IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J16/2014

In the matter between:

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**Applicant**
and	
N W MASHIYA	**First Respondent**
POPCRU	**Second Respondent**
MORATHI & MATAKA ATTORNEYS	**Third Respondent**
THE REGISTRAR OF THE LABOUR COURT	**Fourth Respondent**
THE SHERIFF, PRETORIA WEST	**Fifth Respondent**
THE SHERIFF, PRETORIA CENTRAL	**Sixth Respondent**
STANDARD BANK OF SOUTH AFRICA	**Seventh Respondent**

Heard: **13 April 2017**

Delivered: **5 May 2017**

JUDGMENT

TLHOTLHALEMAJE J

Introduction

[1] The applicant approached the Court on an urgent basis on 8 March 2017 seeking a variety of interim orders. A *rule nisi* was granted on 9 March 2017 by Steenkamp J. Some of the relief sought by the applicant have since been abandoned, and it now seeks confirmation of the order in the following terms:

> "2.1 The applicant is granted leave to supplement its urgent application dated 23 October 2013 and amend its notice of motion as contained therein.
>
> 2.2 The writ of execution dated 25 September 2014 is set aside, alternatively it is declared that the judgment of Judge[s] Steenkamp and Molahlehi have suspended the award pending the finalisation of the review application brought under case number JR2740/13.
>
> 2.3 Any attachment is uplifted.
>
> 2.5 The Sheriff is directed to immediately provide return of service demonstrating which account all monies were transferred to."

Background

[2] This matter has a protracted history dating back to 15 November 2013 after an arbitration award was issued in favour of the first respondent (Mashiya), in terms of which his dismissal by the applicant was found to have been substantively and procedurally unfair. The Arbitrator had ordered the applicant to reinstate Mashiya with full back-pay on the salary he had earned at the time of his dismissal, including all salary increments he would have been entitled to but for his dismissal.

[3] Aggrieved by the award, the applicant then approached this Court in December 2013 under case number JR2740/13 with a review application. There is a dispute in regards to when the applicant was made aware that a record of proceedings was available for transcription. It was however contended on its behalf that it was only notified on 26 February 2014. Having delivered the recording for transcription on 28 February 2014, it was then only made available in June 2014 and served on Mashiya on 2 July 2014. A supplementary affidavit to the review application was also filed and served on 9 July 2014. It was common cause that the applicant did not in its review application, simultaneously seek an order to stay the arbitration award.

[4] Mashiya had reported for duty on 6 January 2014. This was after he had certified the award in terms of the provisions of section 143 of the LRA.[1] The applicant then approached the Court on an urgent basis to stay the execution of the award under the present case number. The matter came before Steenkamp J on 9 January 2014, who had then issued an order staying the execution of the award pending the finalisation of the review application. Mashiya's subsequent application for leave to appeal against that order was unsuccessful as per the ruling of Steenkamp J issued on 25 February 2014.

[5] On the basis that the record of the arbitration proceedings had not been filed on time, Mashiya formed the view that the review application was deemed to be withdrawn in terms of the provisions of clauses 11.2.2 and 11.2.3 of the Practice Manual.[2] He then approached the Registrar of this Court to issue a writ of execution on 28 October 2014. The amount claimed was R1 966 565.40 (One Million Nine Hundred and Sixty Six Five Hundred and Sixty Five Rands and Forty cents). The return of service on the writ was 29 October 2014 at Standard Bank, and the amount of R2 258 717.06 was then attached on 29 October 2014 by the Sheriff (Pretoria Central).

[6] The applicant again approached the Court under the present case number on an urgent basis, to seek an order that the writ be set aside, alternatively

[1] Labour Relations Act 66 of 1995, as amended. (LRA)
[2] Practice Manual of the Labour Court of South Africa. (Practice Manual)

stayed. The matter came before Molahlehi J on 31 October 2014, with Mashiya's case being that the review application ought to be deemed to have been withdrawn in view of the provisions of the Practice Manual. In a judgment delivered on 5 March 2015, Molahlehi J issued an order in terms of which he had granted condonation for the late filing of the record and the supplementary affidavit. He had further reinstated the review application.

[7] In January 2017, Mashiya then served the same writ on the applicant that was previously issued. On 7 February 2017, an official from Standard Bank informed the applicant that the Sheriff had approached it with a warrant in terms of which the Bank was required to make payment of an amount of R2 258 717.06 to the Sheriff, Pretoria Central. Standard Bank wanted clarity from the applicant as to how to proceed in view of the warrant.

