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IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

**Reportable
CASE NO: 2025-047062**

In the matter between:

NATIONAL PROSECUTING AUTHORITY

Applicant

And

SIMPIWE TAKU

First Respondent

COMMISSIONER CEDRICK MSELEKI N.O

Second Respondent

GENERAL PUBLIC SERVICE

SECTORAL BARGAINING COUNCIL (GPSSBC)

Third Respondent

**THE SHERIFF OF THE HIGH COURT,
DURBAN COASTAL**

Fourth Respondent

**THE STANDARD BANK OF SOUTH
AFRICA LIMITED**

Fifth Respondent

Heard: 08 April 2025

Delivered: This judgment was handed down electronically by circulation to the Applicant's and First Respondent's Legal Representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing - down is deemed to be 15h30 on 10 April 2025.

JUDGMENT

LALLIE J

[1] The applicant launched this application seeking the following order:

- '1. That the writ issued against the Applicant by the Third Respondent under its case number GPBC 1407/2023 on 7th February 2025 be and is hereby set aside.
2. Alternatively, that the writ described above be and is hereby stayed, pending the finalization of the review application under this case number which is presently pending in this Honourable Court;
3. That Fifth Respondent is ordered to forthwith release and make available all amounts held in the Applicant's bank accounts, under its name, "the National Prosecuting Authority", bearing the account number: 0[...], and funds in any other accounts held in the Applicant's name with the Fifth Respondent forthwith;
4. That the First Respondent is ordered to pay the costs of this application.
5. That any of the other Respondents who oppose this application pay the costs of this application.
6. Further and/or alternative relief.'

The application is opposed by the first respondent who, in doing so, challenged its urgency.

- [2] Urgency is challenged mainly on the grounds that it is self created and that the applicant failed to afford the first respondent reasonable time to file the answering affidavit. The validity of both grounds is denied by the applicant.
- [3] I have considered the grounds for urgency and the basis of the first respondent's opposition. While I accept the first respondent's version that he informed the applicant in September 2024 of his intention to enforce the arbitration award there were intervening acts including the filing of the interlocutory application for a declaratory order on the issue of the bond of security in the review application and the communication between the parties on the enforcement of the award which reasonably led the applicant to believe that its enforcement would be delayed. I therefore do not accept the first respondent averment that urgency is self created. The extremely truncated schedule the applicant set for the filing of the answering affidavit is unacceptable. It, however, must be weighed with other relevant factors. The factors which tilted the scale in favour of the applicant are that it cannot obtain substantial relief in due course. This application is inherently urgent because the money in the bank account that has been attached in terms of the writ is used for, inter alia, paying witness protection expenses. The ability of the applicant to successfully prosecute criminal cases and the safety of witnesses cannot be jeopardized.
- [4] The factual background to this dispute is that the first respondent was employed by the applicant as an Assistant Director. He was dismissed for misconduct and challenged the fairness of the dismissal at the third respondent (the bargaining council). The dispute was arbitrated by the second respondent (the arbitrator) who, on 18 June 2024, issued an arbitration award in the following terms:
- '(a) I hereby rule that the dismissal of the applicant was procedurally unfair and substantively unfair.

- (b) I hereby order the respondent to reinstate the applicant with full pay to the position, which he occupied effectively from the 09th of October 2019 being the date of the dismissal.
- (c) The applicant must report for duty on the 05th of August 2024.
- (d) I hereby order the respondent to pay the applicant the sum of R529 185,84 being an equivalent of his salary for a period of twelve [12] months as back pay not later than the 05th of August 2024.”

[5] In a letter dated 11 November 2024 the first respondent’s attorneys informed the applicant that the arbitration award had been certified in terms of section 143 of the Labour Relations Act¹ (the LRA). They further advised that the writ of execution had been issued by the Commission for Conciliation, Mediation and Arbitration (the CCMA). Thereafter an exchange of correspondence ensued between the parties about the validity of the bond of security the applicant had filed with the application to review and set aside the arbitration award. The applicant filed an interlocutory application seeking a declaratory order on the issue. On 1 April 2025 it was brought to the applicant’s attention that its bank account which it used in discharging its mandate including witness protection had been frozen. The account was attached as a consequence of the first respondent’s attempt to enforce the arbitration award by executing the writ. The applicant reacted by filing this application.

[6] The applicant did not file a replying affidavit. It was argued on behalf of the first respondent that the rule in *Plascon- Evans Paints v Van Riebeeck Paints (Pty) Ltd*² be applied. The applicant proffered no cogent reason for the rejection of the first respondent’s argument. I could also find no reason in law for not applying the rule. The *Plascon Evans (supra)* rule will therefore be applied.

