REPUBLIC OF SOUTH AFRICA

Reportable
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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 1015/12

In the matter between:

CAPE CLOTHING ASSOCIATION **Applicant**

and

C DE KOCK N.O. **First Respondent**

THE NATIONAL BARGAINING COUNCIL FOR THE CLOTHING MANUFACTURING INDUSTRY (CAPE) **Second Respondent**

SACTWU **Third Respondent**

Heard: **13 December 2012**
Delivered: **14 December 2012**
Summary: Urgent application to stay arbitration award pending review.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant seeks an urgent interim order to stay the enforcement of an arbitration award pending its review. What makes this application unique is that it is not an application to stay the execution of an award in circumstances where one or more employees have been dismissed, have been successful at arbitration, and where the employer seeks to have a writ of execution stayed pending review. In this case, the arbitrator (the first respondent) has held that the applicant's members must pay their employees, the members of the Southern African Clothing and Textile Workers' Union (SACTWU, the third respondent) two extra days' wages pursuant to the interpretation of a collective agreement. The applicant seeks to have the enforcement of that award stayed pending a review of the award.

Background facts

[2] This matter has had a long history, summarised in a previous judgement of this court.[1] It pertains to the payment regime that should apply to SACTWU members when public holidays during the annual leave period fall on a Saturday or a Sunday. The parties have attempted to achieve parity between the Cape and KwaZulu-Natal regions. In the 2010/2011 substantive agreement, it was agreed that the Western Cape would pay one additional day's paid leave for 27 December 2010. Clause 5 of the 2011/2012 substantive agreement reads as follows:

> "WESTERN CAPE PUBLIC HOLIDAYS
>
> 5.1 The Western Cape collective agreement to be amended to reflect the wording of the KwaZulu-Natal Metro agreement wording on payment of public holidays falling during the shutdown of the industry. This parity dispensation shall become binding with effect from the 2011/2012 annual leave period.
>
> 5.2 Consequent to the implementation of the provisions of sub-clause 5.1 above, Western Cape employees shall be paid an additional two (two) days' paid leave for the 2011/2012 annual leave period."

[1] *Cape Clothing Association v SACTWU & others* [2012] 11 BLLR 1145 (LC).

[3] The parties differ over the interpretation of clause 5.2. A year ago, in December 2011, SACTWU declared a dispute in terms of section 64 (4) of the LRA[2] and called its members out on strike. The applicant (the CCA) successfully interdicted the strike on the basis that the dispute between the parties was one concerning the interpretation and application of clause 5 of the collective agreement and that, in terms of section 24 of the LRA, the dispute had to be referred to arbitration. A rule *nisi* granted by this court on 19 December 2011 was confirmed on 12 June 2012[3] and consequently the parties agreed to an expedited arbitration in terms of section 24 of the LRA.

[4] The terms of reference provided for the following:

4.1 The arbitrator had to interpret clause 5 of the agreement.

4.2 The arbitrator had to decide whether clause 5.2 of the agreement correctly set out the common intention of the parties.

4.3 The arbitrator had to decide whether the parties suffered under the mistaken belief that the main agreement did not require employers to pay employees for public holidays that fall on a Sunday during annual leave.

4.4 The arbitrator had to determine whether he had the power to rectify the substantive agreement, and if so, whether it should be rectified.

4.5 The parties agreed that oral evidence could be led.

4.6 "Should the arbitrator's ruling have the effect that the members of the applicant have to pay additional amount of holiday pay to the members of the respondent, such payment will be effected in the last pay run of December 2012."

[5] Both parties were legally represented. Only the CCA led oral evidence, that of its Executive Director, Mr Johann Baard.

[2] Labour Relations Act 66 of 1995.

[3] *Cape Clothing Association v SACTWU & others* [2012] 11 BLLR 1145 (LC).

[6] The arbitrator handed down his award on 10 December 2012. In essence, he found that:

6.1 The parol evidence rule applied[4] and he must therefore attempt to interpret the agreement on its plain wording.

6.2 Only if there was an ambiguity, he would hear sufficient relevant evidence as to determine the true intention of the parties.

6.3 In his view, clause 5.2 of the agreement was not ambiguous.

6.4 Given his view in this regard, he was of the view that "the evidence presented by Mr Baard as to the reason why he signed the agreement with clause 5.2 in fact should not have been led in the first place based on the parol evidence rule and I are such will not place much reliance on his evidence so presented."

