IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: J 363/2024

In the matter between:

VKN ENTERPRISES	**Applicant**
and	
PETER MARTIN LEKALAKALA	**First Respondent**
COMMISSIONER STEIN FOURIE *N.O*	**Second Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Third Respondent**
THE SHERIFF – TLHABANE	**Fourth Respondent**

Heard: **7 May 2024**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date for hand-down is deemed to be 12 May 2024.**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction and background:

[1] The applicant approached the Court on an urgent basis seeking an order interdicting the first and fourth respondents from removing its assets at its premises in execution of the arbitration award issued by the second respondent (Commissioner), dated 30 May 2023. The relief is sought pending the finalisation of

an application to review and set aside the default arbitration award, and a further application to reinstate that review application after it was deemed withdrawn under the provisions of Paragraph 11.2.3 of the Practice Manual. The first respondent (Mr Lekalakala) has opposed the urgent application.

[2] The common cause background to this application is as follows;

2.1 Lekalakala was dismissed by the applicant on 24 April 2023 on allegations of misconduct. An alleged unfair dismissal dispute referred to the third respondent, the Commission for Conciliation Mediation and Arbitration (CCMA), resulted in a default award being issued by the Commissioner on 30 May 2023 in the absence of the applicant. In the award, the Commissioner had found the dismissal of Lekalakala to have been unfair. The applicant was ordered to reinstate Lekalakala and to further pay to him backpay in the amount of R14 620.00.

2.2 The applicant then launched an application to rescind the default arbitration award on 31 May 2023. That application was considered and dismissed by the Commissioner on 23 June 2023. For some reason, the applicant launched a second application to rescind the award on 6 July 2023, which application also met the same fate on 23 August 2023.

2.3 On 31 August 2023, Lekalakala obtained a certification of the arbitration award. Upon being informed of the certification by Lekalakala's attorneys of record (Cheadle, Thompson & Haysom (CTH)) the applicant on 31 August 2023 simultaneously launched an application to review and set aside the default award, and an urgent application to stay the enforcement of the arbitration award. Lekalakala contends that the review application was not even properly served on him or CTH on 31 August 2023, and that this was only done on 13 October 2023.

2.4 The urgent application under case number J 1263/23 which was opposed, was then struck off the roll on account of lack of urgency on 24 October 2023.

2.5 On 21 September 2023, the Registrar of the Court issued a Notice in terms of Rule 7A(5) notifying the applicant that the record from the CCMA was available for collection. The 60 day period within which the record ought

to have been filed under Rule 7A(6) was on 13 December 2023. Since it was only filed on 22 January 2024, the review application is deemed to have been withdrawn under Paragraph 11.2.3 of the Court's Practice Manual.

2.6 Other than the review application having been deemed withdrawn, it was pointed out on behalf of Lekalakala that the application was defective on the basis that it was filed outside of the provisions stipulated in section 145(1) of the Labour Relations Act[1] (LRA), and further that the applicant had not furnished security under section 145(7) of the LRA nor sought an exemption under section 145(8) of the LRA.

2.7 On 16 January 2024, the fourth respondent (Sheriff), visited the premises of the applicant's director and made an inventory of assets. The applicant sent correspondence to CTH requesting that the Sheriff be instructed to withhold the process of attachment in the light of the review application. The application for condonation for the late filing of the review application was only filed on 22 January 2024.

2.8 CTH responded on 25 January 2024 and pointed out all the defects with the applicant's review application, and further indicated that in the absence of those defects being rectified, the enforcement process would proceed. The applicant did not respond to CTH's response and had instead filed an application to reinstate the review application on 25 March 2024.

2.9 On 4 April 2024, the Sheriff had compiled an inventory of assets of the applicant. On 11 April 2024 and after the Registrar of the Court had directed the parties to file heads of argument in the review application, the applicant in response advised that it intended to bring an urgent application on 12 April 2024 in view of the attachment effected by the Sheriff.

2.10 CTH's response was that the urgent application would be opposed. The applicant's attorneys of record reiterated on 13 April 2024 that the urgent application will indeed be filed on 17 April 2024. This urgent application was only launched on 29 April 2023.

