REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: J 441/09

In the matter between:

BARTMANN AAC & BARTMANN MME T/A KHAYA IBHUBESI Applicant

and

DE LANGE CLG First Respondent

THE SHERIFF OF POTCHEFSTROOM Second Respondent

JUDGMENT

TODD AJ:

Introduction

1. This judgment deals with the considerations that this Court takes into account in deciding whether or not to stay the enforcement of orders of this Court. It also deals with the question of costs in the context of litigation that on the face of it is not commercially viable.

2. This is an application brought on an urgent basis to stay the execution of a writ issued by this Court. The stay was originally sought pending the finalisation of an application to make a settlement agreement an order of court and an application to set aside the writ. Following the delivery of further affidavits in the matter, the Applicant (the employer) sought to stay the writ pending an application to rescind the underlying order of this Court, which was made on 5 November 2008 under case number J275/08.

3. In terms of that order, the employer was ordered to pay the First Respondent (the employee) an amount of R6,279.92, together with his legal costs on an attorney and

own client scale. It is not apparent from the papers before me what the cause of action was in the claim for payment of that amount, but the claim appears to have been brought under the provisions of the Basic Conditions of Employment Act (BCEA).

4. The judgment debt, the amount of R6,279.92 plus interest on that amount, was paid during December 2008 in circumstances referred to further below. The writ which is the subject of these proceedings, is for an amount of R16,460.79. This is the amount of the taxed costs and charges of the attorneys of the employee.

Applicable legal principles

5. This Court has discretion to stay the execution of its own orders for such period as it deems fit. This is so both by reason of the specific powers conferred on the Court by section 158 of the LRA, and because the Labour Court is a superior court with authority, inherent powers and standing in relation to matters under its jurisdiction equal to that of a provincial jurisdiction of the High Court[1].

6. The Court's discretion should be exercised judicially, but generally speaking a Court will grant a stay of execution where real and substantial justice requires a stay; or, put differently, where injustice would otherwise be done.[2]

7. The discretion is a wide one. It is founded on the Court's power to control its own process. Grounds on which a Court may choose to stay execution include that the underlying cause of action on which the judgment is based is under attack, or that execution is being sought for improper reasons. But these are not the only circumstances in which the Court will exercise the power.[3]

8. In determining whether or not to grant a stay of execution, the High Court has "borrowed" from the requirements for the granting of interim interdicts[4]. At the heart of the enquiry is whether the Applicant has shown a well-grounded apprehension of execution taking place and of injustice being done to the Applicant by way of irreparable harm being caused if execution is not suspended.[5]

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[1] section 151 of the Labour Relations Act
[2] *Strime v Strime* 1983 (4) SA 850 (C) at 852A; *Santam Ltd v Norman* 1996 (3) SA 502 (C) at 505E-F; *Road Accident Fund v Strydom* 2001 (1) SA 292 (C)
[3] see *Road Accident Fund v Strydom* supra at 301C-D
[4] *Erasmus v Sentraalwes Kooperasie Bpk* [1997] 4 All SA 303 (O) at 307
[5] *Road Accident Fund v Strydom* supra at 304 B-G

9. One of the grounds on which a stay of execution is regularly sought in this Court is that there is a pending attack on the underlying cause of action giving rise to the judgement debt, whether arising from an order of this Court or an arbitration award made in the CCMA[6].

10. There is no closed list of factors that may be relevant to the question whether the interests of justice require a stay of execution. There are, however, a number of considerations that are frequently important in applications of this nature.

11. Applicants usually point out that an amount payable under a judgement of this court bears interest at the rate determined in terms of the Prescribed Rate of Interest Act, 1975. This protects the interests of the judgment creditor (typically the employee in whose favour an order has been made) in the event that a challenge to the underlying cause of action is unsuccessful.

