



THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not reportable

CASE NO: PR 557/17

In the matter between:

OR TAMBO DISTRICT MUNICIPALITY

Applicant

and

SAMWU obo MZAMANE & 9 OTHERS
DEPUTY SHERIFF, MTHATHA

First Respondent
Second Respondent

Application heard: 20 March 2018

Judgment delivered: 25 April 2018

JUDGMENT

VAN NIEKERK J

- [1] This an application to stay the execution of a writ pending the outcome of a review application. The arbitration award sought to be reviewed was issued on 23 July 2015, in favour of the first respondent in the present proceedings. The review application was filed under case number PR 110/15 on 2 September 2015.
- [2] The first respondent has taken steps to enforce the award, which led ultimately to the present proceedings. In March 2017, the CCMA certified the award at the request of the first respondent, and the first respondent thereafter instructed the sheriff to execute. The applicant then instituted urgent proceedings in the High Court to stay the execution of the writ. Those proceedings were withdrawn in November 2017, when the applicant tendered the first respondent's wasted costs, including the costs of two counsel.
- [3] On 16 November 2017, the first respondent addressed a letter to the applicant noting the withdrawal of the application in the High Court, and demanding satisfaction of the award, failing which it would instruct the sheriff to execute by 20 November 2017. There was no constructive response to the letter and the first respondent thereafter proceeded to take steps to enforce the award.
- [4] On 23 November 2017, the applicant filed an urgent application to stay the writ pending the finalisation of the review application and any subsequent appeal processes. Moshoana J issued an interim order interdicting the execution of the award and calling on the first respondent to show cause on 22 February 2018, why a final order in those and other ancillary terms should not be granted.
- [5] On 22 February 2018, the matter came before Gush J. He made the following order:
1. The application is postponed to 20 March 2018 and the rule accordingly extended and furthermore amended in the following terms, namely that the respondent show cause why an order should not be made in the following terms:

- 1.1 that the enforcement and/or certification and/or execution of the award under case number ECD031426 dated 23 July 2015 is hereby stayed pending the finalisation of the urgent application to stay;
 - 1.2 that the second respondent is ordered to return to the applicant any and all property of the applicant that it may have removed from the position of the applicant pursuant to the execution of the award; and
 - 1.3 the applicant is absolved from paying security in terms of section 145 (7) and 145 (8) of the Labour Relations Act 66 of 1995, as amended (LRA) relating to the review application under case number PR 110/15.
2. Paragraph 1.1 operates as an interim interdict pending the return date on 20 March 2018.
 3. The costs of this application stand over for determination of the finalisation of this application.
 4. The registrar is to ensure that the review application brought under case number PR 110/15 is placed before the court when the application to stay is heard.
 5. The applicant is to file its replying affidavit, if any, by 9 March 2018.
 6. Costs of today are reserved.

[6] The first respondent seeks to have the rule *nisi* issued by Moshoana J as varied by Gush J discharged, with costs. It does so primarily on the basis that the review application has lapsed, and/or that the applicant has failed to prosecute the review within a reasonable time and with due diligence. In other words, the respondent submits that there is no longer a *lis* between the parties and that the applicant seeks to stay the enforcement of the award pending the finalisation of a non-existent review application.

[7] As I have indicated above, the present application was lodged in November 2017, more than two years after the filing of the review application. In support of the present application, the applicant states no more than that the review application is pending. The applicant makes no reference to nor proffers any

explanation for the delay in prosecuting the review, which given the relevant statutory and other measures relating to the prosecution of review applications, ought properly to have been disclosed. The lack of candour in the founding affidavit is a matter of concern, if not a self-standing reason for exercising a discretion against the enforcement of the arbitration award.

- [8] The undisputed chronology of events is the following. After the filing of the review application on 2 September 2015, in February 2016, the registrar advised the parties that the record of the proceedings under review was available. On 3 March 2015, the applicant's representatives delivered a communication to the registrar recording that while they were in possession of the bargaining council record, there was no record of the arbitration proceedings. A request was made that the matter be placed before the Judge President, as contemplated by paragraph 11.2.4 of the practice manual.
- [9] On 22 March 2016, the court issued a directive requiring the applicant to take steps to secure the record of proceedings under review by making further enquiries from the second respondent, securing the third respondent's handwritten notes, and reconstructing the record from any other available source. That directive was clearly issued with reference to the contents of the letter dated 3 March 2016.
- [10] On 8 December 2016, almost nine months later, the first respondent's representatives wrote to the applicant complaining about the fact that the prosecution of the review application was being unreasonably delayed. There was no response to this letter. It was in the circumstances that the first respondent sought to have the award certified as contemplated by s 143 of the LRA. When the certified award was received on 20 March 2017, instructions were issued to the sheriff to execute on the award.
- [11] The applicant obtained an interim order in the Mthatha High Court on 30 March 2017, staying the execution of the award, and without the first respondent having been cited in the proceedings. (The respondents cited in the High Court application were the first respondent's attorneys and the deputy sheriff of the

High Court, Mthatha.) The High Court application was duly opposed and ultimately withdrawn on 15 November 2017 with a tender of the waste costs, including the costs of two counsel.