6.5 Based on his conclusion that the CCA was obliged to pay SACTWU's members and additional two days' paid leave for the 2011/2012 annual leave period, it was not necessary for him to pronounce on his powers as an arbitrator to rectify collective agreements or to rectify the agreement "in any way whatsoever". He added, though:

> "I can however state that I am not convinced that an arbitrator has the powers to rectify collective agreements to the extent that the respondent [CCA] is seeking for it to be done. Such power of rectification lies with an appropriate forum such as the civil and or the Labour Courts and not with arbitrators during an arbitration process regarding the interpretation and or application of a collective agreement."

[7] The arbitrator ordered the CCA's members to pay SACTWU's members the additional two days' paid leave by no later than 15 December 2012.

[8] The CCA launched this application on 12 December 2012 and it was heard the following day. Given the arbitrator's ruling, the Court had to hand down its judgement within one day.

[4] With reference to *FAWU v CCMA & others* (2007) 28 *ILJ* 382 (LC).

Evaluation / Analysis

[9] In considering this application, I shall apply the principles generally applicable to applications to stay warrants of execution, even though no such warrant has yet been issued. It would seem to me that the principles that would apply to stay the enforcement of an award in terms of section 145(3) of the LRA should be the same. Those principles were usefully summarised by Todd AJ in *Robor (Pty) Ltd (Tube Division) v Joubert & ors*[5]*:*

> "[10] The discretion to stay execution must be exercised judicially, but generally speaking a court will grant a stay of execution where real and substantial justice requires it or, put differently, where injustice would otherwise be done.
>
> [11] 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, and that execution is being sought for improper reasons. But these are not the only circumstances in which the court will exercise the power
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> [12] In determining whether or not to exercise the discretion, the High Court has "borrowed" from the requirements for the granting of interim interdicts. 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 were not suspended.
>
> [13] 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 judgment debt, whether arising from an order of this Court or an arbitration award made in the CCMA or a bargaining council, and enforceable by reason of the provisions of section 143(1) of the LRA.

[5] [2009] 8 BLLR 785 (LC) paras [10] – [16] (footnotes omitted). See also *Gois t/a Shakespeare's Pub v Van Zyl & ors* (2003) 24 *ILJ* 2302 (LC); *Rham Equipment (Pty) Ltd v Lloyd & ors* (2008) 29 *ILJ* 3033 (LC) and *Bartmann & ano t/a Khaya Ibubhesi v De Lange & ano* (2009) 30 *ILJ* 2701 (LC) paras [6] – [7].

[14] As to the factors that weigh in considering the interests of justice, the applicant points out that an amount payable under an arbitration award bears interest at the rate determined in terms of the Prescribed Rate of Interest Act 55 of 1975. This protects the interests of the judgment creditor (typically the employee in whose favour an award has been made) in the event that the challenge to the underlying cause of action is unsuccessful.

[15] By contrast, if the challenge to the underlying cause of action is ultimately successful, and the amount of the debt has already been paid prior to finalisation of that challenge, the judgment debtor (typically the employer) may find it difficult to secure repayment. This may be likely to be the case where the employee is relatively low paid and has suffered financial hardship in consequence of having been dismissed. This Court is, then, regularly asked to assume that an employee in these circumstances will have difficulty repaying any amount already paid if the challenge to the underlying cause of action later succeeds.

[16] There is no closed list of factors that may be relevant to the question whether the interests of justice require a stay of execution. But there are a number of other considerations, in addition to those raised by the applicant, that are frequently of importance in applications of this nature. These include:

16.1 Whether the attack on the underlying cause of action was brought in time, and whether its prospects of success are strong. This Court's roll is regularly burdened with a large number of applications of this kind, brought on an urgent basis in the face of steps taken to execute an award, when the attack on the underlying award was brought out of time, or when the attack clearly has little or no prospects of success. The interests of justice will seldom warrant a stay in these circumstances.