12. By contrast, if a challenge to the underlying cause of action is ultimately successful, and the amount of the judgment debt has already been paid, the judgment debtor (typically the employer) may find it difficult to recover the amount that it has already paid. This may be the case in particular where the judgment creditor was a relatively low paid employee, or has suffered financial hardship in consequence of having been dismissed. This Court is regularly asked to assume in these circumstances that an employee will have difficulty repaying any amount already paid if the challenge to the underlying cause of action later succeeds.

13. Further important considerations are whether the attack on the underlying cause of action was brought in time[7], and whether its prospects of success are strong. This Court's roll is regularly burdened with a large number of applications to stay execution, usually brought on an urgent basis in the face of steps taken to execute a judgment or award, when the attack on the judgment or award was brought out of time, or when that attack on the face of it has little or no prospects of success. In these circumstances the interests of justice will seldom favour a stay.

14. Another important consideration is the interest that all parties have in securing finality. The dispute resolution system established by the Labour Relations Act provides parties with access to 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

[6] enforceable as if it were an order of this Court by reason of the provisions of section 143(1) of the LRA
[7] As to which, see the dictum in *Dumah v Klerksdorp Town Council* 1951 (4) SA 519 (T) at 522E

of most disputes, and 90 days thereafter for a referral to adjudication – are considerably shorter than ordinary prescription periods. Speedy dispute resolution is important 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.[8]

15. Related to this is the question of the cost to all parties of a delay in finality, and the cost to all parties of instituting or opposing further proceedings brought in this Court to attack the underlying cause of action or to stay execution pending such an attack. Many Applicants come to this Court seeking a stay by way of urgent application, with counsel and attorneys briefed, in circumstances where the amount of the judgment debt is 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. In considering whether real and substantial justice requires a stay of execution, the Court will be mindful of the risk that an injustice may be done to the less powerful party to the proceedings. 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.

17. These are some of the main considerations that will weigh with the Court in considering whether or not to grant a stay of execution.

Appling these principles to the facts

18. Turning to the present proceedings, it need hardly be stated that the amount at issue does not warrant litigation of the kind being conducted in this Court. The parties' combined legal costs will inevitably far exceed the amount of the underlying claim. Indeed, that appears to have been the case already at the stage when the initial default judgment was granted.

[8] LRA section 1; and see, for example, the statements in this regard in the as yet unreported decision of the Supreme Court of Appeal in Shoprite Checkers (Pty) Ltd v CCMA and others (case no 315/08) at paragraphs [28] and [34]. The same point has been made in numerous judgments of this Court.

19. Mr Scholtz, who appeared for the First Respondent, contended that the proceedings were not urgent and that the rules of this Court dealing with urgent applications had not been complied with. Although he pointed to a number of shortcomings in the Applicant's papers in the proceedings, I am satisfied that this was an appropriate matter in which to condone non-compliance with the rules and to allow the Applicant to bring these proceedings as a matter of urgency.

20. Mr Scholtz also pointed out that the Applicant had already paid the amount of the principal debt together with interest, in an amount of R7,588.54. This is evident from a return of service of the Sheriff dated 11 December 2008. This meant that this was a case where the Applicant will have instituted rescission proceedings outside the time periods prescribed by the rules of this Court.

21. In its replying papers the Applicant admits that the Sheriff attended at its premises to execute the writ in December 2008. It asserts, however, that the First Respondent, who was present, was asked to explain why an order had been obtained and a writ of execution issued when, so the Applicant claims, the underlying cause of action had previously been resolved between the parties. The Applicant avers that the First Respondent then stated that this had been an error and that he had erroneously failed to advise his attorney of the settlement agreement previously concluded between the parties. The parties then agreed, so the Applicant contends, that the Applicant would pay the relevant amount of the judgment debt to the Sheriff and would deduct that amount from an amount of salary still due to the First Respondent.

22. This version of events, if shown to be correct, may constitute a valid explanation for the delay in bringing the rescission application. There is no reason apparent on the papers before me why the Applicant should have been aware at that stage that there was also a substantial bill of costs coming its way. Whether or not it should have known this, and whether or not it will succeed in persuading this Court to grant rescission of the order made on 5 November 2008, are questions that I do not need to consider further here.