- [12] On 16 November 2017, the day after the withdrawal of the High Court application, the first respondent's attorneys delivered a letter to the applicant regarding the status of the matter. The letter records, amongst other things, a demand for satisfaction of the award and the intention to execute the award should the matter not be resolved.
- [13] The first respondent submits that there is no review application pending before this court, and that the review application has lapsed, or has been deemed to have been withdrawn, or has been archived for the reasons that the applicant has failed to deliver a record within the 60-day period envisaged by clause 11.2.3 of the practice manual, and that the applicant has failed to ensure that all the necessary papers have been filed in the review application as required by clause 11.2.7 of the practice manual. Further, the first respondent submits that there has been no application for a date for the hearing of the review application as required by s 145 (5) of the LRA. In any event, and leaving aside the provisions of the LRA and the practice manual, the first respondent submits that the applicant has failed to prosecute the review application with a reasonable degree of diligence and notes that on the applicant's own version, it has done nothing to prosecute the review application for a period of some two years from 22 March 2016 when the applicant was directed in terms of the directive to take steps to reconstruct the record.
- [14] The explanation for the failure to take steps to pursue the review application is to be found, by and large, in the replying affidavit, deposed to by the applicant's attorney of record. I will accept, for present purposes, the deponent's authority to depose to the affidavit and deal with the merits despite the fact that the applicant has made out its case in reply. By 12 February 2016, and in the absence of any notification from the registrar, a further letter was sent indicating that the applicant was still not in possession of the notification and enquiring as to when

the record might be collected. During February 2016, the notice of filing by the bargaining council, dated 13 October 2015, was received by the applicant. On perusal of the record, the applicant observed that what had been provided by the bargaining council comprised, apart from the request for arbitration and the award itself, only correspondence generated by the council. The deponent then states that *'Having pursued the filed 'record', it was obvious to me that there is no appropriate record to be filed for the purposes of the review application.'*

- [15] The deponent goes on to state that the issue for determination in the review application is whether the commissioner was entitled to determine the dispute on the merits, when all that he had been required to do was to issue a ruling on the preliminary point raised by the applicant, a point to the effect that the bargaining council lacked jurisdiction to hear the dispute. Given that the record as filed by the bargaining council would not have assisted the review court to decide this point, there was accordingly no 'record' then available to be filed in accordance with the requirements of clause 11.2.6 of the practice manual.
- [16] The deponent avers that it was in the light of the above that on 3 March 2016, he sent a letter to the registrar requesting her to place the file before the Judge President for a direction on the further conduct of the matter. On 29 March 2016, the applicant received the directive from the registrar. The deponent records that the directive was not only sent to the applicant's attorneys, it was also sent to the office of the first respondent's attorney.
- [17] Further delay in the matter is explained by what is referred to as a change of management in the applicant with the appointment of a new municipal manager, and uncertainty as to whether the applicant's attorney would continue to handle the applicant's legal matters. The deponent explains that the situation was compounded by the fact that they were experiencing great difficulty in making contact with the new management. He candidly admits that while this was not entirely satisfactory, the reality of the situation was that it resulted in the matter not being pursued with the necessary vigour. Nevertheless, on 7 April 2017 the deponent says that he sent a letter to the bargaining council enquiring as to the

commissioner's hand written notes in order to establish whether it was feasible to reconstruct the record of the arbitration proceedings. Subsequent to the letter, there was telephonic follow-up with the bargaining council which advised ultimately that it was not in receipt of any hand written notes.

- [18] The deponent states that it became apparent to him that they were no prospects of reconstructing the record and on 22 December 2017, he addressed a letter to the court requesting that the matter be set down for hearing. In summary, the explanation proffered by the contention that the review application is lapsed because the record was not filed within 60 days has no merit since there was, in fact, no available record to be filed. Insofar as the applicant is alleged to have failed to prosecute the review application with due diligence, the applicant points to the fact that much of the delay was occasioned by the unavailability of the record and to the extent that the applicant may be criticised for not having acted promptly with regard to the reconstruction of the record, that criticism can be levelled against the first respondent's attorneys for having taken no steps to reconstruct the record. The applicant contends that a serious injustice will be done if the court were to refuse to stay the enforcement of the award particularly in circumstances where the very amount of compensation awarded is the basis of the gross misconduct alleged by the applicant in the review application. In particular, the applicant contends that there was no agreed statement of common cause facts which would have enabled the commissioner to begin to quantify the compensation amounts. Effectively, so the submission goes, if the court were to allow the award to be enforced, the individual respondents would benefit from an award based on gross misconduct by the commissioner. Finally, the applicant contends that it has what are described as 'high prospects' of success on the merits in the review application.
- [19] Even if I accept that the applicant timeously made enquires as to the filing of the record by the bargaining council (as it did in its letters dated 4 November 2015 and 12 February 2016), and even if I accept that there was no complete record for the applicant to file within the 60-day period, on the applicant's own version, it

