IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR 2384/09

In the matter between:

CHILLIBUSH COMMUNICATIONS (PTY) LTD	APPLICANT
AND	
MICHELLE GERICKE	1ST RESPONDENT
A SWANEPOEL N.O.	2ND RESPONDENT
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	3RD RESPONDENT
THE SHERIFF JOHANNESBURG NORTH	4TH RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] This is an opposed urgent application in terms of which the applicant, Chillibush Communication (Pty) Ltd seeks an order to stay a writ of execution and any

steps in execution pending the outcome of a review application of the default award which was issued in favour of the first respondent, Ms Michelle Gericke. The urgent application is brought under the same case number as the main review application.

[2] The applicant is a company with limited liability and registered in terms of the company laws of South Africa. The first respondent is the former employee of the applicant.

Background facts

[3] The first respondent having challenged her dismissal through the Commission for Conciliation, Mediation and Arbitration (CCMA) obtained a default award in terms of which her dismissal was found to be both procedurally and substantively unfair. It was for this reason that the commissioner ordered the applicant to compensate her in the amount of R145 800,00. For the purpose of this judgment the background to the alleged unfair dismissal dispute which the first respondent had referred to the CCMA is not relevant.

[4] The commissioner's award which was issued under case number GAJB16731-09 is on the front page dated 11th August 2009 and at the end thereof indicates that it was signed on 3rd August 2009. The arbitration award was varied by the commissioner correcting the calculation of the compensation awarded to the applicant.

[5] The applicant being unhappy with the outcome of the arbitration proceedings filed a review application on the 31st August 2009. In its notice of motion to have the arbitration award reviewed the applicant also prayed to have the execution of the arbitration award stayed pending the outcome of the review proceedings.

[6] Thereafter, and on the 18th September 2009, the applicant received a telefax from the CCMA indicating that the first respondent was seeking to have the arbitration award enforced. In response thereto the applicant's attorneys of record addressed a letter to the applicant's attorneys in which it is stated:

> *"Kindly advise whether your client will agree to stay execution in light of the review of the review application or not. Obviously if she is not willing to do so. We will need to bring an urgent application to the Labour Court to stay execution."*

[7] The first respondent replied through her attorneys in a letter dated 21st September 2009 and stated that:

> *"Our client will not proceed with the issuing and execution of the writ should your client agree to pay to the Sheriff or to ourselves as security for our client's claim, the amount of the arbitration award, to be kept in trust subject to conditions. Such payment would be subject to the condition that it be kept in an interest-bearing account until such time as the review proceedings and any further proceedings thereafter, have been*

finalized; which interest will accrue to the benefit of the successful party. Our client, if ultimately successful, shall be entitled to interest at the legal rate, which shall be higher than that accruing in an interest-bearing account and as such will continue to have a claim in respect of any shortfall.

Should your client not wish to proceed on this basis we have been instructed to oppose any urgent application to the Labour Court brought by your client as our client believes that your client does not have any prospects of success in the review proceedings."

[8] On 23rd September 2009, the applicant's legal representatives sent a letter of the same date stating that the applicant was not prepared to accept the terms imposed by the employee. The applicant having refused to deposit the money in the trust account as proposed by the respondent the Sherriff was instructed to attach the goods of the applicant. The Sherriff effected the attachment of the good of the applicant on the 13th October 2009.

[9] The Court has since the introduction of section 143 of the Labour Relations Act in the 2000 (the LRA) amendments seen a significant increase in applications for staying of enforcement of arbitration awards and writ of executions. In terms of section 143 the applicant in whose favour an award has been made can apply to the CCMA to have the award made as if it is an order of the Court. In making an arbitration award as if it is an order of the Court, the Director of the CCMA

performs an administrative action of simply confirming that the award is indeed a valid award issued by the commissioner properly appointed by the CCMA. Initially, the CCMA's interpretation was that an award made in terms of section 143 had the same status as an order of Court similar to those made in terms of section 158(1) (c) of the Labour Relations Act. In other words the status of an award changed to that of an order of Court once it endorsed by the Director or a commissioner delegated to perform that function. That interpretation was corrected in the *Tony Goise t/a Shakespeare's Pub v Van Zyl & others [2003] 11 BLLR 1176 (LC).*

[10] The cases that come before this Court on a far too regular basis on application for the staying of the enforcement of a writ of execution can be categorized into two types. On a general assessment there is on the one hand those applications for staying of the writ of execution where there is a clear abuse by an employer of the process. In this instance the process of staying of a writ of execution is used to frustrate and delay the employee in enjoying the fruits of the arbitration award issued in his or her favour. The other general phenomenon of these kinds of cases is that quite often they involve insignificant compensation amounts. Again looking at them in general terms the amounts involved are much lower than the costs that an employer would have to pay in legal fees for the prosecution of the application to stay the writ. In some instances the compensation amount, it may even be equal or lower than the Sherriff's fee.

