) erroneously sought or erroneously made in the absence of any affected by that award;

(b) in which there is an ambiguity, or an obvious error or commission, but only to the extent that ambiguity, error or commission; or

(c) granted as a result on a mistake common to the parties to the proceedings**"**

[16] In my view, the court does not have the power to rescind CCMA arbitration awards on those grounds envisaged under Section 144. I see no reason why the court should usurp the powers expressly given to commissioners by the Act. At best the court can intervene in terms of Section 158 (1) (a) (iii), in a case where a commissioner refuses or fails to exercise powers given to him/her by Section 144 when called upon to do so.

[17] The facts and the circumstances of this case do not call for any intervention with regard to the rescission of the CCMA award.

[18] Before dealing with the bargaining council award, I need to mention that the issue of who the true employer of the first respondent was, before the dismissal, was argued at length during the hearing of this application. The applicants argued that Mimmo's Florida cc was the employer of the first respondent and that is the party against whom action should have been taken and not the first to the fourth applicants. It was argued on behalf of the applicants that the name Mimmo's Pizzeria, is a trade name

and that it was wrongly cited as a party to both the bargaining council and the CCMA proceedings. The trade name is however the property of the first applicant. The second to the fourth applicants argued that they were wrongly cited in the proceedings as they are independent entities from the first applicant. The relationship between them and the first applicant is that of a franchiser and franchisee.

[19] The first respondent on the other hand argued that the second to the fourth applicants are not independent but are owned and controlled by the first applicant. In argument, the fourth respondent challenged the first applicant's allegation that it was a close corporation. It should be noted in this regard that the first applicant did not produce documentary proof to this effect.

THE BARGAINING COUNCIL AWARD

[20] The crux of this matter centers around the execution of the bargaining council award, which as stated above was made an order of court on 4 April 2000. The facts in brief are that the first respondent referred the dispute to the Bargaining Council for nonpayment of:

"1. Salary for the month of May 1999 of R8500, 00

2. Leave pay for the period 1 August to 30 April 1999 of R6375, 00"

[21] The conciliation process having failed, the matter was referred to arbitration, the outcome of which was an award in favour of the first respondent. Subsequent to the issuing of the award a certain Sarah Kok, an employee of the first applicant addressed a letter to the Bargaining Council on the 18 October 1999 in which she sought to rescind the said arbitration award. The letter reads as follows:

"REFERRING PARTY: HARRY DAVID SHAPIRO

RESPONDENT PARTY: MIMMO'S PIZZERIA AND TAKE AWAY.

Respondent did not receive documentation for the arbitration, we can only surmise that the employee who has left the company, therefore the person to whom it was addressed to did not receive the documentation.

We received the documentation for conciliation. This was attended to and we agreed to arbitration, we would therefore have attended the arbitration."

[22] An attempt to rescind this award was unsuccessful. It was subsequently as mentioned earlier made an order of court. Having obtained the order from the court, the first respondent proceeded to execute the order against the first applicant.

[23] It is not my intention to deal with the issue of who the true employer of the respondent was. However the context and the contents of this letter read together with other documentation, does raise doubts about the version of the applicants in relation to this issue.

[24] Having obtained an order of court the first respondent conducted an investigation as to the location of the assets of the first applicant. His telephonic investigation revealed that amongst other areas, the first applicant's assets were located at Westgate shopping center.

[25] Thereafter the fourth respondent acting as attorney for the first respondent instructed the "Sheriff to attach and take into execution movable goods of "Mimmo's Pizzeria and Take Away of Shop 3, WESTGATE SHOPPING CENTRE, 120 ONDERKERS ROAD , HORRISON, ROODEPOORT AND OF REGENT PLACE, CRADOCK AVENUE, ROSEBANK, and of RANDBURG WATERFRONT, REPUBLIC ROAD, RANDBURG..."

[26] The Warrant of Execution was in the sum of R14 875, 00 (fourteen thousand eight

hundred and seventy-five rand) together with interest at the rate of 15% per annum. The Sheriff effected attachment at the premises of the fourth applicant on the 06 April 2000 and valued the attached goods at R42 000.

[27] On the 7 April 2000 Cristelis Artemmides, the then attorneys of the fourth applicant addressed a letter to the fourth respondent, informing her that the fourth applicant was never a party to the dispute and pointed out that Mimmo's Pizzeria and Take Away is a trade name.

[28] In response the first respondent 's attorney addressed a letter dated the 10 April 2000 to the then attorney of the fourth applicant in which she stated:

"I refer to the above matter and in particular our telephonic discussion on the 7 April 2000 prior to the receipt of our telefax dated same date.

I confirm having advised you that taking into account your verbal advice, pending receipt of documentation in support of your client's contentions I would not instruct the Sheriff to remove the attached goods in satisfaction of the warrant. I confirm further having advised that according to information at the writer's disposal, the businesses reflected in the warrant were owned by the entity against whom my client had a judgment.

