



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Reportable
 Case number: J89/15

In the matter between:

WINDYBROW THEATRE

Applicant

and

VUYO MAPHELA

First Respondent

SHERRIF OF THE HIGH COURT

JOHANNESBURG CENTRAL

Second Respondent

ALLIE ACHMAT

Third Respondent

Date heard: 22 January 2015

Delivered: 13 February 2015

Summary: Urgent application; Attachment in terms of garnishee proceedings under Rule 45(12)(a) of the Uniform Rules of Court set aside; Labour Court not having jurisdiction to order former employee to pay back portion of monies already distributed to him by the Sheriff; Writ of execution stayed pending finalization of review proceedings and monies held in trust by Sheriff ordered to be released to applicant employer.

JUDGMENT

RABKIN-NAICKER J

[1] The Applicant sought an order on an urgent basis in the following terms:

“Ordering the first respondent to pay the amount of R161, 466.65 (one hundred and one thousand four hundred and sixty six rand and sixty five cents) to the applicant, alternatively to the second respondent, within 24 hours of the date of this order;

Directing the Sheriff to release the applicant’s funds currently held in trust to the applicant;

Setting aside the Writ of Execution and the Notice of Attachment issued in enforcement of the arbitration award under case number GAJB 13329 – 14, which was issued by the CCMA on 1 October 2014;

Staying the further enforcement of the arbitration award pending the finalisation of the review application of the award under case number GAJB 13329 – 14; and

Ordering such respondents who oppose this application to pay the costs of this application, jointly and severally, the one paying the others to be absolved;”

- [2] The Applicant is a theatre company owned and funded by the Department of Arts and Culture. It dismissed its Chief Executive officer, the First Respondent and Chief Financial Officer, the Third Respondent, for financial irregularities relating to unauthorised expenditure of some R60 million.
- [3] The First and Third Respondents referred an unfair dismissal dispute to the CCMA and an arbitration award was issued which held their dismissals to be unfair, and ordered compensation of some R 650, 000 to each of them. During November 2014, the Applicant brought review proceedings to set aside the award in the Labour Court, which are still pending under case number JR2377/14.
- [4] The First and Third Respondents proceeded to have the award certified and a writ of execution was issued out of the Labour Court. According to the Applicant, it was not informed of these developments. Without notice to the Applicant, the Sheriff proceeded to attach funds from its bank accounts on 19 December 2014, and 10 January 2015. The Applicant only became aware that a writ been issued and its funds had been attached after the fact. On 30 January 2015 the Sheriff’s office sent copies of the writ garnishee attachment notices to the applicant by email.

[5] The Applicant then discovered that the funds attached by the Sheriff from its current account (some R160,000) had already been paid to the First Respondent by the Sheriff. The attachment of funds from the Applicant's investment account (some R1,3 million) had not yet been distributed to the First and Third Respondents, but only because the funds had not yet been cleared into the Sheriff's account. The Sheriff has since provided an undertaking to the applicant not to distribute any further monies. The applicant sought repayment of the money received by First Respondent or in the alternative for him to provide undertakings or security for repayment. No such undertaking was given and the First and Third Respondents oppose the urgent application in this court. The Sheriff has indicated in his letter that he will abide by the decision of this Court.

[6] Service and execution of orders in the Labour Court take place in accordance with the process applicable in the High Courts as provided for in section 163 of the LRA¹. The Sheriff erred in attaching the funds in question and distributing the monies to the First Respondent without first giving notice to the Applicant. He acted in terms of Rule 45 (12) (a) of the Uniform Rules of Court, which provides as follows:

“Whenever it is brought to the knowledge of the sheriff that there are debts which are subject to attachment, and are owing or accruing from a third person to the judgment debtor, the sheriff may, if requested thereto by the judgment creditor, attach the same, and thereupon shall serve a notice on such third person, hereinafter called the garnishee, requiring payment by him to the sheriff of so much of the debt as may be sufficient to satisfy the writ, and the sheriff may, upon any such payment, give a receipt to the garnishee which shall be a discharge, *pro tanto*, of the debt attached.” (my emphasis)

[7] In **South African Congo Oil Co (Pty) Ltd v Identiguard International (Pty) Ltd**² the SCA considered the meaning of the above rule and found that it should be read with Rule 45(8) which prescribes the manner in which an attachment is to be made, and reads in material part as follows:

¹ Section 163 provides that: “Any decision, judgment or order of the Labour Court may be served and executed as if it were a decision, judgment or order of the High Court.”

² 2012 (5) SA 125 (SCA)

'(8) If incorporeal property, whether movable or immovable, is available for attachment, it may be attached without the necessity of a prior application to court in the manner hereinafter provided:

...

- (c) In the case of the attachment of all other incorporeal property or incorporeal rights in property as aforesaid,
 - (i) the attachment shall only be complete when —
 - (a) notice of the attachment has been given in writing by the sheriff to all interested parties and where the asset consists of incorporeal immovable property or an incorporeal right in immovable property, notice shall also have been given to the registrar of deeds in whose deeds registry the property or right is registered, and (my emphasis)
 - (b) the sheriff shall have taken possession of the writing or document evidencing the ownership of such property or right, or shall have certified that he has been unable, despite diligent search, to obtain possession of the writing or document;
 - (ii) the sheriff may upon exhibiting the original of the warrant of execution to the person having possession of property in which incorporeal rights exist, enter upon the premises where such property is and make an inventory and valuation of the right attached.³

[8] The SCA considered the wording of rule 45(12) (a) as follows:

"[22] The argument of the respondent fails to take account of the plain language employed in rule 45(12)(a) and in particular the words 'attach the same, and thereupon shall serve a notice on such third person'. The adverb 'thereupon' is of particular significance. The Shorter Oxford English Dictionary 6 ed vol 2 at 3234 ascribes the following meanings to it:

- (1) 'Upon that or it; Upon that (in time or order).'
- (2) 'On that being done or said; (Directly) after that.'
- (3) 'On that subject or matter with reference to that.'