The preliminary points and evaluation:

[1] Act 66 of 1995, as amended.

[3] Other than opposing the application on the merits, Lekalakala raised preliminary issues pertaining to urgency; *lis pendens* in the light of the urgent application that was struck off the roll on 23 October 2023; and the failure to establish a *causa* in the light of the deemed withdrawal of the review application and the defects associated with the review application, including the failure to furnish the necessary security in view of the relief granted in the default award.

Urgency:

[4] It was submitted on behalf of the applicant that the relief sought was extremely urgent in that Lekalakala and the Sheriff intended to remove its assets, which will leave it in a precarious position. It was further submitted that the Sheriff had agreed to give the applicant until 9 May 2024 to obtain a stay, and that if it was not granted, the removal of assets would result in the disruption of operations and obligations towards its clients, and would cause significant financial loss. The applicant further contended that it would not get substantial relief in due course in view of the time periods the matter would be heard.

[5] It was submitted on behalf of Lekalakala that the applicant has not satisfied the requirements of urgency in the light of the timeline set out above, specifically since it was indicated as far back as January 2024 that Lekalakala intended to take steps to enforce the award. It was submitted in reference to various authorities[2] that in this case, there were inordinate delays in bringing this application despite the applicant's initially indicating its intention to bring the application in January 2024; the inventory of assets that was done, and the subsequent attachment effected by the Sheriff.

[6] The requirements of urgency as contemplated in Rule 8 of the Rules of this Court are trite as has been re-hashed in numerous authorities. Thus, it is required of an applicant seeking urgent relief, to have set out in the founding affidavit (a) the reasons for urgency and why urgent relief is necessary; and (b) the reasons why the

[2] *National Union of Metalworkers of South Africa v Bumatech Calcium Aluminates* (2016) 37 ILJ 2862 (LC); *Masete v Transnet Bargaining Council* [2021] JOL 50812 (LC),

requirements of the Rules were not complied with. Whether a matter is urgent involves two considerations. The first is whether the reasons that makes the matter urgent have been set out in the founding affidavit and second, whether the applicant seeking relief will not obtain substantial relief at a later stage. It is equally trite that an applicant is not entitled to rely on urgency that is self- created when seeking a deviation from the Rules. Thus, the latitude extended to parties to dispense with the Rules of the Court in circumstances of urgency is not available to parties who are dilatory to the point where their very inactivity is the cause of the harm on which they rely on to seek relief[3].

[7] It needs to be said at the onset that the applicant has hopelessly failed to satisfy the requirements of urgency in the light of the historical background outlined elsewhere in this judgment. In fact, the invariable conclusion to be reached is that the urgency claimed in this application is indeed self-created. My conclusions in this regard are based on the following factors;

7.1 The arbitration award was issued on 1 June 2023 and certified as far back as 31 August 2023. It is common cause that upon that certification, the applicant approached this Court on an urgent basis to stay the enforcement of that award, which application was struck off the roll on 24 October 2023. It was only after the award was certified that the applicant then launched its review application.

7.2 After the matter was struck off the roll, rather than enrolling it on the ordinary roll and pursuing its rights in that regard, the applicant was contend to fold its arms. Despite the Rule 7A(5) notice having been issued and thus enabling the applicant to pursue the review application, it yet again did nothing in that regard until 22 January 2024, when that application was deemed withdrawn under the provisions of clause 11.2.3 of the Practice Manual. Other than the review application having been filed outside of the statutory periods, the applicant had not complied fully with the requirements

[3] See *Jiba v Minister: Department of Justice and Constitutional Development and Others* (2010) 31 ILJ 112 (LC) at para 18; *National Police Service Union and others v National Negotiating Forum and others* (1999) 20 ILJ 1081 (LC) para [39].

of section 145(7) of the LRA. Effectively, that application faced insurmountable hurdles before it could get anywhere near being ready for a hearing.

7.3 As an aside issue, as I understand from the founding affidavit, it is the default award that is the subject of the review application. This is in circumstances where two rescission rulings were issued by the CCMA in respect of that default award. If indeed it is the default award rather than the rescission rulings that is the subject of the review application, this adds a further hurdle for the applicant.