I note that your aforementioned telefax, did not contain documentation, proving your client's ownership of the assets as contended by your client and as conveyed by you to the writer. Kindly forthwith forward to the writer, proof of ownership of the attached goods so that this matter may be finalised."

[29] On the 17 April 2000, the fourth respondent addressed a reminder to the fourth applicant's attorneys in which is stated:

"I refer to the above matter and previous correspondence herein. I note that to date your client's affidavit in support of contentions raised with regard to ownership in your earlier correspondence has not been received.

In the light of this, unless an affidavit is received by my office together with vouchers in support thereof by close of business on Wednesday the 19 April 2000, I regret to advise that my client's instruction is that I proceed to instruct the sheriff to remove the attached goods. I trust that your office will by delivering the requisite documentation in support of your client's contentions by the deadline date, ensure that if your client has a justifiable contention as previously advised by you, that such documentation is provided so that may be in a position to take my client's instructions in regard thereto."

[30] Again on the 20 April 2000, the fourth respondent addressed a letter to the applicant in which it is recorded that the fourth respondent has failed to furnish the necessary proof of ownership of the attached goods. In this letter the respondent's attorney indicated that she would be instructing the Sheriff to remove the attached goods.

[31] On the 25 April 2000 the then attorneys of the fourth applicant addressed a letter to the respondent's attorney informing her that her fax of the 20 April would be forwarded to the person who was dealing with the matter in their office. This person was apparently at that stage away from office.

[32] As indicated earlier, the Sheriff attached the movable property at the alleged premisses of the fourth applicant at Westgate Shopping Centre, on the 6 April 2000. In addressing the issue of irreparable harm the applicants in their founding states:

"18 The aforesaid unwarranted and unlawful execution against parties who were never the employer of the Respondent will result in irreparable and unquantified damages being caused to the Mimmo's Pizzeria & Take Away name and trade mark and also result in the closure of 3 (three) independent restaurants and loss of clientele and goodwill due to the attached goods by the Deputy Sheriff at the premises situated in Randburg, Roodepoort and Rosebank. It will be difficult to claim damages caused by the wrongful actions of the Respondents and attorney Jardin. The Applicant and other parties cited herein have no other suitable remedy in the circumstances other than brining this urgent application..."

[33] On the 9 May 2000 at 13H30, Mr Bollo, attorney for the applicants, telephonically contacted the first respondent with the view to informing her of the intention to bring this application. According to him he was informed that Ms Jardin attorney for the first respondent was in consultation and could not take his call. Thereafter, counsel for the applicants telephonically contacted respondents attorney but was informed that she would only be able to revert to him within half an hour which she never did.

[34] According to the applicants' founding papers, an affidavit indicating the existence of a competing claim was faxed to the Deputy Sheriff on the 9 May 2000. This was after he apparently attempted to remove the attached goods. It is further stated in the founding papers that in a telephone conversation with Mr Le Grange , counsel for the applicants, the Deputy Sheriff advised that his strict instructions were to proceed with the removal of the attached goods. It is further stated in the applicants' replying affidavit that the affidavit indicating the existence of a competing claim was signed by a certain Mr Willemse, on the 20 April 2000 but only presented to the Deputy Sheriff on the 9 May 2000. In this regard paragraph 17.6 of the founding affidavit reads as follows:

"17.6 The affidavit of the aforesaid Willemse was drafted on the 19 April 2000 by attorney Bollo for the specific intent and purpose to present to the Deputy Sheriff should he attempt to remove the goods listed at Annexure AKW3."

[35] In my view the investigation I need to conduct in considering this application is whether or not on the facts as set out on the papers and the circumstances of this matter there is a basis for seeking an urgent relief from the court.

[36] In relation to the second and third applicants, it should be mentioned that the Sheriff has already attached and was about to remove the goods from the alleged fourth applicant's premises. The value of the goods attached exceed the amount of the creditor's claim. There is therefore no basis for the Sheriff to attach goods based at the second and third respondents' premises. The papers before this Court do not

disclose a satisfactory basis why the second and third applicants are part of this this application.

[37] In order to succeed, the applicant must establish the following:

(a) a prima facie right;

b)a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

(c) a balance of convenience in favour of the granting of the interim relief; and

(d) the absence of any other satisfactory remedy (Setlogelo v Setlogelo 1914 AD 221 at 227).

[38] In Penta Publication (Pty) Ltd v Schoombie & others [2000] 2 BLLR 199 (LC) the court held that:

"The four requisites are not individually decisive. They are inter-related. For example, the stronger the applicant's prospects of success, the less it needs to rely on prejudice to itself. Conversely, the more the right is open to doubt, the greater is the need for the other factors to favour the applicant."

[39] In launching an urgent application the applicants sought an indulgence of the court to dispense with the ordinary procedures for enrolling their case. In my view the applicants have not satisfied the test for an urgent relief. The reasons for this conclusion are set-out in details hereunder.

