**IN THE LABOUR COURT OF SOUTH AFRICA**

**(HELD AT JOHANNESBURG)**

**CASE NO: J 1686/10**

**In the matter between:**

**THE BUSINESS ZONE CC** **Applicant**

**and**

**NATIONAL BARGAINING COUNCIL FOR THE CLOTHING INDUSTRY** **1ST Respondent**

**THE SHERIFF, HARRISMITH** **2ND Respondent**

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**REASONS FOR JUDGMENT**

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**LAGRANGE, J**

**Introduction**

1. This matter was heard on an urgent basis on 26 August 2010 and the following order was handed down on 31 August 2010:

> *"…the application to stay the enforcement of the arbitration award dated 3 May 2010, issued under the auspices of the first respondent (case number 7879/ 44/05/10) and to stay the writ of execution consequent thereto, pending the outcome of the review application filed under case number JR 1279/10, is dismissed with costs."*

2. The writ was stayed pending the handing down of the order. My reasons for the order follow.

**Factual Background**

3. The applicant, a clothing company operating in Qwa-Qwa, Free State province, was seeking an interim interdict staying the enforcement of an arbitration award issued on 3 May 2010, under the auspices of the first respondent. It wished to stay the enforcement of the award pending the outcome of a review of the award. The award issued is to enforce the wage and benefit provisions of a collective agreement which applied to the applicant.

4. The amount due by the applicant to the council in terms of the award is R 2,774,061-75 some of which is comprised of underpayments in respect of: prescribed wages (R 1,910,330-00), provident fund contributions (R 54,018-72); council levies (R 44,754-14) and interest (R 261,183-37). The balance consists of an unpaid fine of R 502, 275-72 and costs of R 1500. The period during which the short payments arose relates to the period 1 September 2008 to 31 August 2009. During that time, the applicant fell within the scope of the collective agreement published in government Gazette 28280 dates 15 December 2005 which was extended to non-parties to the agreement on 9 November 2007.

5. The applicant effectively concedes that it was not complying with the collective agreement, but disputes the correctness of the amount awarded. The basis for the discrepancy it advances in its founding affidavit is that the number of employees used to calculate the amount due is incorrect. The short payments which were the subject matter of the award concerned 262 employees of the company, whereas the list of names of the applicant's employees attached to its purported review application consists of 435 employees. If the additional 173 employees were employed during the period under consideration in the award and were paid correctly then that would not affect the validity of the award. If they employed then and were underpaid then it simply means that there may be further claims yet to come. I do not see how that undermines the status of the award in respect of the other 262 employees.

6. On behalf of the applicant, it was also advanced from the bar that the award was based on estimated and not actual underpayments and therefore the amount awarded would be

inaccurate for this reason too. However, as no basis for this contention was laid for this contention in the founding affidavits before the court. It appears for the first time in the belated review application filed the day this matter was heard. This issue will be addressed below.

7. In February 2010, the applicant was served with a compliance order by the Council in terms of which it was called upon to rectify the underpayments. It appears to be uncontested that the applicant made no effort at that stage to comply with the agreement.

8. Prior to the arbitration award being made against it, the applicant took no steps to apply for exemption from the provisions of the agreement, a fact noted by the arbitrator. It was only after the award was issued that the applicant sought an exemption from the Council. It is telling that the application was rejected by the Council, amongst other things, on the basis that wage details were not completed and audited financial statements were not attached to the application. The rejection letter from the Council also notes that the exemption application was dated 1 March 2010, but was only received on 9 July 2010. It was argued on behalf of the applicant that the March date was indicative of its earlier intention to apply for exemption prior to the arbitration award. However, no explanation was tendered why it was never submitted until July.

9. The Council's rejection letter also makes the point that applications for exemption cannot be made retrospectively. By implication, the applicant ought to have applied for exemption sometime around September 2008, once the wage schedule was applicable to it.

