



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: J234/15

In the matter between:

ESKOM HOLDINGS SOC LIMITED

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION AND

ARBITRATION

First Respondent

COMMISSIONER ANGELO RAYNARD; N.O.

Second Respondent

WILHELM JEREMIAH SMITH

Third respondent

SHERIFF OF THE HIGH COURT, BLOEMFONTEIN WEST

Fourth Respondent

Heard: 10 February 2015

Delivered: 11 February 2015

Summary: Urgent application to stay enforcement of the arbitration award pending finalisation of a review application; Attorneys for the execution creditor having previously given a written undertaking not to proceed with execution; Such undertaking binding; Application granted.

JUDGMENT

VOYI, AJ

- [1] This is an urgent application launched by the Applicant as contemplated by Rule 8 of the Rules of the Labour Court. As relief, the Applicant primarily seeks an order staying the further enforcement of the arbitration award issued by the Second Respondent pending the finalisation of the review application launched by the Applicant under case number JR1818/2014 on 28 August 2014.
- [2] The Applicant also seeks an order for the release of the goods already attached by the Fourth Respondent as well as an order setting aside the writ of execution pursuant to which the goods were seized and laid under judicial attachment.
- [3] The application is opposed by the Third Respondent. To this end, an answering affidavit was duly filed. The Applicant delivered a replying affidavit in reaction to the Third Respondent's opposing papers. I also had the benefit of oral submissions from both parties' legal representatives for and against the granting of the relief sought.
- [4] At the core of the urgent application is an *undertaking* given by the Third Respondent's attorneys on behalf of their client. This undertaking came about after the Applicant's previous attorneys addressed an electronic mail to the Third Respondent at approximately 09:16 on 01 October 2014 in the following terms:

'Sirs,

We are ESKOM's attorneys of record in the above matter. As you are aware a review application has been filed in the Labour Court under Case No. JR 1818-14 and is currently pending.

Recently we received a report from client that you have obtained a Writ of Execution to give effect to the ruling under review. It is our humble but firm held opinion that, in the circumstances, your client should not proceed with the execution seeing that the order which he seeks to execute is subject to a formal court process to set it aside.

Crucially, approaching court to set it aside will just result in excessive and unnecessary expenses. We therefore request you URGENT (sic) written undertaking that you will not proceed with execution pending the review. In view of the fact that attachment has already been made, we request that you revert to us by no later than 11H00 A.M today. Unfortunately should we not receive the undertaking, we will be forced to approach the Labor Court (sic) to set it aside on an urgent basis.

Seeing that the costs that would have been incurred in this regard would have been unwarranted, we will then have to pray for a cost order against your client.

Finally, with regards to your client's opposing affidavit in the main review application, we advise that services and the actual papers are defective and that should this not be corrected within 2 days hereof, we will advise client and seek a mandate to finalise the review on an uncontested basis.

Kind regards,'

- [5] In response to this correspondence and at approximately 10:32 on 01 October 2014, the Third Respondent's attorneys conveyed to the Applicant's then attorneys of record the following:

'Dear Sirs

We have discussed your letter to us with our client and who on his turn discussed the letter with his Advocate. Our instructions is (sic) to inform you that our client will not proceed with the writ and that we have been instructed to call the writ back from the Sheriff.

Trusting that you will find it in order.

Regards'

[6] It is worth mentioning that shortly after this response was issued by his attorneys, the Third Respondent also addressed his own electronic mail to the Applicant's previous attorneys. In his correspondence, the Third Respondent stated the following:

'I also want to put it on record that we will not proceed now, but I request Eskom attorney (sic) to get an urgent date from Labour Court (sic). If a date is not given within a week from this date, I will instruct my attorney to proceed with WRT. Thanks.'

[7] The Third Respondent, in his aforesaid correspondence, did not dispute or deny the instructions he gave to his attorneys in response to the request for an undertaking. In essence, the Third Respondent sought to put in place some conditions to the undertaking already provided.

[8] As to what prompted the Third Respondent to bypass his attorneys and send out a correspondence directly to the Applicant's previous attorneys, I do not know. The Third Respondent had elected and appointed his attorneys to represent him and to, effectively, be his mouthpiece. It was, therefore, highly inappropriate of him to disregard his attorneys and communicate directly with the opposing firm of attorneys. It may very well be that the Third Respondent was not aware of this but his attorneys could have guided him accordingly. Be that as it may, I now turn to the undertaking given by the Third Respondent's attorneys as well as its implications.

