IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No J 962/09

SOUTH AFRICAN POST OFFICE LTD **Applicant**

and

NXUMALO DZ **First respondent**
and 11 others

JUDGMENT

VAN NIEKERK J

[1] This is an urgent application to stay a writ of execution issued by this court consequent on an arbitration award made in favour of the first to eleventh respondents, to whom I shall refer as 'the individual respondents'.

[2] The factual background that gives rise to the application are briefly the following. The applicant and the Communication Workers Union ('the CWU') were engaged in a long standing dispute concerning the dismissal of the individual respondents. An arbitration hearing was held on 10 August 2006, and an award issued on 17 August 2006. In the award, the arbitrator held that the individual respondents had been unfairly dismissed, and that they should be reinstated with 12 months' back pay. The

applicant filed an application to review and set aside the award. During December 2006, after the review application had been filed, the applicant's human resources manager prepared a memorandum setting out two options to settle the case. The first option was that the applicant awaits the outcome of the review proceedings; the second that it offers to reinstate the individual respondents and pay them the equivalent of six months' remuneration. The applicant avers that its senior management agreed to pursue the second option, and that the dispute was subsequently settled with the CWU on this basis. The applicant avers further that the individual respondents were reinstated and that they were paid the monetary component of the settlement. As will appear hereunder, these averments are contested by the individual respondents.

[3] On 21 April 2009, the individual respondents secured the issuing of a writ of execution, after certification of the arbitration award on 17 April 2009. On 5 May 2009, the twelfth respondent, the Sheriff for Pretoria west, executed the writ and attached certain of the applicant's assets. The applicant wrote to the sheriff on 7 May 2009 recording its dismay at the attachment, and attaching proof of payment to each of the individual respondents of what it averred was the amounts owing to them in terms of the settlement agreement. This letter was copied to LJB Legal Consultants cc in a letter marked for the attention of Adv LJ Boale, suggesting that he advise his clients that payment of the agreed amount had been effected and that this should be verified with the individual respondents.

[4] On 12 May 2009. Adv Boale replied to the applicant's letter, on a letterhead that reads somewhat resplendently "**ADVOCATE LEGODI JOSIAS, BOALE B. JURIS LLB AND COMPLETING LLM (UNISA) Expect In Labour & Constitutional Law Managing Member of LJB Legal Construction and Cleaning cc**" (sic). Boale stated *inter alia* that

the payments made had been partial payment of its portion to the provident fund. And that he "requested the complete execution of the writ".

[5] On 12 May 2009, the applicant filed the present application, seeking as a matter of urgency *inter alia* to interdict the sheriff from removing the attached goods, and setting aside the writ of execution. On 13 May 2009, attorneys Mokobane and Chauke filed a notice of appointment as attorneys of record for the individual respondents. On 14 May the application was stood down to permit the filing of an answering and replying affidavit. On Friday 15 May the application was argued, and I reserved judgment until Monday 18 May 2009.

[6] The discretion to stay a writ of execution is wide, and must be exercised judicially. Where a writ is sought to be executed for improper reasons (this is what the applicant in essence avers) the court is entitled to stay execution. (See *Strime v Strime* 1983 (4) SA 850 (c), *Santam Ltd v Norman* 1996 (3) SA 502 (c) and *Robor (Pty) Ltd v Joubert & others* (unreported, Labour court J2264/08, 17 April 2009)). In determining whether to stay execution, the courts have applied the test applicable to the granting of interdicts. In effect, the applicant seeks a final order setting aside the writ of execution. In these circumstances, the rules relevant to a dispute of fact in motion proceedings where a final order is sought ought to be applied. These rules were established in what has become known as the "Plascon-Evans test" (*see Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 632 (A)) and were recently affirmed by the Supreme Court of Appeal in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA). The court said the following:

> *"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to*

resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits...which have been admitted by the respondent… together with the facts alleged by the latter, justify such an order. It may be different if the respondent's version consists of bald or uncreditworthy denials, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers" (at paragraph 26).

[7] In the present instance, there are at least two clear and fundamental disputes of fact on the papers. The first relates to the issue of authority. The individual respondents deny the existence of the agreement that the applicant avers was concluded with the CWU. While there is no dispute that the CWU represented the individual respondents at the arbitration hearing, they deny that they authorised any third party to conclude any agreement compromising the terms of the arbitration award on their behalf. The second issue relates to the nature of the payment made into the individual respondents' bank accounts in January and February 2007. The applicant's version is that these amounts were paid pursuant to the agreement reached with the CWU. The individual respondents aver that the amounts related to provident fund contributions that the applicant was required to make. I am not persuaded that these averments, tersely as they may have been made in the answering affidavit, are of such a nature so as to fall into the exception to the *Plascon Evans* rule. These disputes (and any others that may exist) require resolution in order for this court properly to determine whether, as the applicant contends, the writ was improperly obtained. I intend therefore to order that the factual dispute be resolved by the hearing of oral evidence.