10. The original review application which the applicant purports to have launched under case number, JR1279 /2010 on or about 25 may 2010, was in fact an incomplete statement of claim. A proper application was served and filed only on 25 August 2010. The applicant has applied for condonation for the late filing of this application.

**The Arbitration Award**

11. The arbitrator had to determine two issues. The first was whether the applicant had complied with the agreement or not. The second was the order to be made in the event that it had not.

12. The arbitrator found the applicant conceded that it had not complied with the agreement and that it had received the compliance order. Even though the applicant now complains that the figure for underpayments might be inaccurate, because part of the workforce had not been included in the assessment by the Council, the applicant does not currently deny that it had not been complying with the agreement, even though it disputes it made this concession at the arbitration hearing, contrary to what the arbitrator recorded. It does not appear from the arbitration award that the accuracy of the amount claimed in the compliance order, which is the same as the amount due in consequence of the award, was disputed at the hearing and the applicant does not make such a claim. The applicant's non-compliance is also borne out by its application for exemption from the agreement on a retrospective basis.

13. In its answering affidavit the first respondent acknowledges that the applicant presented arguments to the arbitrator, but claims it presented no evidence to counter the allegation that it had been underpaying wages on a systematic basis. According to the evidence of Lubbe, the Labour Affairs manager of the first respondent for the Free State, the representations of the applicant in the arbitration to approximately 10 minutes to conclude and were insubstantial. According to his evidence the essence of the applicant’s complaint to the arbitrator concerned the high levels of some of its costs, and that other employers were also not complying with the agreement. This latter refrain is repeated by the applicant now.

14. The arbitrator found that the applicant had not complied with the agreement in respect of the underpayments which are the subject of the writ, and in respect of the regular submission of records and wage returns on a monthly basis.

**Merits of the Application**

15. The applicant seeks to avoid the consequences of the writ in order to pursue a review application. The court has a wide discretion when granting such relief, which must be exercised judicially.[1] In general, a court will grant a stay of execution if the underlying causa of the judgment debt is being disputed or no longer exists, or when an attempt is made to use for ulterior purposes the machinery relating to the levying of execution.[2]

*Urgency*

16. What is immediately apparent from the summary of facts above, is that the award which the applicant now seeks to avoid could hardly have come as a surprise. The debts arose between September 2008 and August 2009. The applicant does not claim it did not know what its obligations were under the agreement. It was served with a compliance order in February this year. It made no effort of any kind to comply, such as discussing less onerous repayment terms with the Council. When it came to the arbitration hearing the applicant put no evidence before the arbitrator disputing its liability for the amounts due, but only presented arguments why it should be excused from complying with the agreement. It did not attempt to make use of the exemption application process timeously, but only did so after the award was issued. Even then, the applicant did not provide crucial information such as its financial statements which would have shed some light on its ability to pay.

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[1] See ***Bartmann & Another t/a Khaya Ibhubesi v De Lange & Another* 30 *ILJ* 2701 (LC)** at 2703, [6] –[7], viz:

"*[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.*

*[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."* (footnotes omitted)

[2] ***Rham Equipment (Pty) Ltd v Lloyd & Others* (2008) 29 *ILJ* 3033 (LC)** at 3036, [10]

17. Accordingly, it is fair to say that the urgency in this matter comes about in circumstances in which the applicant did not make timeous use of the mechanisms available to it to avoid the order it now faces. When it did have an opportunity to engage on the issues, it did so in a half-hearted way. It made no attempt to seek alternative and less onerous terms of repayment from the Council, or engage with it about any discrepancies it had found in the Council's calculations. It also failed to dispute the amounts due, which were previously set out in the compliance order and presented at the arbitration, until after the award was issued. If it had a *bona fide* dispute with the Council over the amount claimed and had timeously pursued the other avenues available to it to try and resolve the dispute, but to no avail, and if it could demonstrate that there was a reasonable apprehension that it would suffer irreparable harm in direct consequence of the execution of the order, its claim for relief might rest on a firmer footing.