[8] There was an exchange of correspondence between the office of the State Attorney, the Sheriff, and Mashiya's erstwhile attorneys of record (Morathi & Motaka Attorneys) in terms of which the applicant sought to impress upon Mashiya that the writ had been stayed by Steenkamp J. It is significant to note that his current attorneys of record are the third since his dismissal. Mashiya was further advised in that correspondence that he had prematurely filed an answering affidavit to the review application, as he had done so prior to the delivery of the record of arbitration proceedings or being served with the supplementary affidavit. He was further advised that he had since failed to file an answering affidavit in compliance with the provisions of rule 7A (9) for over a period of two years, and informed that the review application, due to his non-compliance with rule 7A (9), remained unopposed.

[9] On 20 February 2017, the applicant discovered that monies had been withdrawn from its Standard Bank account. The Bank later confirmed on 2 March 2017 that Mashiya's writ had been executed. The applicant then approached the Court with this application on 8 March 2017.

[10] A *rule nisi* was then issued by Steenkamp J on 9 March 2017 as already indicated. Skosana AJ extended that rule on 30 March 2017 to 6 April 2017,

and to allow the applicant to file a replying affidavit. Steenkamp J on 6 April 2017 then postponed the matter to 11 April 2017. It was nevertheless heard on 13 April 2017.

[11] The applicant has since abandoned all relief against POPCRU. It is further not pursuing the issue of the reversal of the transfer of monies as Standard Bank has since confirmed that the money was kept in its suspense account. No further relief is sought from the fourth respondent (Morathi & Mataka Attorneys) since they no longer represent Mashiya.

Urgency and the application to supplement

[12] In the light of the *rule nisi* that was granted on 9 March 2017, it was argued on behalf of the applicant that this Court did not need to consider whether the matter deserved its urgent attention. This contention cannot nonetheless be correct. The basis for the principle that on the return day, the Court has the discretion to consider all aspects of the interim order, including the issue of urgency was summarised by Brassey AJ in *Polyoak (Pty) Ltd v Chemical Workers Industrial Union and Others* in the following terms:

> "Many, but by no means all of these shortcomings are excusable when an application is brought as a matter of urgency. In the press of circumstances, the court may be quick to grant interim relief when it does so, when it does no more than oblige the respondents to refrain from doing what, in any event, they should not do. By the time the return day arrives, however, the dust is settled, and then it becomes necessary for a court to consider whether a case has been made out for the relief sought. That an interim order has been granted in no way prevents this process, for, being interlocutory, it serves to dispose of none of the issues that arise in the case. The absence of opposition moreover, cannot cure deficiencies in the papers. Being uncontroverted, the allegations in the founding affidavit can be accepted unless they are baseless or fanciful and they must still embody evidence on which the court can act. Failure to oppose an application, in no way, constitutes an act of submission to the relief sought. On the contrary, respondents in an application that makes out no case have a right to assume that the court will arrive at this conclusion without the aid of argument from

them. On the return day, in short, the court must be satisfied that a proper case has been made out for each facet of relief sought."[3]

[13] It therefore follows that the Court must determine whether a case had been made out for all the forms of relief sought. In this case, it should be concluded that the applicant has satisfied the requirements set out in rule 8 of the Rules of this Court.[4] On the pleadings, it is apparent that Mashiya intends to execute the writ in the amounts mentioned. The fact that the writ was long issued as argued on Mashiya's behalf is neither here nor there, as it is its execution or intention to do so that creates the urgency, viewed together with other considerations under rule 8.

[14] Flowing from correspondence received from Standard Bank advising the applicant of Mashiya's intentions on 3 March 2017, I am satisfied as averred by the applicant's Acting Deputy Commissioner, Legal Services, Kekana, that prompt action was taken by the office of the State Attorney to attend to the matter, including the appointment of attorneys on 6 March 2017. To the extent that this application was launched on 7 March 2017 and filed with this Court on 8 March 2017, I am satisfied that the applicant acted with the necessary haste, and there is no basis to conclude that the urgency in this matter is self-created.

[15] I have further had regard to the application for leave to supplement the applicant's urgent application dated 23 October 2014, and I see no cause why the application should not be granted. The same or similar issues were raised

[3] (1999) 20 ILJ 392 (LC) at 394H–395B.