[9] At an elementary level, it is perhaps useful to refer to the definition of an undertaking in general. The Shorter Oxford English Dictionary¹ defines an undertaking to mean 'a pledge, a promise or a guarantee'. In the legal context, I borrow from the (then) Guide to the Professional Conduct of Solicitors (1990) published by the Law Society, London, which defined an undertaking to be an unequivocal declaration of intention which is given by one practitioner to another, who reasonably places reliance thereof, in the course of their practice.

¹ The Shorter Oxford English Dictionary, 6th Ed., Vol. 2 ; N-Z

- [10] In this matter, I have no hesitation in coming to the conclusion that the Third Respondent's attorneys did give an undertaking that the writ of execution will not be acted upon pending the outcome of the review. The undertaking was given after the said attorneys had discussed the correspondence requesting an undertaking with the Third Respondent himself.
- [11] It was even mentioned that the Third respondent had, further, discussed the matter with his Counsel. Of importance, the undertaking given was not qualified and was in direct response to the request made by the Applicant's previous attorneys.
- [12] The nature of an attorney's undertaking has received considerable attention in other jurisdictions. It goes without saying that undertakings are of great significance to the practice of law. The importance of undertakings by attorneys in the Canadian context was remarked on in *Bogoroch & Associates v Sternberg*² as follows:
- '[Attorneys'] undertakings are matters of utmost good faith. They are traditionally given to expedite and facilitate the furtherance or conclusion of matters upon which [attorneys] are engaged on behalf of their clients. These efficacies result in savings to lawyers' time that can be passed on to clients. Time is spent more efficiently and work is done more smoothly. Because of that, [attorneys] must be able to rely upon undertakings, which are promises given by one [attorney] to another to do or to refrain from doing an act.'
- [13] It was also pointed out in *Hammond v. Law Society of British Columbia*³ that '*[w]hen a lawyer's undertaking is breached, it reflects not only on the integrity of that member, but also on the integrity of the profession as a whole.*'
- [14] In view of the correspondence directly from the Third Respondent himself, it would not be far-fetched to conclude that the Third Respondent's attorneys may have been pressured by their client in discarding the undertaking previously given. The letter they issued on 4 November 2014 attests to this possibility. In this letter, the Third Respondent's attorneys recorded *inter alia*

² (2007) 229 OAC 284

³ 2004 BCCA 560 (CanLII)

that '[they] now received instructions from [their] client to again proceed with the Warrant of Execution herein.'

[15] What the Third Respondent's attorneys failed to appreciate is that their undertaking was of paramount importance and could not have been disregarded at whim, whatever the Third Respondent's subsequent instructions may have been. This was pointed out in *Heg Consulting Enterprises (Pty) Ltd and Others v Siegwart and Others*⁴, where Desai J remarked as follows:

'Katzeff, an obviously experienced attorney, knew that, in terms of the ethical rules of his profession, the interests of his client were, inter alia, subject to his duty to the Court and any undertakings given by him in the course of his professional work.' [the underlining is mine]

[16] It is worth pointing out as well that undertakings given by attorneys in the course of their practice are more than mere contractual arrangements as failure to honour an undertaking can constitute professional misconduct.⁵

[17] In my opinion, attorneys are not legally obliged to give undertakings to their colleagues. However, once an undertaking has been given, it must be honoured. The simple rule to be observed has to be that an attorney should not give a professional undertaking which he cannot fulfil and should fulfil every such undertaking which he gives.

[18] All things considered, I come to the conclusion that the undertaking given by the Third Respondent's attorneys, on the Third Respondent's instructions, is strictly binding and must be given effect to.

[19] It is legally impermissible for the Third Respondent and his attorneys to simply disregard or abandon their undertaking in this matter. The undertaking was freely given and the Applicant's attorneys relied thereupon. It must be honoured.

⁴ 2000 (1) SA 507 (C)

⁵ See: Ruling of the Council of the (then) Transvaal Law Society (1981 DR 160)

[20] It, therefore, follows that the present application must succeed. I accordingly grant an order as prayed for in paragraphs 2, 3 and 4 of the notice of motion dated 5 February 2015.

Voyi, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

Mr A Patel of Cliffe Dekker Hofmeyr Inc

For the Third Respondent:

Adv JP Breytenbach

Instructed by:

Stander & Partners