[8] Finally, I wish to address the issue of Mr Boale's right of appearance. The rules of this court extend rights of appearance *inter alia* to advocates and attorneys, and to officials of genuine trade unions and employer organisations. In the case of attorneys, this court has held that only attorneys admitted to practise and enrolled as such and having a trust account and Fidelity Fund certificate may appear (see *Marx v Stalcor & others; Glaubitz v Preston Anderson CC* (2001) 22 *ILJ* 2669 (LC). It is not uncommon for persons to appear in this court, claiming the right of appearance as an admitted advocate, having represented their clients to that point in the capacity of officials of a trade union or employer organisation of dubious authenticity and pedigree, or as labour consultants. In principle, and on the basis of this court's refusal to permit admitted but non-practising attorneys to appear, I have my doubts whether these persons ought to enjoy the right of appearance in this court, and whether their "members" and clients are adequately protected against unscrupulous conduct. Be that as it may, I did not invite argument on this question and, for the present at least, do not intend to take it further. But I was concerned when I perused the papers in the present matter that all of the correspondence annexed to the papers suggests that in their dealings with the applicant, the individual respondents were represented by LJB Consultants cc and that Adv Boale, who appeared on behalf of the individual respondents when the application was called, was a member of that close corporation. I was also concerned that the answering affidavit had no filing sheet to indicate that it had been prepared and presented by a firm of attorneys, and that the quality of the drafting of the affidavit was such that it did not seem to me that the individual respondents had been properly and professionally advised by a firm of attorneys. When the application was called, I expressed my concern to Adv Boale, who represented the individual respondents at the hearing in his capacity as an advocate, that it was improper for him to act in the course of the dispute for the individual respondents as a labour consultant (specifically in the

capacity of a member of a close corporation) and thereafter to appear in this court as their counsel. Adv Boale is not a member of the Society of Advocates. I asked him whether he had been briefed to appear in the application. He replied in the affirmative, and produced a brief from attorneys Mokobane and Chauke. No-one from that firm was present in court. I then requested Mr Nxumalo, the first respondent and the only individual respondent present in court, whether the individual respondents had instructed the firm Mokobane and Chauke. He stated that he had consulted Mr Mokobane in March 2009. On this basis, and on the basis of the brief produced by Mr Boale, I then permitted him to represent the individual respondents, subject to the reservation that I would refer the matter to the appropriate authority for further investigation should I consider this appropriate.

[9] It concerns me that attorneys Mokobane and Chauke, apparently instructed in this matter prior to the certification of the arbitration of the award and the issuing of the writ of execution, played no role in this matter other than to brief Boale. The application to certify the award and to have a writ issued, LRA Form 7.18, was signed by Boale, in his capacity as the representative of the individual respondents. As I have noted, all of the correspondence conducted with the sheriff and the applicant emanated not from the offices of Mokobane and Chauke, but from LBJ Consultants cc and in respect of the letter of 12 May, from Boale in his personal capacity. On the face of it, it was irregular for the firm Mokobane and Chauke to accept an instruction from the individual respondents and then to abdicate their professional responsibilities to LJB Consultants cc and to Boale, but for briefing Boale to appear in court to oppose the application. On the face of it, it was also irregular for Boale to act for the individual respondents in the capacity of a member of a close corporation and/or in his individual capacity by engaging with the CCMA, the sheriff and the applicant, and thereafter to accept a brief from Mokobane and Chauke to

appear as counsel. These are matters that warrant further investigation by the relevant professional bodies.

I accordingly make the following order:

1. The matter is referred to oral evidence, on a date to be arranged with the Registrar.
2. The costs of the proceedings on 14 and 15 May 2009 are reserved.
3. Pending the further judgment of this court, the 12th respondent is interdicted from taking any further steps to execute the writ of execution issued under case number GA 12312-02 on 21 April 2009, and in particular from removing any goods attached pursuant to that writ.
4. The Registrar is directed to forward a copy of this judgment and the papers filed in this matter to the Law Society of the Northern Provinces and the Johannesburg Bar Council, for investigation into the propriety of the conduct in these proceedings respectively of Attorneys Mokobane and Chauke, and Adv LJ Boale.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of Hearing: 15 May 2009
Date of Judgment: 18 May 2009

Appearances:
For the applicant: Adv TF Mathibedi
instructed by Mabuza Attorneys

For the respondent: Adv J L Boale
Instructed by: Mokobane & Chauke Attorneys