IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

JOHANNESBURG

CASE NO: J1087/07

DATE: 2007-07-25

Not reportable

In the matter between

JAMES TSHABALALA Applicant

and

ADT SECURITY (PTY) LIMITED Respondent

J U D G M E N T

CELE AJ:

1. The application before me is one in terms of Section 166 of the Labour Relations Act 66 of 1995, hereafter referred to as the Act. It is hereby sought that leave should be granted to the 3rd and 4th respondents so that they may appeal to the Labour Appeal Court against an *ex tempore* judgment of this Court in this matter dated 7 December 2007.

2. This Court granted a Rule *nisi* in this matter, the effect of which was to stay the enforcement of an arbitration award in this matter where a writ had already been issued for execution against the applicant. I shall retain the appellation of the parties as they were in the urgent application, notwithstanding the fact that the applicants today are the 3rd and 4th respondents.

3. The Rule *nisi* was granted by this Court by my brother, NEL AJ on 16 May 2007, with the return date which was extended until 7 December 2007. The return date was extended on 19 October 2007 by my brother, FRANCIS J, to December 2007.

4. The terms of the Rule *nisi* appear in the papers. I will not go through each one of them but they are more or less those terms as were prayed for in the notice of motion where one such prayer was an order for costs against the 3rd and 4th respondents, jointly and severally held liable.

5. I examine now briefly the grounds for appeal. The attack against the order of this Court was premised on the submission that the Court erred in finding that the deponent to the founding affidavit had authority to depose to the founding affidavit. As the attack was made, the Court had made the observation to this effect:

> "On paragraph 1 of that affidavit, it does say that he was duly authorised to launch the application and to depose to the affidavit. What fell short was to file that authority, indeed it is desirable that it should have been filed but it would be too technical to say that therefore the application is faulty merely because of that, I would not sustain that as a valid objection to this application. It will be different where he has not made this averment but seeks to correct that in a replying affidavit where he suddenly introduces something new which the respondent would not have had a chance to deal with because in terms of the documentation, then there would have been no chance for the respondent to gainsay what would have been said. It is not permissible of an applicant to leave important averments in the founding affidavit only to raise them in the replying affidavit, for that would have prejudicial effect to the other party."

6. Even if it may be so said that this portion I have referred to does not specifically say that a *prima facie* case had been made by the applicant in the papers, but it is very clear that, when one looks at the papers the applicant had made out a case that there was authority to launch the application.

7. In the answering affidavit nothing was said to gainsay this evidence. When the two versions are weighed as one was dealing with an application on the papers, clearly, the version of the applicant prevailed and that is why I came to the conclusion

that I reached.

8. It is so that in the replying affidavit there was an attachment which the 3rd and 4th respondents then concede but it is attachment of the resolution but there is a further attack on it that the director who signed it was sitting alone and that it is not showing that there was a meeting with other directors. All of these are attached but there is nothing to gainsay it.

9. The test set in my view is met here in the absence of any evidence to gainsay what the applicant has said. If there was any other evidence to the contrary then the Court would have to look at that evidence and then give value to it. See Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints 1984 (3) 623 on how disputed facts are resolved in application proceedings. In my view that ground should not, therefore, be sustained.

10. I go to the next issue. The further submission is that the Court erred in finding that the matter was urgent. The submission here is that when the matter was before me the applicant ought to have shown the existence of urgency at the time and that it failed to do so. The 3rd and 4th respondents made a number of submissions and they have referred me to a number of authorities in support of this submission.

11. When that submission was made I invited Mr Lebethe to indicate to me what kind of urgency would have been shown when, in fact, a Rule *nisi* had taken care of that situation. A Rule *nisi* was issued with immediate effect. It practically stopped the execution, or the enforcement, in fact, of the arbitration award. So, the writ would not be executed.

12. On the return date, clearly there would have been no urgency for the applicant to show. I also indicate to Mr Lebethe two examples in respect of how urgency could be shown, where there is wildcat strike, unprotected strike, as it were and the Court grants the employer which operates with immediate effect and thus prohibiting it and the employees go back to work. On the return date when the employees shall have return back to work, normality would have been returned.

13. It would be difficult to prove the urgency at that time because the Rule *nisi* would have taken care of the urgency that would have been existing at the initial time of the application. I did not get a clear answer from Mr Lebethe. I gave him another example of an interdict where an aeroplane is about to take off with a baby and the Court grants an interdict that the child should not be taken on board and the matter is postponed to a later date which is a return date when consideration has to be made whether the Rule *nisi* should be confirmed or not.

14. Again, there is no longer any urgency because of the effect of the Rule *nisi*. How an applicant would show urgency on the return date, is the question he was to answer in support of his argument.