[4] Rule 8 provides, in relevant part, that:

"(1) A party that applies for urgent relief must file an application that complies with the requirements of rules 7(1), 7(2), 7(3) and, if applicable, 7(7).

(2) The affidavit in support of the application must also contain—

(a) the reasons for urgency and why urgent relief is necessary;

(b) the reasons why the requirements of the rules were not complied with, if that is the case; and

(c) if a party brings an application in a shorter period than that provided for in terms of section 68(2) of the Act, the party must provide reasons why a shorter period of notice should be permitted."

before Molahlehi J, *albeit* he did not specifically deal with the issue of the writ of execution in view of having granted condonation for the late filing of the record and the supplementary affidavit. Furthermore, the facts leading to this application are essentially the same, save for other developments that took place between Molahlehi J's order and the launching of the present application.

The issues for determination and the submissions

[16] Central to the determination of this application is:

a) Whether the review application had lapsed in view of the provisions of clauses 11.2.6 and 16.1 of the Practice Manual, and whether the applicant ought to bring an application to revive that application;

b) whether to the extent that the review application is alleged to have collapsed, there was no underlying *causa* to attack the writ;

c) whether the setting aside of the writ was pronounced upon and thus *res judicata*;

d) whether Mashiya had complied with the provisions of State Liability Act 20 of 1957 prior to executing the writ; and

e) whether the writ of execution was properly issued in view of the quantum payable not having been quantified by the Arbitrator when the award was issued.

Evaluation

[17] Mashiya holds the view that the review application is deemed to have been withdrawn based on the provisions of the Practice Manual. It was however contended on behalf of the applicant that the pleadings in the review application had been closed, and the only issue outstanding was for the matter to be set-down by the Registrar of the Court.

[18] Mashiya relies on the provisions of clause 11.2.3 of the Practice Manual for the contention that the review application had lapsed. The provision reads as follows:

> "11.2.3 If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been given. If consent is refused, the applicant may, on notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time. The application must be accompanied by proof of service on all other parties, and answering and replying affidavits may be filed within the time limits prescribed by Rule 7. The Judge President will then allocate the file to a judge for a ruling, to be made in chambers, on any extension of time that the respondent should be afforded to file the record."

[19] It was common cause that the same issue, i.e., about the review application having collapsed, came before Molahlehi J who had not only granted condonation for the late filing of the record of proceedings and the supplementary affidavit, but had also reinstated that review application. In the light of that ruling, it follows that this Court cannot be called upon to determine the same issue and I fail to appreciate the reason Mashiya, in the light of that order, would seek to persist with the same argument. As matters stand, the review application remains reinstated, and there is no basis for any contrary contention.

[20] Mashiya further placed reliance on the provisions of clause 16.1 of the Practice Manual, which the relevant portion reads as follows:

> "16.1 In spite of any other provision in this manual, the Registrar will archive a file in the following circumstances:
>
> - in the case of an application in terms of Rule 7 or Rule 7A, when a period of six months has elapsed without any steps taken by the applicant from the date of filing the application, or the date of the last process filed."

[21] Mashiya's main contention was that the order by Steenkamp J staying the execution of the arbitration award pending the finalisation of the review application had lapsed and no longer had any effect, as the applicant had failed to prosecute the review application for a period of 24 months. These arguments are however unsustainable for a variety of reasons. The first is that the above provisions specifically refers to applications that have remained inactive for a period of over six months. The provisions do not refer to court orders, which, it is trite remain in force and effect until executed or set aside.

[22] The Registrar of the Court can only archive files, but orders in those files remain in force and effect. It is accepted that a file may be archived in circumstances where a party has not acted on that file for a period of six months. In this case, flowing from Molahlehi J's order, the applicant had filed the record of proceedings and a supplementary affidavit. It was contended on its behalf that it had made several attempts to secure a set-down date with the Registrar of this Court.

[23] Inasmuch as the applicant seeks to lay the blame on the door of the Registrar to the extent that the matter had not been allocated a set-down date, it is further my view that the provisions of the Practice Manual, and in particular, clauses 11.2.3 and 16.1 are not a substitute for the provisions of rule 11 of the Rules of this Court. Molahlehi J in his judgment specifically held that the provisions of the Practice Manual were simply a procedural tool to facilitate the management of review applications, and did not trump the Rules of this Court.[5]

[24] There is a perception amongst practitioners in this Court that the raising of these provisions can lead to an application being dismissed, and this is premised on an incorrect interpretation of the provisions of clause 16.3 of the Practice Manual which provide that:

[5] At paragraph 16.