Given the context in which the adverb appears in rule 45(12)(a), the first two meanings ascribed thereto are appropriate. Properly interpreted the phrase '(a)ttach the same, and thereupon shall serve a notice on such third person' envisages two separate jural acts: (a) an attachment of the debt; and (b) service upon the garnishee of the prescribed notice.

³ At paragraph 8

[23] For these reasons I conclude that it is indeed a necessary requirement of rule 45(12)(a) that the sheriff attach the debt in accordance with rule 45(8)(c). Such attachment coupled with service of the garnishee notice has the effect, as in English law and other foreign jurisdictions, of prohibiting the person upon whom the garnishee notice is served from parting or dealing with the debt pending the outcome of the garnishee proceedings. It is by virtue of the attachment that the garnishee becomes obliged to pay not the judgment debtor, but the judgment creditor (see Reichenberg (*supra*) at 747H in fin; as also the cases there cited, namely *Paramount Furnishers v Lesar's Shoe Store and Outfitters* 1970 (3) SA 361 (T) at 364 – 365; and *African Distillers Ltd and Others v Honiball and Another* 1972 (3) SA 135 (R) at 136H).”

[9] Given the above authority the attachment of the funds had to be coupled with notice to the Applicant, and the Sheriff’s failure to complete the attachment in terms of the Rules rendered the attachment unlawful and invalid. The attachment thus stands to be set aside.

[10] A further issue I must deal with is the question of whether this Court can order the First Respondent to repay the monies he received from the Sheriff by virtue of the unlawful attachment. Adv Fourie for the Applicant argued that such an order is competent given that this would be incidental to the Labour Court’s powers. He referred to the inherent power of high courts to protect their own process taking into account the interests of justice. In so doing he referred to sections 169 and 173 of the Constitution of the Republic of South Africa which provisions deal respectively with the jurisdiction of the High Court of South Africa and its composition, and the inherent power of the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

[11] While the Labour Court is a specialist court with an equivalent status to the superior courts, it is not part of the High Court of South Africa. Section 157 (1) and (2) of the LRA provide as follows:

“(1) Subject to the Constitution and section 173⁴, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.

⁴ Section 173 of the LRA deals with the jurisdiction of the LAC.

(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from -

- (a) “employment and from labour relations;
- (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
- (c) the application of any law for the administration of which the Minister is responsible.”

[12] Section 157 has been the subject of much judicial scrutiny since its drafting⁵. After an examination of this jurisprudence, the meaning of this section and its implications were succinctly summarised by Nugent JA in **Mhanya v University of Zululand**⁶ as follows:

“[18] Thus to summarise:

- The labour forums have exclusive power to enforce LRA rights (to the exclusion of the High Courts).
- The High Court and the Labour Court both have the power to enforce common-law contractual rights.
- The High Court and the Labour Court both have the power to enforce constitutional rights so far as their infringement arises from employment.”

[13] Given the above, I do not find any basis to support the submission by Adv Fourie that the Labour Court has an inherent power to protect its own process in terms of section 173 of the Constitution. I therefore find that I do not have jurisdiction to order First Respondent to repay the money he received from the Sheriff. The Applicant may rely on other legal avenues to recover the amount.

[14] In as far as the prayer to set aside the warrant of execution is concerned, no case has been made out that the writ is no longer supported by its *causa*⁷. There was a submission made in oral argument that the warrant itself, issued out of this court, was unlawful in its terms. No substantiation for this was

⁵ For example in *Fredericks v MEC for Education and Training, Eastern Cape, and Others* 2002 (2) SA 693 (CC); *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC)

⁶ 2010 (1) SA 62 (SCA)

⁷ *Van Dyk v Du Toit* 1993 (2) SA 781 (O)

made on the papers and the inference sought to be drawn by submissions made in open court that the Registrar was at fault in issuing the writ are regrettable.

[15] Given that the Applicant is publically funded, I find no reason to order that the Sheriff keep monies in his trust account for the First and Third Respondent's security. The application for review of the award in question was launched before the amendments to the LRA came into effect and the issue of mandatory security does not arise. The First and Third Respondents made no substantive case in their papers against the staying of the writ pending the review. Their opposition to the application seemed rather to be the result of a great deal of acrimony between the parties to the dismissal dispute.

[16] I therefore exercise my discretion to stay the execution of the writ pending the finalization of the review application. Given that it was the erroneous procedure followed by the Second Respondent that gave rise to this application, I am not going to make a costs order *in casu*. I therefore make the following order:

Order

1. The Second Respondent is ordered to release the Applicant's funds currently held in trust to the Applicant;
2. The enforcement of the writ of execution issued under case number GAJB 13329 – 14 is hereby stayed pending the finalization of the review application under case number JR2377/14.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

APPEARANCES:

Applicant: Adv Greg Fourie instructed by Cliffe Dekker Hofmeyr Inc

Respondent: Adv J Bauer instructed by F Rudolph Attorneys

LABOUR COURT