15. It must be remembered that my brother NEL AJ had applied his mind on whether or not the matter was urgent at the time and he dealt with the urgency as at that point in time. In my view the submission has no merits. I do not think that another Court would arrive at a different conclusion.

16. The further submission is that the Court erred in granting costs against the 1st and 2nd respondents. This had been prayed for in the papers. It is an order that could have been made, I do not see any clear submission made specifically on why Court erred. It must be remembered that the matter was opposed on the return date and it is natural for the Court to consider whether or not it had to grant costs against the 3rd and 4th respondents.

17. In my view it was within the Court's jurisdiction and discretion to grant an order, as it did. It is an order that as I have indicated has been prayed for. I note though that the prayer in the notice of motion had asked for a costs order without limiting it to a case where the application is opposed. I would have approached it differently if the matter had not been opposed on the return date.

Obviously I would, in applying my discretion, have considered that it had not been opposed.

18. I am much aware of the fact that the applicant sought to ask the 3rd and 4th respondents not to execute but, whilst that is the consideration it must be remembered that the filing of the review application does not stay the enforcement of an award. It was necessary that the applicant had to approach this Court and by then, because there was attachment, the matter had become urgent and the applicant was granted a Rule *nisi*.

19. There was submission that the Court erred in finding that granting the stay or making the order final would be prejudicial to the 3rd respondent. In other words, this is a question of a value judgment when the Court has to look at whether or not the applicant for an urgent application is likely to suffer irreparable harm if the order is not granted.

20. I have looked at the position of each of the parties. Mr Lebethe had submitted and in the papers showed that indeed, the employee for whom the 1st respondent was acting, Mr Tshabalala, had found some temporarily employment. I examined that position in which he was against the position of the applicant.

21. Indeed, whilst the review application is still pending and whilst Mr

Tshabalala is still not able to reap the benefit of the award, to that extent there is a delay, to that extent he has been prejudiced but I had to weigh that against the prejudice and the suffering there would be had the Rule *nisi* not been confirmed.

22. It must be remembered that, if the applicant is not successful in the review application, in a case such as this one, the outstanding amount attracts interest, so the harm that Mr Tshabalala stands to suffer will be redressed in the future, should the applicant loose the review application.

23. The further submission that the arbitration award is as good as the order of this Court and that, therefore, it might not be reviewable. That the Court erred in finding that, the arbitration award in respect of which a writ of execution had been issued was capable of review.

24. Mr Lebethe referred me to a number of authorities in relation to the interpretation that may be accorded to this issue. One has to bear in mind that the Labour Court is a specialised court. It has its own legislation, it has its own common law.

25. I begin by looking very briefly, as the applicant has pointed out, to Section 145(3) of the Act. It is an appropriate section because it is applicable in this case. We are dealing with the arbitration

award which was issued by a commissioner of the CCMA. Section 145(3) reads:

> "The Labour Court may stay the enforcement of the award pending its decision."

That provision does not qualify the kind of award that may be stayed.

26. The amendment to the Act does not, in my view, or particular to Section 145(3), does not in my view detract from this provision. Even further on, as the applicant has rightly pointed out, Wagley AJ, pronounced on *Tony Gois t/a Shakespeare's Pub v Van Zyl and Others* 2003 (11) BLLR 1776 (LC) that:

> "The Amendment Act - the new section 143 - did not alter the nature or composition of the award. The award remains a CCMA arbitration award. It is not transformed into a court order as a result of the certification process…"

27. Clearly, that is why today we still have certified arbitration awards still being made orders of this Court in terms of Section 158(1)(c) with the view to, for instance, entertaining an application for a contempt of court. If the arbitration award that had been certified should be given the value of a judgment or an order of this Court, this Court would not have to make it its own order then. Clearly, therefore, it is not the same. It is an award issued by the CCMA. It is not a Court order, until that point is reached when it has been

made a Court order in terms of Section 158(1)(c) of this Court. In my view such awards are reviewable. Practically they are reviewable everyday in this court.

28. I have looked at the rest of the submissions by the 3rd and 4th respondents and they are quite comprehensive. I have been referred to a number of decisions and, as I have indicated, in some of the instances there are clear and specific provisions in common law that have been developed which one needs to apply when labour matters are concerned.

29. In my view the application before me has no merits in its entirety. I do not think that another Court would arrive at a different conclusion.

30. Accordingly, this application is dismissed with costs.

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Cele AJ

Date of Editing: 29 April 2009

Appearances:

For the Applicant: David Lebethe-Union Official

For the Respondent: Attorney S Wilkins

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