

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J1996/10

In the matter between:

MALUTI-A-PHOFUNG MUNICIPALITY

Applicant

and

TSEO PAULUS MOKOMATSILI

First Respondent

THE SHERIFF: HARRISMITH

Second Respondent

THE COMMISSION FOR CONCILIATION, MEDIATION  
AND ARBITRATION: BLOEMFONTEIN

Third Respondent

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#### REASONS FOR ORDER MADE

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FRANCIS J

1. On 7 October 2010, I struck an urgent application from the roll and said to the applicant's counsel that I would provide reasons for the order that I made. These are my reasons.
2. The applicant is Maluti-A-Phofung Municipality, a municipality based in Phuthadijhaba. It brought an urgent application on 6 October 2010 which it set down for a hearing on 7 October 2010 at 14h00. The applicant's attorney was instructed to set the matter down for 7 October 2010 at 12h00. Counsel who appeared for the applicant informed this Court that the respondents were notified about the change in time of the application.
3. The applicant is seeking the following relief:
  - “1. *Declaring that this matter be heard as one of urgency in accordance with the provisions of Rule 8 of the Labour Court Rules and condoning the applicant's*

*departure from the ordinary provisions relating to time periods and service, to the extend that it may be necessary to do so;*

2. *Directing that the operation of the writ of execution issued out of this court on the 13th of May 2010 and the subsequent attachment made by the second respondent on the 28th of May 2010 be stayed, pending the outcome of the applicant's application for Rescission of the Arbitration award granted against it by the third respondent on 3rd December 2009 under case number FS4080-08;*
  3. *Interdicting and restraining the second respondent from removing the goods attached on the 28th of May 2010, pending the outcome of the applicant's application for Rescission of the Arbitration Award granted against it on the 3rd of December 2009 under case number FS4080-08;*
  4. *Directing that the costs of this application be costs in the Application for the Rescission of the Arbitration Award, save in the event of opposition, in which case costs are to be borne by such parties opposing this application.*
  5. *Further and/or alternative relief.*
4. Since this is an urgent application the application must comply with the provisions of rule 8 of the Rules of this Court. The affidavit in support of the application must contain the reasons for urgency and why urgent relief is necessary and the reasons why the requirements of the rules were not complied with.
  5. The first respondent, Tseo Paulus Mekomatsili is a former employee of the applicant. The second and third respondents are the Sheriff of the High Court for Harrismith and the Commission for Conciliation, Mediation and Arbitration (the CCMA) respectively. The

first respondent was dismissed by the applicant after a disciplinary hearing and had obtained a default award for compensation in an amount of R416 666.67 at the CCMA on 3 December 2009 under case number FS4080-08.

6. The applicant denies that it had received notice of the arbitration hearing and had it been made aware of the date it would have appeared at the arbitration and opposed it. The applicant was notified telephonically on the morning of the proceedings at the CCMA and immediately requested a postponement to make arrangements to oppose the arbitration proceedings and tendered all wasted costs occasioned by the postponement. The request for a postponement was refused and a default award was granted against it. The applicant submitted that it has a reasonable prospect of successfully obtaining a rescission of the CCMA award in that it did not receive notice of the proceedings and has a defence to the first respondent's claim and has reasonable prospects of success.
7. The applicant said in its founding affidavit that it intended to apply for the rescission of the default award but a warrant of execution has been issued and a sale in execution is imminent. The rescission application was only filed with the CCMA on 29 September 2010. The writ of execution was issued on 13 May 2010. The applicant said that the matter was urgent since the sale in execution is due to be held on 8 October 2010. The notice of sale of execution is dated 15 September 2010 stating that the sale is taking place on 8 October 2010. The applicant said that the removal of the items attached would have the effect of severely hindering its business operations. The severe truncation of ordinary time periods and service provisions has been made necessary by the extremely tight time constraints placed upon the applicant. As such the application has been prepared in haste

and will be issued and served on the respondents as soon as possible. The relief sought is only interim in nature pending the outcome of the rescission application. The applicant has a very realistic prospect of success in the rescission application and the matter can proceed to arbitration in the CCMA in the ordinary course with both parties being present and with all of the relevant facts placed before the presiding commissioner. The applicant said that all the parties were well aware of the applicant's position about the facts as set out in the affidavit, as this position has been maintained by the applicant from the outset in early 2008 and is not simply a tactic to delay the satisfaction of the first respondent's claim. It is a municipality and can satisfy the award made in favour of the respondent by the CCMA in due course. The first respondent will suffer no prejudice as a result of the granting of the relief sought. The potential prejudice to the applicant if the relief sought is not granted is extreme as has been set out in its affidavit. From a practical point of view, and an effort to limit legal costs and the unnecessary burdening of the courts with subsequent actions, applications and potential damages claims, that the relief sought should be granted.

8. This Court had raised with Mr Sadler who appeared for the applicant whether the applicant has made out a proper case for urgency. He informed this Court that on the facts before this Court no such a case was made but submitted that the Court should despite this still consider the application since there are good prospects of success. He informed the Court that the applicant had received the notice of sale in execution dated 15 September 2010 but did not know when it was received. The applicant's attorney only found out about it yesterday after he was informed by the first respondent's attorney about it.

9. The applicant has only filed an application to rescind the default award on 29 September 2010. In the rescission application it is stated that a warrant of execution was issued and an attachment of the applicant's goods was duly made. It is not stated when the attachment took place. The notice of sale in execution is dated July 2010 stating that the sale was going to take place on 27 August 2010. The applicant launched an urgent application out of this Court seeking *inter alia* an order staying the sale in execution pending the outcome of the rescission application of the default award. The urgent application was not argued and upon receipt of a copy of the application the first respondent's attorney agreed not to proceed with the sale in execution pending the outcome of the rescission application.
10. There is no explanation given why the application for rescission was filed on 29 September 2010 and not soon after the first urgent application. It is unclear what had happened to the first urgent application. A second sale of execution notice was issued and the sale is scheduled to take place on 8 October 2010. The applicant has not stated in its founding affidavit when it became aware of the second sale of execution notice. There is no explanation tendered in the founding affidavit about what had happened between the period 23 August 2010 until this application was launched. The applicant was at all times aware that a warrant of execution was issued. Its goods were attached on 28 May 2010 and no steps were taken to bring this application after the attachment.
11. The applicant has been extremely lax in these proceedings. The urgency that might exist was self created. The notice of motion in the urgent application is also defective in

that it does not inform the respondents that they have the right to oppose the application and if so by when.

12. It was for this reason that I made the order referred to in paragraph 1 above.

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FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : C SADLER INSTRUCTED BY SUNIL NARIAN INC

FOR RESPONDENTS : NO APPEARANCE

DATE OF HEARING: 7 OCTOBER 2010

DATE OF ORDER : 7 OCTOBER 2010

DATE OF REASONS : 8 OCTOBER 2010