7.4 Having failed to take any step in prosecuting its original application to stay the enforcement of the award since 24 August 2023 when the first urgent application was struck off, the applicant reacted only after 4 January 2024 after the Sheriff acted on the writ by visiting its premises to make an inventory of assets.

7.5 On 25 January 2024, Lekalakala had proceeded with the enforcement process. It was only at that point since the review application was deemed withdrawn that the applicant had filed an application to reinstate it. A further reaction from the applicant came on or about 11 April 2024 when the Registrar directed the parties to file heads of argument in the review application. It is also at that time that the applicant intimated that it sought to bring an urgent application to stay the enforcement of the arbitration award.

7.6 Nonetheless, this application was only launched on 29 April 2024, some 11 months since the award was issued; or some eight months since the award was certified; or at worst, some six months since the initial urgent application was struck off the roll.

7.7 The urgency in this case if any, did not arise on 24 April 2024 when the Sheriff advised the applicant that the attached goods were to be removed and sold, nor did it arise when the Sheriff further advised the applicant that it was granted an indulgence until 9 May 2024.

7.8 The whole purpose of seeking urgent relief is to prevent a harm, especially one that is foreseen. When a litigant obtains a writ of execution or a certification of an award as in this case, the intention is clear, which is that the Sheriff is going to act on that writ if a party does not comply with an order

of Court. A litigant such as the applicant in this case however, cannot wait for a period of eight months to protect itself against the writ. It further served no purpose for the applicant to have on no less than two occasions threatened to approach the Court on an urgent basis without acting on that threat. Thus, various opportunities presented themselves before April 2024, when the applicant could have approached the Court for urgent relief.

7.9 To a large extent, I agree that the inordinate delays in bringing this application, coupled with the applicant's reaction whenever either Lekalakala or the Sheriff intended to pursue the enforcement of the award are demonstrative of a classic case of self-created urgency. In the end, the applicant failed to demonstrate that it had acted with the necessary and reasonable haste in obtaining urgent relief to protect itself against the harm or prejudice it claimed.

7.10 It is trite that amongst the issues to be considered when urgent relief is sought is whether the applicant will not obtain substantial relief at a later stage. In this case, of course as a result of the attachment, the Sheriff will remove the applicant's assets which may be sold on auction.

7.11 The difficulty with the applicant's case however is that it finds itself in its position as a result of its dilatoriness and not taking Lekalakala's award and its review application seriously. When the urgent application to stay the enforcement of the writ was initially brought before the Court and struck off the roll, the applicant rather than taking an opportunity to re-enrol the matter did nothing. Between 24 October 2023 until January 2024, this was the applicant's second opportunity to prevent the harm that would have resulted from the execution, particularly since Lekalakala did not take any steps during that period to enforce the award despite it being certified. A litigant such as the applicant, cannot in my view complain of a lack of substantial redress or irreparable harm in circumstances where it created the conditions for such harm or failed to act in haste in preventing that parlous position it finds itself in.

7.12 In the light of all the factors considered above, the matter ordinarily ought to be struck off the roll.

Plea of lis pendens:

[8] Even if there may be a basis for finding that the matter deserves the urgent attention of this Court, an even more insurmountable hurdle for the applicant is that the application ought to fail on the basis of the plea of *lis pendens*. It is trite that the three elements for a successful reliance on the plea of *lis pendens* are; the litigation is between the same parties; that the cause of action is the same; and that the same relief is sought in both sets of proceedings.[4]

[9] Thus, if an action is already pending between parties and the applicant lodges another action against the same respondent on the same cause of action and in respect of the same subject-matter, whether in the same or in a different Court, it is open to the respondent to take the objection of *lis pendens*, because another and same action has already been instituted. In such instances, the Court may in its discretion, stay one action pending the decision of the other or dismiss the action.

[10] In *Dumisani and Another v Mintroad Saw Mills (Pty) Ltd*[5], the Labour Appeal Court held that it was against public policy that litigants should be able to consistently demand the same relief and on the same grounds from the same adversary. Furthermore, it was held that the primary purpose of the LRA is the effective and speedy resolution of disputes, and in line with that purpose, this Court and other tribunals are duty bound to a measure of both finality and certainty in dealing with disputes between parties.