*The harm the applicant seeks to avoid*

18. Frequently, applications to stay of writ in this Court concern arbitration awards in favour of employees whose ability to repay the amount, if the award is ultimately set aside on review, is doubtful. Even then, the court does not necessarily grant the relief sought. Other factors such as whether the employer was dilatory in challenging the award or prosecuting the review application, or whether the review application appears to be a *bona fide* one, with some prospects of success, are typical considerations which the court will take into account in exercising its discretion.

19. In this case, no reliance is placed on a claim that the Council's might be unable to repay the amount, nor is there any suggestion that the harm the applicant will suffer is financial. It claims the harm it faces is that the factory has closed and it is about to forfeit orders "worth thousands of rands". The applicant does not provide any detail about any of the orders which are supposedly jeopardized. The respondent points out that the attachment of goods by the sheriff did not require the applicant to close the factory or cease production. Obviously though if a sale in execution proceeds then this might well occur. However, it must be said that the applicant still makes no effort to explain why a closure is unavoidable at this juncture

nor does it provide anything but the vaguest detail about the nature and extent of the jeopardized orders. The learned author, Prest, has noted that where the evidence in support of an application is 'extremely meagre' a court may decline to grant an interdict.[3]

20. The applicant does not say it is unable to tender payment of the amount, nor does it say it is unable to provide security for the debt as an alternative to a sale in execution as a means of satisfying the debt. No financial information was put before the court demonstrating that it really has no other way of satisfying the award, but to let a sale in execution proceed. On the evidence before me, I am not satisfied that the applicant has demonstrated that the threat of closure it claims to be facing is harm that necessarily follows from the existence of the writ of execution. Thus, the applicant has failed to establish it is facing harm that can only be prevented if the stay of the writ is not granted.

21. In passing, it is noted that the applicant also claims that neither its employees, nor the representative union support the Council's attempt to recover underpayments from it, but not a single supporting affidavit was filed in confirmation of these claims.

*The existence of alternative relief*

22. Clearly, in respect of the disputed portion of what is owed to the Council the applicant in principle has a remedy insofar as the arbitration award might be set aside and a fresh arbitration hearing convened. Whether it is likely to succeed in that application is a matter for consideration in weighing up the balance of convenience. As far as the possible closure of the factory is concerned, the applicant failed to demonstrate that the only means of avoiding this eventuality at this time was to obtain a stay of execution (see discussion above).

*The balance of convenience*

23. The balance of convenience seeks to evaluate the relative prejudice to the applicant if it is refused an interdict now but is ultimately successful on review, against the prejudice to the

[3] Prest C B, The Law and Practice of Interdicts, 2nd Impression, 2007, at 215.

respondent if the interdict is granted and it is ultimately successful. In this instance, because the applicant has not satisfactorily demonstrated that the harm it fears is one that it cannot avoid, the matter might end here.

24. However, if I am wrong in this respect and assume instead that the applicant has demonstrated that the harm it seeks to prevent will probably arise as it has no other means of avoiding it, then the balance of convenience falls to be considered. Where interim relief is sought pending the outcome of a review application, then the merits of the review should be taken into account in determining where the balance of convenience lies.[4]

25. In this instance, the applicant is seeking to set aside the award on a number of grounds. Some of the reasons relied on in its belated review application are merely iterations of general grounds on which an award may be set aside. In the absence of any factual specificity in the founding affidavit which would connect the stated review principles to the facts of the arbitration, these cannot be considered. However, the applicant does set out some specific claims, which will be considered.