> "Where a file has been placed in archives, it shall have the consequences as to further conduct by any respondent party as to the matter having been dismissed."

[25] These provisions as already indicated above, cannot trump over the Rules of this Court. Thus, it cannot be correct that if a file is archived by way of a directive or as a result of an administrative action by the office of the Registrar, the implications thereof are that the matter is dismissed for all intents and purposes. In most instances, files are archived at the instance of the Registrar of this Court to the extent that there was non-compliance with the Rules of this Court. Where however, there is a directive from a Judge to archive a file, the effect thereof is that the file will remain dormant until such time that an application is launched in terms of the provisions of clause 16.2 to retrieve it. Only upon a consideration of that application can a Judge (normally in chambers) dismiss the application to retrieve the file, which would then have the effect of dismissing the review application. In this case, it was contended on behalf of Mashiya that a directive was sought from the Judge President in terms of the provisions of clause 16 of the Practice Manual, but that the matter was not attended to. It cannot however follow from those unsuccessful attempts be concluded that the review application in this matter is of necessity dismissed.

[26] To reiterate, a mere directive or administrative action on the part of the office of the Registrar to have a file archived cannot have the status of a court order. A matter can only be dismissed through a court order. Thus, if a respondent party is of the view that the applicant party in review proceedings is not doing enough to expedite the finalisation of the matter, including even after the pleadings have been closed, the appropriate route would be to approach the court with a rule 11 application to dismiss that review application.

[27] The net effect of clauses 11.2.3 and 16.1 of the Practice Manual if invoked is merely to deem applications as withdrawn, which can be reinstated by way of an application for condonation as it had happened in this case, or where a matter is archived in terms of clause 16 of the Practice Manual, it can equally

be retrieved upon such an application by the affected party, unless determined otherwise by a Judge in chambers.

[28] In circumstances where I am satisfied that attempts were made to secure a set-down date as in this case, there is no basis for a conclusion to be reached that the file was archived. This is especially where the applicant party had closed its pleadings. In essence, to the extent that Mashiya was of the view that the applicant was dragging its feet, nothing prevented him from approaching this Court with a rule 11 application. He cannot wait for 24 months and then complain that the applicant had done nothing to expedite the review proceedings.

[29] It follows from these conclusions that the review application remains the underlying *causa* which gave rise to the writ. Whether that application remains unopposed is not for this Court to determine. On Mashiya's own version in any event, the answering affidavit to the review application was filed on 27 December 2013, whilst the supplementary affidavit was filed by the applicant on 9 July 2014. As to whether the review application is opposed or not is an issue to be determined on another court date.

[30] As to whether the execution of the writ is a matter that is *res judicata* has to be assessed within the context of the orders issued by this Court. Steenkamp J had stayed execution of the award on 9 January 2014 pending the final determination of the review application, and the applicant's contention was that the Court could not even consider whether to stay the execution of the writ as it was *functus officio*. It was however submitted on behalf of Mashiya that Steenkamp J's order was obtained at the time when the writ of execution had not been issued by this Court, and further that Molahlehi J had not granted an order that the writ of execution was to be set aside or stayed. On the strength of Molahlehi J's order, it was submitted on behalf of Mashiya that the implication thereof was that the applicant's initial request to stay the writ was declined. Thus, the argument went, the applicant sought to re-introduce the same matter before the same court, and between the same parties, and was accordingly barred from doing so.

[31] An order staying the execution of an award as issued by Steenkamp J pending the final determination of the review application means that for all intents and purposes, the award, in whatever form, cannot be executed. It is thus irrelevant whether a writ was obtained subsequent to that order, and the mere fact that Mashiya only sought to execute the amount rather than reporting for duty is neither here nor there.

[32] As correctly pointed out on behalf of the applicant, the Court was *functus officio* in respect of the execution of the award and in my view, nothing can be read into the fact that Molahlehi J had not dealt with that issue when it was before him in that it was not necessary to pronounce on the execution of the writ in view of Steenkamp J's order. Mashiya nevertheless contended that the order granted by Steenkamp J staying the writ was in any event extended by Molahlehi J, but that order was interim pending the finalisation of the review application. The argument went further that since the review application had lapsed, the stay of execution was discharged. A finding has already been made that there is no merit in the allegation that the review application had lapsed. The stay of execution of the award therefore remains in effect until the review application is determined.