23. On these facts alone, I would have been inclined to refuse to stay execution of this Court's order of 5 November 2008, despite the pending rescission application, having regard to the various considerations that I have set out earlier in this judgement. There is, however, a special feature of this case that warrants further attention.

24. The First Respondent instituted four separate claims against the Applicant in this Court,

under different case numbers but at the same time. The papers before me shed light on only two of these. In the claim brought under case number J725/08, the First Respondent sought an order for payment of the amount of R6,272.92, together costs on an attorney and own client scale. In the claim brought under case number J726/08, he sought an order directing the Applicant to provide him with the written particulars of his employment contemplated in section 29 of the BCEA, again with an order for costs on an attorney and own client scale. The other two applications instituted by the First Respondent at the same time are not further described in the papers before me.

25. The two separate applications that are described in the papers were instituted simultaneously under separate provisions of the BCEA. Both applications were unopposed. Two separate orders were obtained by default on the same date, 5 November 2008, each with an accompanying order for costs on an attorney and won client scale.

26. In the first of these applications, brought under case number J725/07, in which the primary relief sought was an order for payment of the amount of R6,272.92, the First Respondent's attorneys subsequently taxed a bill of costs in the amount of R16,460.79.[9] A cursory review of the bill of costs in the matter rings alarm bells. The bill, viewed in its totality, has what Wallis J described in the *Sibiya* case[10] as a "surreal air" about it.

27. The attorneys charge for an initial ninety minute consultation with the First Respondent, and separately for the perusal of various documents which should no doubt have been perused during the consultation. There follow a number of telephone attendances, mainly calls from the client, which last no more than three or four minutes, for each of which there is a charge of R108. Before the papers have been drafted, costs on the bill are in the region of R2,000.

28. For drawing the notice of application and founding affidavit some R4,000 was claimed, and a little under R2,000 allowed. Then there are various further attendances to get the proceedings started, including a further thirty minute consultation with the client and attendance *ad jurat*, the drawing of a schedule of documents and the sorting and perusal of annexures, the drawing of a confirmatory affidavit with attendance *ad jurat* and making copies, and the service and filing arrangements. These add a further

[9] In a similar matter which came before this Court on the same day as the present application, the employee party was represented by the same firm of attorneys as the First Respondent in the present matter. The primary relief claimed in that matter was an order for payment of an amount of R3,753.93. The attorneys had prepared a bill of costs in an amount (as yet untaxed) of R27,680.08: see *Afriguard (Pty) Ltd v Ntsane* (case no. J432/09, unreported).
[10] In *Sibiya v Director General: Home Affairs and others* (High Court, Kwazulu-Natal Division, Pietermaritzburg, unreported, case number 13859/08) at [36]

approximately R2,000 to the cost of instituting the proceedings.

29. Thereafter the bill includes the cost of travelling to and from Potchefstroom to draw, index and paginate the court file, the cost of perusing and copying the notice of set down, with telephone calls in between keeping the client informed of these developments. A further thirty minute consultation with the client is recorded "regarding matter placed on unopposed roll". The bill then includes the preparation of a draft order and writ of execution on the day before the matter was to be heard.

30. On the 5th of November 2008, the date on which this and the related application under case number J726/08 were heard, the bill includes a total of three hours travelling time to and from Potchefstroom, and a "day fee" for appearance in the Labour Court in an amount of R3,000. In addition to this there is half an hour spent "while order is typed and issued", and a charge for receiving and perusing the order.

31. Whereas the amount claimed by the employee in the matter was R6,272.92, the total fees and disbursements claimed by the attorneys, in an unopposed matter, exceeded R20,000. After the deduction of R6,641 that was taxed off the bill, and the addition of a drawing fee and VAT, the bill was finally allowed in the amount of R16,460.79.