[11] It was long stated in *Nestle (South Africa) Pty Ltd v Mars. Incorporated*[6] that once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated. Thus, the same suit, between the same parties should be brought only once and finally.

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[4] See *Association of Mineworkers and Construction Union and others v Ngululu Bulk Carriers (Pty) Limited (In Liquidation) and others* 2020 (7) BCLR 779 (CC) at para 26 – 31.

[5] (2000) 2 BLLR (LAC) at para 9.

[6] [2001] ZASCA 76, [2001] 4 ALL SA 315 (A).

[12] In this case, this urgent application falls within the four corners of the above requirements. In this application as was the previous one struck off the roll on 24 October 2023, the parties are the same, the cause of action between the parties arose from the certification of the award which Lekalakala seeks to execute, and the relief is the same since the applicant seeks a stay of the execution of the award on the basis of the pending review application. The only difference is that in this case, the review application has since lapsed, which makes the applicant's case even more onerous to the extent that a case of the underlying *causa* may even be argued.

[13] The Court accepts that a successful plea of *lis pendens* is not an absolute bar to proceedings commencing. It is a matter within the discretion of the Court to decide whether an action brought before it should be stayed pending the decision of the first action, or whether it is more just and equitable that it should be allowed to proceed. Thus, the Court enjoys a discretion to be exercised in a proper case and determine whether the interest of justice dictated that the second action should be allowed to proceed[7].

[14] I have considered the history and background of this matter, inclusive of numerous legal steps taken by the applicant in resisting the enforcement of the award (*i.e.,* two failed rescission applications, one urgent application struck off the roll, the application for condonation in respect of the late filing of the review application, and the application to reinstate the deemed withdrawn application). Even if it is acknowledged that the applicant was within its rights to pursue all these legal steps, what is clear from the summary of the background in this judgment is that the applicant's conduct in so doing, was more in the form of delayed reactions to Lekalakala's attempts in enforcing the award rather than seriously seeking to vindicate its rights in defending against the award. Against these factors, clearly the interests of justice cannot dictate that this Court should exercise its discretion and permit the applicant to have this application determined or let alone stayed, when there is a similar application on the same set of facts with the same relief being sought pending before this Court. This in my view would not only countenance an

[7] *Eksteen v Road Accident Fund* [2021] ZASCA 48; [2021] 3 All SA 46 (SCA); 2021 (8) BCLR 844 (SCA) at paras 52 – 53.

abuse of the urgent Court's roll, but also go contrary to the core principle of the LRA, which is the expeditious resolution of labour disputes.

[15] Against the above conclusions, it follows that even though on the grounds of lack of urgency this application ought to be struck off the roll, the Court however elects to dismiss it on the basis of the successful plea of *lis pendens*.

Costs

[16] In making an award of costs, the Court in accordance with the provisions of section 162(1) of the LRA must take into account the requirements of law and fairness. It was submitted on behalf of Lekalakala that an award of costs in his favour was appropriate in view of the fact that there is currently no relationship with the applicant. To a large extent I agree that Lekalakala ought not be burdened with the costs of this application, and further agree that this application was brought to Court in bad faith with no discernible object other than to frustrate Lekalakala in his quest to enforce his award. Inasmuch as the applicant was entitled to challenge the award, its conduct of merely doing so as a reaction to steps taken by the Sheriff or Lekalakala in enforcing the award fortifies my view that the intention was merely to delay and frustrate that enforcement. In these circumstances and given my conclusions on the issue of urgency and the plea of *lis pendens,* it is my view that the requirements of law and fairness dictate that the applicant be burdened with the costs of this application.

[17] Accordingly, the following order is made;

Order:

1. The applicant's application to stay the execution of the default award under case number NWRB1421-23 dated 30 May 2023 is dismissed with costs.

Edwin Tlhotlhalemaje
Judge of the Labour Court of South Africa

Appearance:

For the Applicant: Adv. M.B. Hlongwane, instructed by TIT Tshoga Attorneys.

For the First Respondent: Messrs S. Makalima and A. Gwebityala of Cheadle Thompson & Haysom Incorporated.