16.2 The interest of all parties in securing finality. The dispute resolution system established by the Labour Relations Act provides parties with 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 of most disputes, and 90 days thereafter for a referral to adjudication – are considerably shorter than ordinary prescription periods. Speedy dispute resolution is a core 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]

16.3 The cost to all parties of a delay in finality, and the cost to all parties of instituting or opposing further proceedings, whether in this Court or elsewhere, to attack the underlying cause of action or to stay execution pending any such attack. Many applicants come to this Court by way of urgent application, with counsel and attorneys briefed, in circumstances where the amount of the judgment debt is likely to be 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.

16.4 The risk of injustice being done to the less powerful party to the dispute. 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."

[10] Before considering those principles, I need to consider a number of preliminary points raised by Mr *Whyte.*

Application premature?

[11] Mr *Whyte* has argued that the application is premature because the arbitration award has not yet been certified by the director of the CCMA in terms of section 143(3) of the LRA, nor has SACTWU or the Bargaining Council (the second respondent) sought to obtain a writ of execution from the registrar of this court. The submission is that, until such time as a warrant has been issued, the applicant (the CCA) is not entitled to the relief sought.

[12] Given the view that I have taken on the merits of the application, I need not consider this argument. That is best left for another court to consider at another time in circumstances of less urgency. I doubt, though, that it has merit. Section 145(3) provides simply:

> "The Labour Court may stay the enforcement of the award pending its decision" [on review].

[13] It seems unlikely that the legislature would have intended to read in the words "[the award] that has been certified and in respect of which a warrant of execution has been issued". However, I do not intend to premise this judgement on that point.

Urgency

[14] SACTWU also argues that the matter is not urgent, as the CCA has advised its members not to comply with the award on the basis that it is (on its version) "fatally flawed".

[15] As Mr *Oosthuizen* pointed out, that argument is based on a misinterpretation of an email that the CCA sent to its members on 11 December 2012, the day after the award was handed down. That email – signed by Baard -- states:

> "Having consulted with our legal team, they are very confident that the award is fatally flawed in law. The strong recommendation is that the CCA file for the award to be stayed pending a review application…. This process is now underway and we are filing an urgent application in the Labour Court to that effect. Until further notice from myself, there is no legal obligation on you to pay your employees an extra two days leave pay."

[16] It is quite clear, and Mr Oosthuizen confirmed from the bar, that the legal advice to the CCA's members was that they need not make payment pending this application. He assured the court that his client had no intention to disregard the order of this court, should it not be in its favour.

[17] In these circumstances, the application is clearly urgent. The date of 15 December agreed upon by the parties and confirmed by the arbitrator is on a Saturday. That means that, should the application for a stay not be granted, the CCA's members have to pay their employees the extra two days' pay tomorrow, Friday, 14 December 2012.

Waiver

[18] The agreed terms of reference provide that:

> "Should the arbitrator's ruling have the effect that the members of the [CCA] have to pay additional amount of holiday pay to the members of [SACTWU], such payment will be effected in the last pay run of December 2012."

[19] It is common cause that the last pay run of December 2012 is on 14 or 15 December 2012. SACTWU argues that, having agreed to these terms of reference, the CCA had waived its right to challenge it.

[20] This argument cannot be sustained. As Innes CJ explained as long ago as 1924 in *Laws v Rutherford*[6], in order to establish waiver, the party attempting to rely on it must show that the other party, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it.

[21] In the present case, by agreeing to the terms of reference, the CCA did not decide to abandon its right to review the arbitration award, whether expressly or by its conduct. The fact that parties agreed to a final and binding arbitration award does not remove the right to review that award for legitimate and lawful reasons, unless the parties expressly say so.

[22] I now turn to the merits, applying the principles summarised in *Robor.*[7]

Irreparable harm

[23] The most difficult hurdle that the CCA has to overcome, in my view, is to show that it will suffer irreparable harm if the application is not granted.

[24] As the court pointed out in *Robor*[8]*:*

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[6] 1924 AD 261 at 263.

[7] *Supra.*

[8] *Supra* para [15].

> "[I]f the challenge to the underlying cause of action is ultimately successful, and the amount of the debt has already been paid prior to finalisation of that challenge, the judgement debtor (typically the employer) may find it difficult to secure repayment. This may be likely to be the case where the employee is relatively low paid and has suffered financial hardship in consequence of having been dismissed. This Court is, then, regularly asked to assume that an employee in these circumstances will have difficulty repaying any amount already paid if the challenge to the underlying cause of action later succeeds."