[33] Of major concern however in this application is the writ of execution sought to be stayed or set aside. The applicant's contention was that to the extent that the Arbitrator in the arbitration award had not quantified the amount payable to Mashiya, the latter was not entitled to an execution of the amounts claimed, and that the writ ought to be set aside as it was unlawful. The applicant raised concerns as to how Mashiya arrived at the sum of R2 million, and how the writ was issued in the manner it was when the amounts had not been quantified by a court or the CCMA.

[34] Mashiya in his answering affidavit flippantly, merely noted the applicant's concerns in this regard, and contended that since the award stated that he should be reinstated with full salary and increments, the writ amount was readily determinable.

[35] The requirements of a valid writ of execution entail that there must be a judgement liability in which the debt or other obligation of the judgement debtor, which is to be enforced by the sheriff, is specifically set out and described. It was common cause that the arbitrator in issuing the award only ordered the applicant to reinstate Mashiya and to pay him back-pay, including increments he would have been entitled to but for his dismissal. It was further not in dispute that Mashiya had unsuccessfully approached the Bargaining Council on no less than two occasions to vary the award and to quantify the amounts. As to how an amount as claimed by Mashiya was arrived at remains a mystery, as it cannot be correct that an amount easily determinable from the award is by necessity the amount that can be claimed in a writ.

[36] As correctly referred to by the applicant's Counsel, Prinsloo AJ (as she then was) in *Engen Basson's Service Station v Vanqa*[6] held that "*a writ of execution will be set aside as incompetent if the judgment was not definite and certain, as where the amount payable can be ascertained only after deciding a further legal problem*".[7] A valid judgment or order is a prerequisite for the issuance of a writ. Thus a writ may also be set aside if not issued in conformity with the judgment; or where the wrong party/entity is named therein as a party.[8]

[37] In this case, other than making the assertion that the amount was easily determinable from the award itself, it is not stated by Mashiya as to how he had in any event reached the amounts claimed particularly since the Bargaining Council refused to vary the award or quantify the amounts payable. Even more worrying however is how the office of the Registrar of this Court had issued the writ when the award itself made no mention of the amounts claimable. It follows that since the writ does not meet the basic requirements for it to be executable, it therefore ought to be set aside. It

[6] (2014) 35 ILJ 1568 (LC).

[7] Id at para 14.

[8] Van Loggerenberg, *Erasmus Superior Court Practice,* 2nd ed (Juta and Co (Pty) Ltd, Cape Town 2015) Vol 2 at D1-604 to D1-605.

further follows that there is no need to consider other averments made in relation to whether Mashiya had complied with the provisions of the State Liability Act.

Costs

[38] This Court may make an award of costs in accordance with the requirements of law and fairness. The applicant sought a cost order *de bonis propriis* on the basis that Mashiya's current attorneys of record were sent a lengthy letter on 8 February 2017 in which the entire history of the matter was set out. The attorneys were informed that to proceed with the attachment where there was an order staying the execution of the award was tantamount to contempt of court in view of Steenkamp J's order. This did not appear to dissuade Mashiya and his attorneys of record from persisting with their intention or actual execution of the writ.

[39] It is my view that in the light of the conclusions reached on all legal points raised on behalf of Mashiya, his attorneys of record should have known better, especially after receipt of the correspondence sent by the applicant as indicated above. There was clearly no basis for him to pursue the execution of the writ, particularly in view of it being unlawful. However, taking into account these considerations and the requirements of fairness, I deem it appropriate to order that only the costs of this application be payable.

Order

[40] In the premises, the following order is made:

1. The matter is heard as one of urgency, and the failure to comply with the Rules of this Court relating to forms and service is condoned.
2. The applicant is granted leave to supplement its urgent application dated 23 October 2014 and to amend its notice of motion.
3. The writ of execution dated 28 October 2014 is set aside.
4. Any attachment pursuant to the above writ of execution is uplifted.

5. The Sheriff is directed to immediately provide a return of service demonstrating which account all monies (if any) were transferred to.

6. The applicant is ordered to approach the office of the Registrar of this Court within seven (7) days of the date of this order for a set-down date on an expedited basis in respect of its review application under case number JR2740/13.

7. The first respondent is ordered to pay the costs of this application.

E. Tlhotlhalemaje

Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Adv. L. Pillay with Adv. Karolia
Instructed by:	State Attorney
For the First Respondent:	Adv. MM. Ndziba
Instructed by:	Ruan Rabie Attorneys