26. The applicant complains firstly that the arbitrator appears not to have considered important issues such as CMT ('cut, make and trim') pricing, the high cost of transport and low productivity. It does not explain how this renders his decision reviewable. While these considerations may well play a part in determining an exemption application, the applicant does not indicate why they are material considerations in an arbitration to determine whether or not it complied with the agreement. Further, in paragraph 12 of the arbitrator's award, he records that "(t)he Respondent conceded that they were in breach of the agreement but requested me to consider their reason for failure to adhere." (sic) Even if the contested concession mentioned in this statement is ignored, it appears that the reasons mentioned by the arbitrator must refer to the very factors which the applicant says the arbitrator failed to

[4] ***Ladychin Investments (Pty) Ltd v South African National Roads Agency & Others*** **2001 (3) SA 344 (N)** at 355A/B and 357C/D – D, and ***Independent Municipal & Allied Workers Union v City of Tshwane Metropolitan Municipality*** **(2008) 28 *ILJ* 171 (LC)** at 182, [31]

consider. It seems he did in fact consider them, but did not view them as affecting his finding that the applicant had not complied with the agreement.

27. Secondly, the applicant disputes that it ever agreed it was not adhering to the collective agreement as recorded by the arbitrator. Lastly, it complains that the amounts set out in the award were based on estimates and no exact figures of wages nor employees were used in determining the award. These two grounds are considered together.

28. As mentioned above, the arbitrator had to determine firstly whether the applicant had complied with the agreement. The arbitrator records in his award, among other things, that: "(the) Respondent submitted no actual argument but stated that they are prepared to comply but needed time to gradually phase in the wages etc." [5] Although the applicant denies it conceded that it was non-compliant, it does not take issue with this recordal by the arbitrator, nor does it place any reliance on this statement in its review application. Its own argument is not that it paid the correct wages, but that the calculation of the underpayments was incorrect because it was based on estimates. The figures relied on by the arbitrator were those contained in the earlier compliance order on which Mr Lubbe testified. There is no evidence on the face of the award that the correctness of those figures was raised as an issue in the arbitration. Moreover, the applicant does not claim to have even attempted to do so. In any event, if the arbitrator's calculations were simply incorrect, that is not sufficient, without more, to set aside his award on review.

29. On the content of the award there is also nothing which suggests that the applicant defended itself on the basis that it was compliant. Quite the opposite appears to be the case: the applicant was advancing reasons why it could not pay the wages in the agreement. If it had complied with the agreement why would it have been making such representations? It does not allege it provided evidence proving its compliance which the arbitrator then ignored.

30. On the basis of the aforegoing it does not seem the applicant has a reasonable prospect of success in persuading a court on review that the arbitrator was wrong in concluding it had not

[5] At paragraph 11 of the award

complied with the agreement and the amounts it owed. When this is taken account the balance of convenience appears to favour the respondent, as the review application will simply delay the date of payment further.

*Possible third party claim on the attached assets*

31. Before concluding it must be mentioned that in its founding affidavit the applicant mentions that "….the large majority of machines and equipment belong to Mr Mohamed Zubair Hassim Rhaman (who is not a member or employee of the applicant)". The applicant further observes that Mr Rhaman would be entitled to file an application in the High Court concerning this equipment and has done so in another matter. Mr Rhaman's confirmatory affidavit was attached to the founding affidavit.

32. Clearly as the writ in question was issued by the Registrar of the Labour Court and the application to stay its operation is under consideration by this Court, anyone who has a legal interest in whether or not it should be stayed or not would be able to join these proceedings on that issue. Mr Rhaman, who is obviously aware of these proceedings, has chosen not to. Accordingly, I do not see how I can consider his possible claim which he has not pursued as a factor bearing on the evaluation of the balance of convenience as the applicant suggests.

**Conclusion**

33. In the circumstances, I am satisfied the applicant has failed to demonstrate that the urgency was not self-created, or that the prejudice it claimed to be facing would follow unavoidably because it could not satisfy the claim. Futhermore, it would seem the balance of convenience favours the respondent. Accordingly, the abovementioned order was issued.

**ROBERT LAGRANGE**

**JUDGE OF THE LABOUR COURT**

**Date of hearing: 26 August 2010**

**Date of order: 31 August 2010**

**Date of filing reasons: 1 September 2010**

**Appearances:**

**For the applicant:**

**Attorney: C M Dell**

**For the first respondent**

**Advocate: G Fourie**

**Attorney: Crawford & Associates**