[40] In the first instance, there is no doubt in my mind that there was a delay in bringing this claim. In all probabilities, the first applicant was aware of the attitude and the position taken by first respondent from the time he launched his claim with the bargaining council. Correspondence between the first and the fourth applicants on the one hand and the fourth respondent acting as an attorney for the first respondent reflects the view and the position taken by the first respondent with regard to his claim against the first applicant.

[41] In relation to the fourth applicant, again there is no satisfactory explanation as to why it waited until the eleventh hour to approach the court for a relief. The attachment was effected at its alleged store in Roodepoort on the 6 April 2000. Thereafter there was an exchange of correspondence between its attorneys and the first respondent's attorney. The gist of this correspondence was that the first respondent would not instruct the Deputy Sheriff to remove the attached goods pending an affidavit by

the fourth applicant proving ownership of the attached goods pending the applicant furnishing an affidavit in support of its claim. Apparently the fourth applicant's attorneys failed to furnish the said affidavit as was requested and the first respondent's attorneys indicated their intention to instruct the Sheriff to proceed "if the affidavit was not fourth coming". The applicants' papers do not give any explanation as to why the respondent was not furnished with the said affidavit.

[42] As concerning the issue of alternative relief , in my view, the court would probably have held a different view had the fourth applicant furnished the said Willem's affidavit or given a satisfactory explanation as to why the affidavit was not furnished before the matter became urgent.

[43] It has been stated in case law that when litigants approach the Court for an urgent relief they are in essence asking the Court to condone non compliance with the rules. (See Luna Meubel Vervaardiges (EDMS) v Markkin and another 1977 (4) SA 135 (W)). The courts have for this reason not approached this issue lightly. It is for this reason that a litigant should not only set out in its founding papers the bases for urgency but also take the court into its confidence by setting out all material aspects relevant to its case.

[44]Mere allegation of urgency, it has been held, is not sufficient. Litigants have also been warned to ensure that they should carefully analyse and evaluate the facts of their cases before classifying the relief they sought as founded in urgency. In this regard the court in the Luna Meubel (supra) stated:

"Practitioners should carefully analyse the facts of each case to determine, for the purpose of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6(12)(b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down." (at 137F).

[45] The difficulty with the applicants' case as stated earlier relates to the delay in taking steps to protect their alleged rights from the time that the Deputy Sheriff attached the goods to the time he gave them notice of intention to remove the attached goods. There is further no explanation as to why the applicants, particularly the fourth applicant did nothing from the 9 April to the 10 May.

[46] It is clear from correspondence between the first respondent's attorney and the then attorneys for the

fourth applicant that the respondent was adamant and persisted in his view that the fourth applicant was owned and controlled by the first applicant. It cannot be said that the first respondent misled the applicants into believing that he was abandoning what he believed to be a right derived from the Court Order.

[47] The first respondent in instructing the Sheriff to execute the Court Order seeks to enforce a right he derives therefrom. Whatever right the applicants seek to defend in this regard cannot override the first respondent's rights. In my view this right can only be taken away through rescission of the Court order and thereafter rescission of the arbitration award. It is also my view that unless and until the a Court Order and the bargaining council award are rescinded or set aside on review, the first respondent has a right which he is entitled to enforce through the judgement execution process.

[48] This brings me to the allegation that the fourth respondent was wrongfully targeting the applicants. In my view there is no basis for this attack. The documents before me clearly reveal that all what the fourth respondent sought to do was to carry out and protect the rights of her client. She communicated to the first and the fourth applicant in particular her client's instructions regarding compliance with the Court Order. Her conduct in prosecuting her client's rights was at all material times reasonable and professional.

[49] The second difficulty with the applicants' case relates to the requirement of using an alternative remedy to the urgent relief. Although it is stated that no alternative remedy was available there is however no satisfactory explanation again as to why the interpleader proceedings were not evoked. It is alleged in the founding papers that counsel for applicants telephonically contacted the Deputy Sheriff with the view to requesting him to stay removal of the attached goods. The response from the Deputy Sheriff, according to the applicants' papers was that he would proceed with the removal unless he received contrary instructions from the fourth respondent. Except for this general allegation there is no other evidence in the applicants papers to indicate what steps or measures did they take to ensure that interpleader proceedings are initiated. It should be noted that the telephone conversation referred to, took place on the 9 May 2000, a day before this application was lodged with the Court.

[50] It is further alleged that the affidavit counter claiming property at the fourth applicant's premises was faxed to the Deputy Sheriff. Again except for this bare allegation there is no other evidence to support

it. There is also no evidence as to what the fourth applicant did once the affidavit was, as it is alleged, faxed to the Deputy Sheriff. There is no indication as to whether or not there was any follow-up with the Deputy Sheriff to find out what his attitude was regarding the stay of the removal or interpleader proceedings. It needs also to be mentioned that not only was the Deputy Sheriff not joined in this application but there is also no confirmatory affidavit to support allegations in relation to him.

[51] In the light of the above the application is dismissed and applicants are ordered to pay costs on own attorney and client scale.

Molahlehi AJ

ent: 06/06/2000

For the applicants Adv Le Grange.

For first and fourth respondents Ms Jardin