

**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not reportable  
Case No: J 1936/19

In the matter between:

**NEW ERA PACKAGING**

**Applicant**

and

**DUMISANI NGWENYA N.O**

**First Respondent**

**COMMISSION FOR CONCILIATION, MEDIATION**

**AND ARBITRATION**

**Second Respondent**

**SATU obo MEMBERS**

**Third respondent**

**Heard: 1 October 2019**

**Delivered: 22 October 2019**

---

**JUDGMENT**

---

**TLHOTLHALEMAJE, J**

[1] With this application, the applicant seeks an interim order staying the enforcement of an arbitration award dated 4 March 2018 issued in favour of the third respondent, pending the finalisation of a review application launched on 12 April 2018. The third respondent, acting on behalf of its members (40 individual employees) opposed the application.

[2] The background material to this application is fairly common cause. The arbitration award issued as above had followed upon an alleged unfair labour practice dispute that came before the first respondent (Commissioner Ngwenya) at the CCMA. Upon receipt of the award, the third respondents had it certified in April 2018. The arbitration award was subsequently varied to

include a calculation of amounts payable to the individual employees. When the applicant failed to make payments in accordance with the arbitration award, the sheriff attended at the applicant's premises on 27 August 2019 and made certain attachments in fulfilment of the arbitration award.

- [3] The applicant approached the Court with an application to stay the writ of execution on 4 September 2019. The matter came before Mabaso AJ on 16 September 2019 and was dismissed with no order as to costs. The third respondents' contention is that the dismissal of the application before Mabaso AJ was due to the fact that the review application had lapsed in accordance with the provisions of clause 11.2.7 of the Practice Manual of this Court, and therefore the execution of the award could not be stayed.
- [4] Upon the first application to stay the writ having been dismissed, the third respondents' attorneys of record made a demand for payments in terms of the arbitration award. The applicant met the demand with a second application to stay the writ on 19 September 2019, enrolling the matter for 1 October 2019.
- [5] In seeking to stay the execution of the writ, the applicant contends that it has reasonable prospects of success with its review application, and further that it stands to suffer irreparable prejudice should the execution not be stayed. It further contends that the third respondents would not suffer any prejudice since they had not taken any steps to enforce the award since March 2018.
- [6] In opposing the application to stay, the third respondent pointed out the defects in the applicant's founding affidavit, and in particular, the fact that the affidavit was not properly commissioned as it did not indicate the date and place of commissioning. The applicant did not file a replying affidavit, and one would have thought that such a patent error as raised in the answering affidavit would have been rectified, but this was not to be so.
- [7] Several issues however arise in this application insofar as the applicant had instituted the second application to stay the execution of the writ. In regards to the first application which was as already indicated, dismissed by Mabaso AJ, in the absence of a replying affidavit, it can be accepted that that application was dismissed as the review application relied upon had lapsed.

- [8] It is trite that to the extent that a stay of execution of the writ is sought pending a review application, there must be a proper review application before the Court. In this case, the review application under case number JR567/2018 which the applicant seeks to rely on was delivered on 12 April 2018. There is a dispute as to whether that application was served on the third respondent or not. Be that as it may, a record of arbitration proceedings was filed and served belatedly on 27 August 2019.
- [9] The status of that review application is such that it remains deemed to have lapsed. This Court can only determine disputes in motion proceedings on the basis of what is pleaded. Thus, if what is pleaded does not sustain the right to the relief that is sought, the application ought to be dismissed. Given the status of the applicant's review application, the applicant in its Notice of Motion seeks an order staying the execution of the writ. Nothing is said in that Notice of Motion about any pending application to reinstate or revive the review application to the extent that interim relief is sought, nor is there anything said in regards to the reasons the transcribed record of arbitration proceedings was filed belatedly, and the basis upon which condonation in that regard should or would be granted.
- [10] Worse still, a copy of that application to revive was not placed before the Court. This effectively means that this Court is again constraint to grant the interim relief sought in the absence of any indication that the application to revive would succeed. The founding affidavit in support of the application to stay is replete with references to the review application and the grounds of review. Any prospects of success referred to is merely in reference to that review application, and not any pending application to revive the review application.
- [11] The applicant assumes that the mere fact that it had furnished security in accordance with the provisions of section 145(7) of the LRA, or that a record (which is in any event incomplete) was filed and served is sufficient to have the writ of execution stayed. That assumption is misplaced in that in the absence of that review application being properly before the Court in the sense that the revival application had succeeded, that review application

cannot be said to be properly before the Court for the purposes of a stay of execution.

- [12] The requirements for interim relief are well-known. The applicant is required to establish a *prima facie* right; a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; that the balance of convenience favours the granting of an interim interdict; and that it has no other satisfactory remedy.'
- [13] For a moment, it can be accepted that the matter is urgent to the extent that the sheriff is ready to execute the writ. This however does not imply that the applicant has satisfied all the requirements of urgency, to the extent that the sheriff had indicated an intention to execute as far back as 27 August 2019. It can further be accepted that the applicant has no other alternative remedy. This however is as far as the applicant's case goes.
- [14] To the extent that the applicant seeks interim relief, it is apparent that it has not, in the absence of a proper application to review the arbitration award, established any right, even if *prima facie*. It follows that the balance of convenience cannot favour it, and that it is the third respondents who would continue to suffer harm as they are in possession of a favourable arbitration award, which they are not able to execute.
- [15] I have further had regard to the requirements of law and fairness insofar as the issue of costs is concerned. When the initial application to stay the execution of the writ was dismissed by Mabaso AJ, no order as to costs was made. One would have assumed that the applicant would have taken stock and reflected on how best to deal with the quandary it finds itself in, which in any event, is self-inflicted. This case as pleaded, clearly show that the applicant failed in that regard. In these circumstances, I can see no reason in law and fairness, why the third respondents should be burdened with the same costs on the second occasion, in respect of applications which were unsustainable.
- [16] Accordingly, the following order is made;

Order:

1. The Applicant's application is dismissed with costs.

---

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

**APPEARANCES:**

For the Applicant:

T Nkambule.

For the Respondents:

E Liebenberg, Instructed by Leonard Singer  
Attorneys