¹ Act 66 of 1995 as amended.

² [1984] 2 All SA 366

- [7] The applicant sought to rely on the first respondent's failure to comply with the provisions of section 3 of the State Liability Act³. The submission is refuted by the first respondent who contended that the writ was issued in terms of the LRA a statute which takes precedence over the State Liability Act. In the absence of a replying affidavit the averment is unrefuted. I accepted the first respondent's contention because it is consistent with the provisions of section 210 of the LRA.
- [8] The first respondent submitted that the applicant failed to prove its entitlement to the relief it seeks in prayer 2 of the notice of motion because there is no *prima facie* right to the relief it seeks in respect of staying the writ. The applicant sought the stay of the writ pending the finalisation of the review application. The applicant submitted that there is a pending review application as, *inter alia*, the 60 day period within which it is required to file the record prescribed in Rule 37(14) has not expired. The first respondent submitted that there is no pending review application because it had lapsed.
- [9] In support of his contention the first respondent submitted that on 17 October 2024 the bargaining council dispatched the record to the applicant. He submitted that in terms of rule 37(14) the applicant was required to have filed the record within 60 days from 17 October 2024. The 60 day period expired on 11 February 2025. As the applicant had not complied with the provisions of rule 37(14) the review application had been deemed withdrawn as envisaged in rule 37(15).
- [10] In the letter the first respondent sought to rely on the office of the State Attorney acknowledged having received the record on 14 October 2024. In the absence of the replying affidavit, I accept the first respondent's version based on the *Plascon Evans (supra)* rule because it is unrefuted and not far fetched. As the review was deemed withdrawn as envisaged in rule 37(15) there is no review application. The writ may not be stayed pending a non-existent review

³ 20 of 1957.

application. In the absence of the review application the need to deal with the validity of the bond of security has fallen away.

- [11] The applicant submitted that the writ should be set aside because the first respondent followed an incorrect procedure by seeking to enforce the certified award through the issuing of a writ. It submitted that the first respondent should have instituted contempt proceeding in enforcing the arbitration award. It was argued on behalf of the first respondent that the procedure he followed is correct. It is based on section 143 of the LRA which provides that an award sounding in money may be enforced through a writ.
- [12] It is common cause that in the award the applicant is ordered to reinstate the first respondent with full back pay with effect from the date of his dismissal, the 9 October 2019. The applicant was further ordered to pay the first respondent back pay in the amount of R529 185.84 by 5 August 2024. The applicant did not comply with the arbitration award.
- [13] In determining whether the applicant established valid grounds for the setting aside of the writ I have taken into account that the enforcement of a certified award is governed by section 143 of the LRA. The section makes no reference to back pay. The term back pay is used in *Kubeka and Others v Ni-Da Transport (Pty) Ltd*⁴ where the time of its payment is expressed as follows:

“Back pay is only contractually owing upon the full restoration of the employment contract. This requires more than a tender of services by the unfairly dismissed employees. The employer should also have accepted those employees back into its employ. If the employer failed to do so, the correct legal path was to have forced it to restore the contract of employment by means of contempt proceedings... the judgment ordering reinstatement does not in and of itself reinstate the contract of

⁴ [2021] 4 BLLR 352 (LAC).

employment; rather, it is an order directing the employer to accept those services. If the employer fails to do so, the remedy is to bring contempt proceedings to compel the employer to do so.”

[14] The significance of the full restoration of the contract of employment before back pay is due to an employee is that the LRA is silent on back pay. The power of arbitrators to order reinstatement is conferred on them by section 193(a) of the LRA which provides that after finding a dismissal unfair they may order the employer to reinstate an employee. Payment of back pay is therefore part of the execution of the reinstatement order. It is inextricably linked to it. The enforcement of a certified award which orders an employer to reinstate an employee is regulated by section 143(4) of the LRA. I therefore accept the applicant’s averment that the first respondent followed an incorrect procedure by attempting to enforce the reinstatement award through a writ. The writ was, in the circumstances, irregularly issued. It must be set aside.

[15] I could find no reason in fairness for granting a costs order against the first respondent.

[16] In the circumstances the following order is made:

1. The writ issued against the applicant by the third respondent under case number GPSC1407/2023 on 7 February 2025 is set aside.
2. The fifth respondent is ordered to forthwith release and make available all amounts held in the applicant’s bank accounts under its name ‘the National Prosecuting Authority’ bearing account number 0[...], and funds in any other accounts held in the applicant’s name with the fifth respondent.
3. There is no order as to costs.

NZM Lallie

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate Winfred

Instructed by State Attorney

For the First Respondent: Mr Hlomgwane of Mhlanga Inc.

LABOUR COURT