was aware by 29 March 2016 that it was obliged to take specified steps to secure the complete record. That record would necessarily reflect the terms on which the parties agreed that the arbitration would be conducted, and crucially, whether the proceedings were limited to the determination of the applicant's point in *limine*, or whether, as the award records, the arbitrator was to determine the claim on the merits in the event that the point in *limine* was dismissed. There is a delay of over a year, between 29 March 2016 and 7 April 2017, when the applicant did nothing to prosecute the review application. Even then, the only action taken in April 2017 was to telephone the bargaining council to enquire as to the existence of any handwritten notes. The attempt by the applicant to shift blame onto the first respondent is without foundation. The terms of the directive issued by the court are clear – it specifically enjoins the applicant to take steps to ensure that a complete record is before the court and imposes no obligations on the first respondent whatsoever. The applicant failed to report to the court any of the difficulties that it was encountering to secure the complete record, or to seek additional directives. Further, the applicant appears to have come to the conclusion that there was no prospect of reconstruction of the record without as much as an enquiry to the first respondent's attorneys. Finally, the applicant's decision to request the registrar to enroll the matter for hearing was in effect a request to have the matter enrolled on an unopposed basis – the applicant had not filed any Rule 7A(8) notice, nor had the first respondent filed an answering affidavit. The applicant's assertion that there had been no record filed appears to have been overlooked in a belated attempt to enroll the review application for hearing.

- [20] The relevant legal principles are well-established. Section 145 (3) empowers the court to grant the stay or suspension of the execution or enforcement of an award. In *Robor (Pty) Ltd (Tube Division) v Joubert and others* [2009] 8 BLLR 785 (LC), the court said the following:

The discretion to stay execution must be exercised judicially, but generally speaking a court will grant a stay of execution with real and substantial justice requires it or, put differently, where injustice would otherwise be done.

The discretion is a wide one. It is founded on the courts 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 judgement 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.

- [21] The court went on to identify a number of other factors, including and importantly for present purposes, whether the underlying challenge to the arbitration award was brought in time, the party's interest in finality, the costs to all parties of a delay in finality or of instituting or opposing further proceedings, and the risk of injustice being done to the less powerful party to the dispute (see paragraph 16 of the judgment).
- [22] In the present instance, the interests of justice necessarily require the court to reflect on the statutory purpose of expeditious dispute resolution. This court has on many occasions noted that reviews must necessarily be prosecuted with diligence. The amendment to s145 (which requires an applicant to apply for a hearing date within six months of delivery of the application, and the time periods introduced by clause 11 of the practice manual, are all intended to expedite review applications. In the present matter, the explanation for the failure to prosecute the review with due diligence (which effectively amounts to difficulties in obtaining instructions from the applicant) is unsatisfactory. The prejudice to the first respondent is obvious – the affected employees have been denied the benefit of an award issued in their favour as long ago as July 2015. The review application has not progressed beyond the filing of a notice of motion and a founding affidavit, and the filing of an incomplete record. To the extent that the applicant submits that it will be severely prejudiced were it to be required to satisfy the award, this is a situation of its own making and on account of a delay for which it is solely to blame.
- [23] Given the basis of the conclusion to which I have come, it is not necessary for me to consider Mr Kroon's submission to the effect of that given the variation by Gush J to the terms of the rule *nisi* as originally granted, the only relief which may

be granted is that of the enforcement of the award be stayed pending the outcome of the present application (and not of the review application), thus disposing of the application on the basis that even if the rule was to be confirmed, it would mean only that the enforcement of the award is stayed until the conclusion of the present application. I doubt whether that is an outcome that Gush J intended but, as I have indicated, it is not a matter that requires determination.

- [24] Finally, in relation to costs, the first respondent has sought costs on a punitive scale. In my view, the first respondent is entitled to its costs, but the conduct of the applicant has not been so egregious so as to warrant an order for costs on a punitive scale. Further, I am not persuaded that the matter was of such complexity so as to warrant the employment of two counsel.

I make the following order:

1. The rule *nisi* issued on 23 November 2017 is discharged, with costs, such costs to include the costs of the proceedings on 22 February 2018 when the rule *nisi* was extended.



André van Niekerk

Judge

REPRESENTATIVES

For the applicant: Mr SC Zondi, Mdledle Inc. Attorneys

For the respondent: Adv. P Kroon SC, with him Adv. L Voultsos, instructed by Mbulelo Qotoyi Attorneys