IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN CAPE TOWN)

CASE NUMBER: C647/2010

DATE: 12 AUGUST 2010

In the matter between:

CELLUCITY (PTY) LIMITED Applicant

and

CWU ON BEHALF OF MS E PETERS 1st Respondent

THE REGISTRAR OF THE LABOUR COURT 2nd Respondent

THE SHERIFF OF THE HIGH COURT 3rd Respondent

J U D G M E N T

STEENKAMP, J:

This is the return day of a *rule nisi*, which was granted by agreement following an urgent application on 29 July 2010. The application is one to stay a writ of execution issued by the second respondent, the Registrar of the Labour Court, and the warrant of execution effected by the Sheriff of the High Court, the third respondent, on 12 July and 21 July 2010 respectively.

The background to this application is that an arbitration award was made in favour of the individual first respondent, Ms E Peters, who is assisted in this matter by her trade union, the Communications Workers Union, on 4 September 2009 under case number WECT 9584-09. On 21 October 2009, the applicant filed a review application in terms of section 145 of the Labour Relations Act, read with Rule 7A. The notice of motion was dated 8 October 2009 and was filed on 21 October 2009, together with a supporting affidavit by one Bridget Fonseca. (Her surname was misspelt as Fonesca in the opening paragraph of that affidavit). She is the applicant's human resources manager, responsible for industrial relations matters. Ms Fonseca also deposed to the founding affidavit in this urgent application.

Two significant aspects appear from that affidavit forming part of this application before me today. Firstly, when the application was launched, the so-called affidavit was unsigned. Of course it did not constitute an affidavit properly speaking at that stage. A faxed signed copy of an affidavit without a case number was only handed up to Court this morning and given to Mr Jacobs, the trade union official appearing for Ms Peters, at the same time, ie at the commencement of these proceedings. No original affidavit has yet been filed. What is also significant is that Mr Marais of Snyman Attorneys, who appears

for the applicant, stated from the bar that the affidavit was "compiled" by his colleague, Mr Snyman.

In paragraph 17 of that affidavit it is stated that the reason why the applicant has not prosecuted the review application since October last year is that the CCMA only filed the record of proceedings this year (my underlining). For the record I point out that it is today 12 August 2010. It is also stated in that paragraph of the affidavit that the arbitration record of the proceedings contained on one compact disc is "currently" in the process of transcription and should be completed within the next two weeks. What is not stated in the affidavit is when the applicant or its attorneys gave that compact disc to the transcribers in order to be transcribed. Neither could Mr Marais assist me from the bar, despite the Court having stood down for him to attempt to contact Mr Snyman, which he was not able to do. He could also not tell me who the transcribers are or when the CD was given to them.

What is worrying is that this evidence on affidavit is not borne out by the court file in the review application, which is case number C733/2009. What appears from the review application is that the CCMA in fact filed the record on 30 October 2009. The CCMA issued a notice of filing in compliance with Rule 7A(3) read with Rule 7A(2)(b) on 30 October 2009 and sent the

hard copy of the record, comprising all the documents that were dealt with at arbitration, to Snyman Attorneys by registered mail on that same day.

Also on the same day, i.e. 30 October 2009, the registrar of this court sent a fax to Snyman Attorneys containing a notice in terms of Rule 7A(5), noting that in this review one CD and the contents of the CCMA's file, had been filed with the court. It also notified Snyman Attorneys that the applicant must uplift the CD for transcription within 30 court days. Despite this, the applicant and its attorneys did nothing to comply with Rule 7A(6) and Rule 7A(8). The next significant moment is on 18 May 2010 when the registrar of this court again sent a fax to Snyman Attorneys, referring to this review application, *Cellucity v CCMA & Others,* and stating:

> "The above matter refers. Please note that the applicant must file his application in terms of Rule 7A(6) and Rule 7A(8) within five days of receiving this notice. In order for the latter to proceed, the above has to be complied with."

Once again the applicant and its attorneys did nothing. It appears that it was only when the sheriff arrived at the applicant's premises to attach its goods on 21 July 2010, that

the applicant and its attorneys were prompted into action. However, they still waited for a week before serving an urgent application, together with an unsigned document purporting to be an affidavit, on the first applicant's trade union, CWU, on 28 July 2010, giving them notice to appear in court the next day, on 29 July 2010. It is in those circumstances on 29 July 2010 that the CWU agreed to a *rule nisi* being issued with a return day in two weeks' time in order to give it an opportunity to oppose. The matter thus came before me today as an opposed matter.

With regard to urgency, the applicant has not made out a case on its papers why the matter is urgent, other than a bald statement to say that because the goods were attached on 21 July, the matter is "therefore clearly urgent". The relief sought is interim in nature, given that it is relief pending the finalisation of the review application, although this is the return day of a *rule nisi*.

Mr Jacobs, the union official, submitted that the applicant has not established a *prima facie* right, much less a clear right. I agree with him. There is no automatic stay of an arbitration award pending an application for review. What is significant in this case is that the applicant and its attorneys have dragged their heels for the last 11 months doing nothing to prosecute

the review that it had launched timeously.

Turning to any harm caused by an execution, although it cannot be gainsaid that the applicant will be caused some harm, it is not irreparable. If they do prosecute the review application and if they are successful, they can take steps to recover the money owing to Ms Peters at this stage, which amounts to three and a half months' salary.

The balance of convenience clearly favours Ms Peters. She is an individual who has been unemployed for the last 11 months, following what, in terms of the arbitration award forming the subject of the review application, was an unfair dismissal.

I do not express any view on the prospects of the review application at this stage, but the award that stands until and unless it is reviewed, is at this stage cold comfort for Ms Peters, who was awarded the equivalent of three and a half months' salary as compensation, and it is now 11 months later. As I have pointed out, the applicant and its attorneys have been far from diligent in showing any inclination to prosecute the review application. There is no guarantee that if the stay of execution is granted, they will become more industrious.

With regard to costs, the first respondent is represented by her trade union and not by legal representatives. There are, therefore, no legal costs incurred, but the trade union official has incurred some costs, including travel costs. I must say as an aside that I seriously considered ordering costs *de bonis propriis* in this matter, given that Mr Marais has stated that the affidavit attached to this application was "compiled" by his firm of attorneys, specifically Mr Snyman. It appears, on the face of it, that that affidavit contains an untruthful statement that is intended to mislead this Court. However, the affidavit was still deposed to by Ms Fonseca, albeit belatedly, and I will do no more than to ask the registrar to bring this judgment to the attention of the Law Society of the Northern Provinces.

I make the following order:

1. The *rule nisi* issued on 29 July 2010 is discharged.

2. The applicant is ordered to pay the first respondent's reasonable costs, including the union representative's travel costs occasioned by this application.

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STEENKAMP, J

Date of hearing and judgment:	12 August 2010
For the applicant:	PD Marais
	of Snyman attorneys
For the first respondent:	C Jacobs of CWU
	(trade union official)