[11] Another feature of these applications is that the employer does nothing in the form of challenging the award but waits until the employee takes steps to have the award enforced. In fact quite often the employer does nothing when it receives the application in terms of section 143 of the Labour Relations Act. The first time that the employer reacts in these types of cases is when the Sherriff arrives at its premises to attach property to realize the debt arising from the arbitration award. Having, sat for months and doing nothing, such employers when suddenly confronted by the Sherriff rushes off to Court with a half-baked review application, and an urgent application to stay the writ and as stated above the amount involved in the award is often a few thousand rand.

[12] The other type of cases is those where the employer has initiated steps towards or has commenced with review or a rescission application and the employee has instructed the Sherriff to attach because of fear that the employer may delay the further proceedings unreasonably. There may also be a suspicion on the part of the employee that the employer has embarked on dilatory tactics, and there is a concern that the employer may be unable to satisfy the payment of the amount on the finalization of the review or rescission application.

[13] Before dealing with the approach which the Court has adopted in exercising its discretion in dealing with the application to stay the writ of execution, I whish to comment briefly and in passing about the analysis of the first category of the cases discussed above. It seems to me that the unintended consequences of the introduction of the provisions of section 143 Labour Relations Act in

2000, outweighs the objective which the legislature sought to achieve. The provisions of section 143 are undermined by the delaying tactics of certain employers. The problem does not in my view arise only at the stage of the writ of execution but at the every beginning of the section 143 process itself. As I understand it the purpose of section 143 was not only intended to expedite the enforcement of arbitration awards but mainly to ensure that only genuine and legitimate awards are enforced. Section 143(1) provides as follows:

> *"An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court, unless it is an advisory arbitration award."*

[14] In order to reach the status *"as if it were an order of the Labour Court"* such an award need to be certified as such by the Director of the CCMA or any commissioner delegated to perform such function. The powers of the Director in performing this function does not in my view extend to correcting the substantive determination made by the commissioner in the award but may suggest to the commissioner a vary of the award if there are typographical errors and errors in the calculation of the compensation.

[15] In my view and by way of comparison what the legislature intended with this section was nothing different to the function performed by a notary public where if a party wishes to execute a notarial deed he or she simply appear before the notary, public present the document with his or her identity

document and then the document is notarially executed. The function of the Director in this respect is simply to confirm that the arbitration award is one issued by a person who is properly appointed as a commissioner by the CCMA board and that the arbitration award whose status is sought to be changed to be *"as if it is an order of the Court"* is the one issued by such a commissioner.

[16] The other unintended consequence that has become a challenge to the enforcement of the arbitration awards is, with due respect, the bureaucratic process designed by the CCMA in its interpretation of section 143. As indicated earlier the incorrect interpretation given to section 143 by the CCMA prior to the *Shakespeare Pub* case was that the status of an award changes to that of being same as an order of Court issued for instance in terms of section 158(1)(c) of the Labour Relation Act. It would seem to me that that interpretation informed and became the basis of designing the process of dealing with enforcement of arbitration awards inn terms of section 143.

[17] Whilst as I have already indicated the function of the CCMA Director in certifying the awards is purely administrative the process is designed on the similar if not the same basis as that required in terms of section 158(1) (c) of the Labour Relations Act 66 of 1995, in that an employee who wishes to have the arbitration award issued in his or her favour is required not only to make a formal application but also to serve it and call on the employer to show cause why such an arbitration award should not be made as if it is an order of the Court. In the result, that process is not only highly legalistic, a result I do not

believe the legislature had intended, but is also dilatory in finalizing the outcome of the arbitration process. It should also be noted that anecdotal evidence suggests that most of those affected by this process are vulnerable employees who are not unionized, are illiterate and falling in the lowest of the earning bracket. I am accordingly tempted to suggest that there is a need to relook at the provisions of section 143 particularly in the light of the advanced and sophisticated electronic system which the CCMA has in place. I have in fact noted that all the arbitration award which have come before this Court in the last year or so are watermarked and it would seem is done through the electronic system. In my view that system does provide the security which section 143 was intended to provide.

[18] I now turn to deal with the process which the Court has adopted in dealing with applications to stay the writ of execution pending the finalization of review or rescission applications. In terms of section 145(3) of the LRA, the Court has the discretion to stay the enforcement of the arbitration award pending the outcome of the review application. This discretion which is very wide has to be exercised judicially taking account certain factors. The most important consideration in the exercise of the discretion is whether there is a pending underlying cause of action arising the arbitration award or in certain instances arising from the Court order. There is a wide range of factors which the Court will take into account in considering whether or not to order a stay of the execution of an arbitration award, the most important of which is whether the interest of justice supports the

stay of execution pending the finalization of the review or rescission application. See *Robor (Pty) Ltd (Tube Division) v Joubert & others [2009] JOL 23568 (LC).*

[19] The other factors as discussed in the *Robor case (supra),* are:

> *"16.1 Whether the attack on the underlying cause of action was brought in time, and whether its prospects of success are strong. This Court's roll is regularly burdened with a large number of applications of this kind, brought on an urgent basis in the face of steps taken to execute an award, when the attack on the underlying award was brought out of time, or when the attack clearly has little or no prospects of success. The interests of justice will seldom warrant a stay in these circumstances.*
>
> *16.2 The interest of all parties in securing finality. The dispute resolution system established by the Labour Relations Act provides parties with easily accessible remedies. In return, they must exercise their rights quickly. The time periods for doing so – 30 days for a referral to conciliation in the case of most disputes, and 90 days thereafter for a referral to adjudication – are considerably shorter than ordinary prescription periods. Speedy dispute resolution is a core to one of the LRA's primary objects, the effective resolution of labour disputes. This is one of the ways in*

which the LRA seeks to advance economic development, social justice and labour peace.