[25] The case before me, as I stated in the introductory remarks, is an unusual one. The workers have not been dismissed. They are still in the employ of the CCA's members. Should the CCA's members pay the workers the two days' wages in accordance with the arbitration award, and should the CCA be successful on review, its members will be able to deduct those amounts from their employees' wages. They will be within their rights to do so in terms of section 34(1)(b) of the Basic Conditions of Employment Act.[9]

[26] Any harm that the employers will suffer at this stage by giving effect to the arbitration award is not irreparable. Even if the CCA were to be successful on review, its members are in the unusual position that they can recover the money that they have paid to the employees without much further ado. It is obvious that the CCA and its members therefore also have an alternative remedy in due course, should the application for review be successful.

[27] It is also in this context that the balance of convenience needs to be considered.

Balance of convenience

[28] The CCA's members will suffer some inconvenience by giving effect to the arbitration award now, pending the application for review. That has to be weighed up against the prejudice occasioned by the employees.

[9] Act 75 of 1997.

[29] Subsequent to its intended strike action having been interdicted by this Court, SACTWU agreed with the CCA to refer the dispute to expedited arbitration. The parties agreed that the arbitrator's award will be final and binding (subject to my comments about waiver above). A year later, and having given effect to the judgement of this Court, the parties are back in court. The workers have an expectation that the arbitration award will be given effect to and that they will pocket some extra wages, however paltry, in these days before Christmas. The amounts in question are not large – it amounts to between R278,80 and R314, 40 per employee. The CCA says that the financial implications for its members are in the region of R 2 million – but that amount has to be divided amongst some 250 employers and approximately 20 000 employees.

[30] The CCA also submitted that, should payment be made now and should its members try to recover those payments after a successful review application, SACTWU's members may embark on wildcat strike action. It has laid no basis for this submission. When its intended strike action – pursuant to SACTWU having followed the prescribed procedures set out in s 64 of the LRA – was interdicted by this court, SACTWU and its members complied with the court order and referred the dispute to arbitration. That is why the CCA has come back to Court on an urgent basis after the arbitration award was not in its favour. There is no basis to assume that SACTWU or its members will embark on unprotected strike action.

[31] At best for the CCA's argument in this regard, there were some rumours at Pep Clothing that workers would embark on strike action before the shutdown if they were <u>not</u> paid the two days' wages in terms of the arbitration award. Pep accordingly decided to pay the amounts, while reserving its rights to recover them if the review application were to be successful. That is exactly the remedy that is available to the other members of the CCA.

[32] The prejudice suffered by the CCA and its members, should the application be granted, is outweighed by the prejudice suffered by the workers. The balance of convenience favours SACTWU and its members.

[33] I consider the applicant's prospects of success in the review application to be a neutral factor. I do not consider it necessary to express a view on its prospects of success, other than to say that the underlying cause of action is obviously under attack, and the stay is not being sought for improper reasons; but that does not sufficiently tilt the scales in the applicant's favour in weighing up the balance of convenience.

Interests of justice

[34] It remains to consider the interests of justice generally, including the interest of all parties in securing finality.

[35] This matter has dragged on for some time. The intention was that a final and binding arbitration award should bring the dispute to an end. It would appear to me to be in the interest of justice, and in conformity with the objects of the Labour Relations Act, including the expeditious resolution of labour disputes, to give effect to the arbitration award at this stage.

[36] I also debated with counsel whether an expedited review would assist their clients' members. They agreed that, regardless of the outcome of this application, it would be in everyone's interests to expedite the review process. I agree, given the large number of employers and employees affected and their interest in securing finality. I have therefore requested the parties' legal representatives to prepare a proposed expedited timetable and, with the assistance of the Judge President and the Registrar, the Court will attempt to have the review application set down for hearing within two months.

<u>Conclusion and costs</u>

[37] In these circumstances, it is not in the interests of justice to grant the application. With regard to costs, I take into account that there is an ongoing relationship and an ongoing dispute between the CCA and SACTWU. I do not consider a costs order to be appropriate in the circumstances.

Order

The application is dismissed, with no order as to costs.

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Steenkamp J

APPEARANCES

APPLICANT:	A C Oosthuizen SC
	Instructed by Norton Rose South Africa.
THIRD RESPONDENT:	J Whyte of Cheadle Thompson & Haysom.