32. There is no copy before me of the bill of costs under case number J726/08, which I assume must by now have been prepared. That was the parallel application brought to compel the same employer to provide the particulars of the employee's employment contemplated in section 29 of the BCEA. For present purposes I say nothing further about this other than to point out the obvious concern that I have that the bill of costs in that matter will reveal duplications in relation to consultations, telephone calls keeping the client informed of developments, and fees for travelling to and from court and for attending court when the matter was heard.

33. In considering the bill of costs prepared under case number J725/08, the comments of Wallis J in paragraphs [35], [36] and [37] of the *Sibiya* case referred to earlier have particular resonance. After considering the costs reflected in two bills in the matters that he was dealing with there, which included a standard appearance charge by counsel in an amount of R750, Wallis J pointed out that the attorneys who succeeded in obtaining orders for costs in those matters claimed amounts of, on average, between R4,000 and R5,000 in total for an unopposed application on a party and party scale.

34. On these costs, Wallis J had the following to say, at paragraph [37] of the judgment:

> *"Yet apart from the production of application papers that are run off on a word processor in standard form, no significant legal effort is involved in dealing with these matters. In the social security cases I describe this as a profitable cottage industry for the legal practitioners concerned."*

35. At paragraph [61], he states the following:

> *"I have drawn attention earlier in this judgment to the basis upon which bills of costs are prepared in these cases and presented for taxation. For reasons already given I have substantial reservations as to whether the bills of costs presented for taxation by these attorneys are in fact an accurate reflection of the work that they perform or whether they are, like the application papers, prepared as a matter of rote in the knowledge that they will be agreed with the State Attorney. …. Not only am I concerned whether the bills of costs being presented in these cases accurately reflect the work done by the attorneys, but I am also concerned, bearing in mind the production line manner in which the papers in these cases are produced, whether it is permissible or appropriate for the attorneys simply to charge in accordance with the tariff laid down in rule 70 or whether this constitutes a form of over-reaching. I appreciate that it is not over-reaching of their own client because they are not charging their clients fees. However, it seems to me equally inappropriate for an attorney to present a bill of costs for taxation to the opposing side where the fees claimed are exorbitant in relation to the amount of work actually done and the nature of that work. This is inconsistent with the bill being a party and party bill."*

36. Although costs in those cases had been awarded on a party and party scale, it seems to me that the same concern arises where the bill is on an attorney and own client scale. It is inconceivable that the attorneys could ever have charged their client, or intended to charge their client, an amount of more than R16,000 for proceedings in which an amount of some R6,000 was claimed. If that is correct, then the attorneys have claimed payment of costs substantially in excess of what they had in fact agreed to charge their client. Viewed in that context, this and the many similar claims like it which populate this Court's unopposed roll, assume the complexion of litigation that is driven by attorneys to generate revenue, rather than by the clients in whose name the proceedings are instituted.

37. The bill of costs in the present matter gives rise to a real concern that the underlying application amounts to an abuse of the process of this Court. It appears to indicate that the "cottage industry" about which Wallis J was has spread to this Court. Indeed, the costs claimed here far exceed those with which Wallis J was concerned in *Sibiya.* It appears that Applicants may be being encouraged to bring multiple applications to this Court, either to enforce various provisions of the BCEA or to claim rights under their employment contracts, where the costs purportedly incurred in this Court, and claimed by the attorneys, far exceed the value of enforcement or the amount at issue, and where the same result could be achieved far more cost effectively utilising the enforcement mechanisms specifically provided for in Chapter Ten of the BCEA.[11]

38. Although matter number J726/08 is not before me, it is apparent from the papers in that matter which are attached to the papers in the present proceedings that the same Applicant sought, and was granted on an unopposed basis, an order directing compliance by the employer with its obligations under section 29 of the BCEA. While this is not something that it is necessary for me to decide for the purpose of the present application, it seems appropriate, in light of the concerns that I have raised in the preceding paragraph, for me to express my view that an employer's obligation under section 29 of the BCEA is not a "basic condition of employment" as defined in that Act. It may well follow from that, it seems to me, that the subject matter of that application falls outside the jurisdiction conferred on this Court by the provisions of section 77(3) of the BCEA, and that those obligations may be enforced only by means of the enforcement provisions set out in Chapter 10 of the BCEA. That is, however, not a question that was before me in this matter, and I say nothing more of it here.

