



REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Case no: J 235/15

In the matter between:

AL SHA TRADING (PTY) LTD

Applicant

and

NEIL HARRISON

First Respondent

CCMA

Second Respondent

**SHERIFF OF THE HIGH COURT,
GERMISTON**

Third Respondent

Heard: 14 May 2015

Delivered: 22 May 2015

Summary: Application to set aside writ of execution. Debt settled after deducting tax from *ex gratia* payment in settlement of dispute. Employee not entitled to gross amount free of tax.

JUDGMENT

STEENKAMP J

Introduction

- [1] This is an application to set aside a writ of execution, brought on an urgent basis.

Background facts

- [2] The applicant and its former employee, the first respondent, settled a dispute at the CCMA. The parties agreed orally at an initial conciliation meeting that the applicant would pay the employee an initial or “interim” amount of R100 000. It did so. Then, at a further meeting at the CCMA, the dispute was settled fully on the basis that the applicant would pay the employee a further *ex gratia* amount of R141 000. The agreement was recorded in writing. It did not specify whether the settlement amount would be gross or nett of income tax. It did specify that it would be inclusive of all “statutory payments”, citing leave pay, notice pay, wages and severance pay. Nothing was specified under “other”.
- [3] The applicant applied to the South African Revenue Service (SARS) for an employee’s tax deduction directive in respect of the full *ex gratia* payment of R241 000. It obtained the directive, deducted income tax in the sum of R96 400 as directed, and paid the balance of R44 600 to the employee.
- [4] The employee maintains that he is entitled to payment of the gross amount. He had the settlement agreement certified in terms of s 143(3) of the LRA and had a writ of execution issued on the strength of the certified agreement. The writ was for the amount of R96 400, i.e. the amount that the employer had deducted according to the SARS tax directive. The applicant seeks to have the writ set aside.

Evaluation / Analysis

- [5] Before dealing with the merits, the Court has to decide whether the applicant has established urgency.

Urgency

- [6] The employee argues that the applicant has not established urgency.

- [7] The warrant of execution was issued on 27 January 2015. The Sheriff attached goods to the value of R100 000 on 5 February 2015.
- [8] The employee says the applicant should have taken steps immediately after the award had been certified and the writ was issued. But the applicant only became aware of the writ when the sheriff arrived at its premises on 5 February. It brought this application on 9 February.
- [9] I am satisfied that the applicant acted expeditiously. It could not have taken steps to have the writ set aside before it became aware of it.

Is the ex gratia amount taxable?

- [10] There can be little doubt that an *ex gratia* amount paid in settlement of an employment dispute is taxable.
- [11] Mr *Saloojee*, for the applicant, referred in this regard to *Stevens v Commissioner, South African Revenue Service*¹ where the SCA held that the definition of 'gross income' in the Income Tax Act² makes a receipt in respect of services rendered or by virtue of employment taxable. I agree with him that, where an *ex gratia* payment is made to an employee in recognition of his service to the employer, there is an unbroken causal relationship between the employment on the one hand and the receipt on the other. There is a causal connection between the employment and the receipt, and the receipt is taxable.
- [12] "Gross income" is defined in s 1 of the Income Tax Act to include –
- (d) any amount ..., including any voluntary award, received or accrued –
 - (i) in respect of the relinquishment, termination, loss, repudiation, cancellation or variation of any office or employment or of any appointment ... to any office or employment".
- [13] And "remuneration" is defined as –

¹ 2007 (2) SA 554 (SCA).

² Act 58 of 1962.

“...any amount of income which is paid or is payable to any person by way of any salary, leave pay, wage, overtime pay, bonus, gratuity...”³

[14] Section 2 of Schedule Four of the Income Tax Act further states:

“(1) Every –

(a) employer who is a resident;

(b) ...

who pays or becomes liable to pay any amount by way of remuneration to any employee shall, unless the Commissioner has granted authority to the contrary, deduct or withhold from that amount, or, where that amount constitutes any lump sum contemplated in paragraph 2(1)(b) of the Second Schedule, deduct from the employee's benefit or minimum individual reserve as contemplated in that paragraph, by way of employees' tax an amount which shall be determined...”

[15] In this case, the employer was obliged to deduct employees' tax as directed by SARS from the gratuity it paid to the employee. On that basis, the employee is not entitled to the amount it seeks to recover by way of the writ of execution.

The effect of certification

[16] The employee has had the settlement agreement certified in terms of s 143(3) of the LRA. In terms of s 143 (1) a certified award “may be enforced as if it were an order of the Labour Court”; but certification does not convert it to a court order.⁴

Clear right?

[17] In these circumstances, the employee is not entitled to the payment he seeks to recover by way of the writ of the execution. The employer was obliged to deduct and pay over to SARS the amount of R96 400. It paid the balance in terms of the settlement agreement to the employee. Therefore the debt in respect of which the writ was obtained has been extinguished and the writ must be set aside. The *causa* for the writ has

³ My underlining.

⁴ *Tony Gois t/a Shakespeare's Pub v Van Zyl* [2003] 11 BLLR 1176 (LC).

fallen away.⁵ As Ackermann J noted in *Le Roux v Yskor Landgoed (Edms Bpk)*:⁶

“Die algemene reël is dat ‘n eksekusielasbrief tersyde gestel sal word as die lasbrief nie ondersteun of nie verder ondersteun word deur sy *causa* nie. Die *causa* is die skuld en die vonnis wat daarop verleen is.”

[18] The applicant has established a clear right to have the writ set aside.

Alternative remedy?

[19] The employee further submitted that the applicant has an alternative remedy: it could refer a dispute over the interpretation or application of the settlement agreement to the CCMA in terms of s 24(8) of the LRA.

[20] That may be so; but the applicant argues that there is no dispute about the interpretation of the agreement. It is clear that the applicant agreed to make an *ex gratia* payment to the employee arising from the termination of his employment. That amount is subject to the deduction of employees' tax as a matter of law. The employer simply followed the peremptory provisions of the Income Tax Act in obtaining an employees' tax directive and acting in accordance with it. There is nothing to interpret.

Conclusion

[21] I am satisfied that the employee is not entitled to the amount deducted by the employer and paid over to SARS. The employer has established a clear right to have the writ of execution set aside.

[22] With regard to costs, I take into account that the employee is an individual who may have laboured under the impression that he was entitled to the full amount. He was brought to court to defend the applicant's claim. It was not unreasonable for him to do so. In law and fairness, I do not consider a costs order to be appropriate.

⁵ Cf *Ras en andere v Sandrivier Citrus Estates (Pty) Ltd* 1972 (4) SA 504 (T) 510 D-F.

⁶ 1984 (4) SA 252 (T) at 257, cited in *Rank Sharp SA (Pty) Ltd v Kleinman* (2012) 33 ILJ 2937 (LC) para 39.

Order

The writ of execution issued under CCMA case number GAEK 6933-14 is set aside.

Steenkamp J

APPEARANCES

APPLICANT:

Y F Saloojee

Instructed by Imraan M Suliman.

FIRST RESPONDENT:

C Higgs (attorney).