



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, (JOHANNESBURG)

JUDGMENT

Reportable

Case no: J 1508 / 2013

In the matter between:

ENGEN BASSON'S SERVICE STATION

Applicant

and

ANDILE VANQA

Respondent

Heard: 5 December 2013

Delivered: 11 December 2013

Summary: Urgent application to set aside a writ of execution. Writ was obtained without a Court order setting out the amount or an affidavit setting out the claim. Issuing of the writ was irregular.

JUDGMENT

PRINSLOO; AJ

Introduction:

[1] The Applicant approached this Court on an urgent basis seeking an order to set aside the writ of execution dated 26 September 2013. The application is opposed.

Brief History:

- [2] This matter has a long and unfortunate history and by the time this urgent application was filed, the Respondent had filed a number of applications in respect of the dispute he had with the Applicant.
- [3] The background to this application is shortly as follows: on 4 May 2010 the Applicant and the Respondent entered into a settlement agreement in terms of which the Applicant agreed to re-employ the Respondent with effect from 31 May 2010 on the same terms and conditions of employment that governed the employment relationship prior to his dismissal.
- [4] On 26 July 2010 the Respondent filed an application in terms of the provisions of section 158(1)(c) of the Labour Relations Act¹ (the 'Act') to make the settlement agreement an order of Court.
- [5] On 10 November 2010 this Court granted an order wherein the settlement agreement was made an order of Court.
- [6] The Applicant did not comply with the Court order and on 18 March 2011 the Applicant filed an application for joinder and contempt of Court, seeking that the Respondent be declared to be in contempt of the Court order issued on 10 November 2010.
- [7] On 2 August 2013 this Court held that the Respondent was in contempt and Mr Stoffel de Walt was ordered to appear in Court on 23 August to show cause why he should not be incarcerated or fined. On 23 August 2013 the Applicant was ordered to accept the Respondent back into its employment on Monday 2 September 2013. The Court ordered that the issue of arrear payment should be dealt with by way of separate process.
- [8] The Respondent subsequently approached the Registrar of this Court to issue a writ of execution, which was indeed issued on 26 September 2013 in the sum of R 119 944,07.

The urgent application

¹ Act 66 of 1995

- [9] On 23 October 2013 the Sheriff attached the Applicant's goods and will execute the writ in due course to satisfy the Respondent's claim for R 119 944,07. The Applicant is seeking to set aside of the writ of execution.
- [10] The Applicant's case is that no adequate 'separate process' was followed prior to the issuing of the writ and there is no Court order issued in accordance with the amount stipulated on the writ of execution.
- [11] In argument Mr Henning for the Applicant submitted that the writ of execution was obtained without a Court order and without any evidence being placed before the Registrar. Without a judgment or Court order containing a quantification of the claim, a writ cannot be issued without further adjudication or some form of evidence. It was submitted that the Respondent should approach this Court for determination of the amount due, alternatively he should issue summons. The Applicant disputes the period of the calculation as well as the rate at which the calculation was done.
- [12] Mr Motane on behalf of the Respondent submitted that the Applicant's intention was clearly to delay the matter and its approach is opportunistic. He submitted that the writ should not be set aside, despite being unable to respond to or counter the argument that without a Court order or affidavit, the Registrar should not have issued the writ of execution.

The legal position:

- [13] The Applicant seeks an order setting aside the writ of execution.
- [14] 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 problem².
- [15] In *De Crespigny v De Crespigny*³ it was held:

'In the result I think that it can be stated authoritatively that a writ of execution which has been issued will be held to be incompetent if the amount payable under the judgment can only be ascertained after deciding a further legal problem.'

² The Civil Practice of the High Courts of South Africa, Herbstein and Van Winsen, 5th Edition, at page 1091.

³ 1959 (1) SA 149 (N).

[16] In *Ngaka Modiri Molema District Municipality v Ramphele and others*⁴ this Court held as follows:

'It is also not clear from the file before this court how the writ was obtained. It seems to me that the registrar should be directed that as a rule of practice no writ of execution should be issued where an order or a judgment does not quantify the judgment debt unless the request for the writ is accompanied by an affidavit setting out how the debt has been quantified. In the case of a default judgment where the debt is not quantified the party requesting the writ would have to indicate in the affidavit what evidence was before the court which would assist the registrar in ascertaining and quantifying the judgment debt.

[17] In *Premier, Limpopo Province v Makgoka and others*⁵ the quantum payable in terms of a settlement agreement was disputed and this Court held that:

“Essentially the issue of the correct quantum stems from a disagreement about the interpretation of the settlement agreement. It is well established that the arbitral powers of CCMA commissioners and bargaining council arbitrators are limited when it comes to matters of interpreting agreements to the interpretation and application of collective agreements. This court routinely deals with the interpretation of settlement agreements particularly where there is a dispute about whether a settlement agreement, which has been made an order of court, has been complied with or not.

Accordingly, it would seem that the appropriate forum to determine the dispute about what is due in terms of the settlement agreement is the Labour Court, and whether the payment made by the applicant amounts to compliance with the award.”

[18] It is common cause between the parties that there is a settlement agreement in terms of which the Respondent is re-employed with effect from 31 May 2010 and that he was re-employed only on 2 September 2013. The entitlement to back pay for the entire period from May 2010 to date of re-employment is disputed, so is the rate at which it should be calculated.

⁴ (2011) 32 ILJ 2181 (LC).

⁵ (2010) 31 ILJ 2974 (LC).

[19] It is evident and common cause that there is no Court order which specifies the amount to be paid, nor is there an affidavit that sets out how the amount should be calculated.

[20] In my view the writ of execution should be set aside as incompetent as the judgment was not definite and certain and the amount payable can be ascertained only after deciding a further legal problem. The Registrar should not have issued the writ where the request to issue the writ was not accompanied by a Court order specifying the amount or an affidavit setting out how the amount claimed was calculated. The issuing of the writ without a Court order or affidavit, is therefore irregular.

[21] The parties should approach this Court to determine the dispute about what is due in terms of the settlement agreement. However, I believe that if the parties look dispassionately at their respective interpretations of the settlement agreement and engage constructively with each other to try and settle this matter, it should be unnecessary for this Court to deal with the dispute any further.

Order

In the premises, I make the following order:

1. The writ of execution dated 26 September 2013 is set aside;
2. There is no order as to costs.

Prinsloo, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For The Applicant: Attorney Henning

Instructed by: Truter Crous Wiggil & Vos Attorneys

For the second respondent: Mr Motane (Union Official)

Instructed by: NUMSA

LABOUR COURT