16.3 *The cost to all parties of a delay in finality, and the cost to all parties of instituting or opposing further proceedings, whether in this Court or elsewhere, to attack the underlying cause of action or to stay execution pending any such attack. Many applicants come to this Court by way of urgent application, with counsel and attorneys briefed, in circumstances where the amount of the judgment debt is likely to be less than or, perhaps, little more than the cost of doing so. The position is far worse if one takes into account the overall cost of the attack on the underlying cause of action which is usually the basis of the application to stay. It is difficult to conceive what the commercial justification is for litigation of this kind, and one fears that all too often litigants are acting on inadequate or inappropriate legal advice.*

16.4 *The risk of injustice being done to the less powerful party to the dispute. The stronger financial position of most employers enables them to mount attacks on the underlying cause of action which the employee party is frequently powerless to oppose or to expedite. This may lead to an outright abuse of the dispute resolution system."*

[20] In the present matter, the applicant sought to stay execution of the payment of the amount of R145 800, 00 which was award to the first respondent in terms of an arbitration award that was made on 11th August 2009. As indicated earlier the stay of the enforcement of an award is sought pending the outcome of the review application filed on the 31st August 20009. It is apparent from these dates that this is not a case of an employer who sat and did nothing when it came to know about the arbitration award. It is for this reason that the first respondent did not, correctly, oppose the stay of the execution of the writ pending the outcome of the review application. In this respect the first respondent does not dispute that the underlying *causa* for the writ is still the subject matter of an ongoing dispute between the parties. However, the first respondent contends that the writ of execution can only be stayed on condition the applicant pays into the trust account of the Sherriff the compensation amount awarded by the commissioner in the arbitration award.

[21] The first respondent conceded correctly so, that there is no authority requiring payment into the trust account of the Sherriff the amount of compensation ordered by the arbitrator pending the outcome of the review or rescission application.

[22] There is however, a robust practice which has been developed by the Court to deal with burden arising from the dozens of applications brought daily by employers to stay writs of execution. The practice is also intended to induce expeditious processing of the review or rescission applications. The Court has

also adopted this practice in those cases where the amount in question is so nominal or there is evidence suggesting that the applicant is using the process as a delaying tactic.

[23] The closest authority in as far as the demand of the first respondent is concerned by way of analogy would be an application for security for costs by a defendant in civil litigation. In the civil litigation process the defendant will have to show by way of evidence, in an application for security for costs, that the plaintiff will be unable to pay the costs if unsuccessful in the action. See *Herbstein & Van Winsen, Civil practice of the Supreme Court at page 339*. It seems to me that that approach could also apply in stay of writ of execution where there is a demand that the compensation amount be paid into the trust of the Sherriff. It would mean that in stay of execution proceedings the applicant may be required to pay the compensation amount into the trust account of the Sherriff or for that matter of the attorneys pending the outcome of the review or rescission application if the respondent (employee) has shown that by the time the review proceedings are finalized the applicant would not have money to pay the debt and he or she may not have sufficient assets to realize such a debt. This approach if adopted should not detract from practice adopted by the Court in dealing applications involving delaying tactics on the part of the employer or insignificant compensation amounts.

[24] In the present case there is no evidence that firstly the applicant is using the process to delay the first respondent receiving amount ordered by the

commissioner and secondly there is also no evidence that by the time the review proceedings are completed the applicant would not have enough money or that its assets may have diminished to the extend that it would not be able to meet the claim. The amount of R145 800 which the commissioner has ordered as compensation is also not insignificant. I agree with the applicant that that amount if put into the Sherriff's trust account could have a negative impact on its cash flow or other business imperatives. More importantly there is no evidence suggesting that the applicant is seeking to evade the execution of the writ.

[25] In my opinion the applicant stand to succeed in its application to have the writ of execution stayed pending the outcome of the review application launched by the applicant.

[26] In the premises the following order is made:

(i) This application is heard and considered as one of urgency in terms of rule 8 of the Rules of the Court.

(ii) All steps in the execution of writ of execution issued following non compliance with the arbitration award under case number GAJB16731-09 is stayed pending the outcome of the review application filed under case number JR2384/09.

(iii) The costs shall be the costs in the review.

Molahlehi J

Date of Hearing : 20th October 2009

Date of Judgment : 18th December 2009

Appearances

For the Applicant : Adv G Fourie

Instructed by : Matjila Hertzberg & Dewey Attorneys

For the Respondent: Adv Faye Darby

Instructed by : Webber Wentzel Attorneys