39. In the present matter the Applicant has established at least on a *prima facie* basis, that the underlying proceedings should never have been instituted, having become settled between the employer and employee. The Applicant's averments in this regard, and in particular the circumstances in which the initial judgement debt was paid to the Sheriff, give rise to a concern that the attorneys for the First Respondent may have been acting without proper instructions, or that the First Respondent failed to communicate to his attorneys that at least one of the disputes that had initially been referred to them had subsequently become resolved.

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[11] Compare the similar recent cases dealt with in the unreported judgments in *Afriguard (Pty) Ltd v Ntsane*, referred to in footnote 8 above; and in *Swanepoel v Kievietskroon Country Estate* (unreported). Each of these cases was initiated by the same firm of attorneys, the attorneys of record of the First Respondent in the present matter.

40. In all of the circumstances, and notwithstanding the existence of various disputes of fact on the papers, the Applicant has established at least a *prima facie* case that it should be granted a stay of execution pending resolution of the challenge that it proposes to bring to the order made by this Court on 5 November 2008.

41. I have already alluded to the fact that the present proceedings appear to represent litigation that is not warranted having regard to the legal costs that are being incurred by both parties, and that cannot on any reasonable construction be commercially viable. The parties should take heed of this concern in deciding whether and to what extent to continue to prosecute or to oppose these proceedings. Partly for this reason, I would be inclined to make no order as to costs in the matter. Nevertheless, since the parties will have an opportunity to deliver further papers and to make submissions on the return date, including as to costs, I intend to reserve the question of the costs incurred in the proceedings to date.

42. On the return date I would expect both parties to address this Court, in addition, on the question whether this litigation is appropriate, or commercially viable, and whether the attorneys should be permitted to charge their clients their usual fees, or any fees at all, in relation to this litigation. This is a matter on which the parties should be prepared to address this Court on the return date.

Order

43. In the circumstances I make the following order:

1. The Applicant's failure to comply with the applicable rules is condoned, and the application may be brought as one of urgency.

2. A rule nisi is issued calling upon the Respondents to show cause on a date to be determined by the Registrar why a final order should not be granted in the following terms:

2.1 That further execution of the order made by this Court on 5 November 2008 under case number J275/08, including the writ issued on 10 February 2009, is stayed pending finalisation of an application to rescind the order.

3. Paragraph 2.1 shall operate with immediate effect as an interim order pending the return date.

4. The Applicant is given leave to supplement its founding papers within 10 days of the date of this order.

5. The Respondents may deliver further answering papers within 10 days of delivery of any supplementary papers referred to in paragraph 4, and the Applicant may deliver replying papers within 5 days thereafter.

6. In any supplementary papers delivered in the proceedings the parties are directed to deal, in addition to any other matters that may be relevant, with the following matters:

6.1 Whether any bill of costs has been prepared and taxed under case number J726/08, and if so the outcome of that taxation.

6.2 What other proceedings were instituted between the same parties at the same time as the proceedings under case numbers J725/08 and J726/08, and the present status of those proceedings.

6.3 The total amounts of the fees and costs for which the parties have been invoiced by their attorneys to date in these proceedings, in the proceedings under case number J726/08, and in the other proceedings referred to in 6.2, and the amounts paid to date.

7. The costs of this application are reserved for determination on the return date.

Date of hearing:	12 March 2009
Date of judgment:	17 April 2009
For the Applicant:	N Lombard, instructed by Blake Bester
For the First Respondent:	W Scholtz of Jansens Incorporated