REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO. J2264/08

ROBOR (PTY) LTD (Tube division)	Applicant
and	
JOUBERT, N	First Respondent
TOFU, A	Second Respondent
HAMBIDGE N.O.	Third Respondent
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Fourth Respondent
METAL & ENGINEERING INDUSTRIES BARGAINING COUNCIL	Fifth Respondent

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JUDGMENT

TODD AJ:

1. This matter came before me on the return date after an interim order was granted by this Court on 28 October 2008. The interim order stayed the enforcement of an arbitration award made by an arbitrator appointed by the Metal and Engineering Industries Bargaining Council, the Fifth Respondent in this application.

2. The arbitration award was made during September 2004.

3. The substance of the award was that an employee, Alfred Tofu, the Second Respondent in these proceedings, was found to be entitled to be paid severance pay by his employer, the Applicant, in an amount of R15 264.00.

4. The Applicant initiated review proceedings in this Court during October 2004 in which it

sought to overturn the award.

5. The papers in the review proceedings are not before me, but in its founding papers in this application the deponent states that the review application was "ripe for trial" when the Applicant adopted the view that the employee's claim in terms of the arbitration award had prescribed. On the papers, it appears that this contention was first raised by the Applicant when steps were taken on behalf of the employee, some four years later, to have the arbitration award certified as contemplated in the provisions of section 143 of the Labour Relations Act and a writ of execution issued. This happened during May 2008. The Applicant had, on the papers before me, done little or nothing during the intervening four years to prosecute the review application.

6. The Applicant's response was to mount vigorous opposition to the certification of the award, primarily on two grounds: first, that the employee was being represented impermissibly, by a labour consultant, in seeking to enforce the award; second, that the delay in seeking to enforce the award had resulted in the debt becoming prescribed.

7. Despite this opposition, the arbitration award was duly certified during October 2008 and a writ of execution issued. The Applicant then "investigated" the circumstances in which the award had been certified and a writ issued, concluded that various irregularities had been committed, and instructed its attorneys to bring the present proceedings on an urgent basis.

8. The Applicant also, during October 2008, brought an application in terms of the provisions of section 144 of the Labour Relations Act to rescind the certification of the award.

9. This Court has the power, in its discretion, to stay the execution of its own orders for such period as it deems fit. The discretion is expressly conferred by the provisions of section 145(3) of the LRA pending a review application brought under the provisions of that section. Whether or not a review application is pending under that section, the Court in any event has a discretion to stay the enforcement of an arbitration award contemplated by the provisions of section 143(1) of the LRA, and to stay the enforcement of its own orders. This is so both by reason of the specific powers conferred on the Court by section 158 of the LRA, and because the Labour Court is a superior court with authority, inherent powers and standing in relation to matters under its jurisdiction equal to that of a provincial jurisdiction of the High Court.[1]

[1] section 151 of the LRA

10. The discretion to stay execution must be exercised judicially, but generally speaking a Court will grant a stay of execution where real and substantial justice requires it or, put differently, where injustice would otherwise be done.[2]

11. The discretion is a wide one. It is founded on the Court's power to control its own process. Grounds on which a Court may choose to stay execution include that the underlying cause of action on which the judgement is based is under attack, and that execution is being sought for improper reasons. But these are not the only circumstances in which the Court will exercise the power.[3]

12. In determining whether or not to exercise the discretion, the High Court has "borrowed" from the requirements for the granting of interim interdicts.[4] At the heart of the enquiry is whether the Applicant has shown a well-grounded apprehension of execution taking place and of injustice being done to the Applicant by way of irreparable harm being caused if execution were not suspended.[5]

13. One of the grounds on which a stay of execution is regularly sought in this Court is that there is a pending attack on the underlying cause of action giving rise to the judgement debt, whether arising from an order of this Court or an arbitration award made in the CCMA or a bargaining council, and enforceable by reason of the provisions of section 143(1) of the LRA.

14. As to the factors that weigh in considering the interests of justice, the Applicant points out that an amount payable under an arbitration award bears interest at the rate determined in terms of the Prescribed Rate of Interest Act, 1975[6]. This protects the interests of the judgment creditor (typically the employee in whose favour an award has been made) in the event that the challenge to the underlying cause of action is unsuccessful.

15. By contrast, if the challenge to the underlying cause of action is ultimately successful, and the amount of the debt has already been paid prior to finalisation of that challenge, the judgement debtor (typically the employer) may find it difficult to secure repayment. This may be likely to be the case where the employee is relatively low paid and has

[2] *Strime v Strime* 1983 (4) SA 850 (C) at 852A; *Santam Ltd v Norman* 1996 (3) SA 502 (C) at 505E-F; *Road Accident Fund v Stydom* 2001 (1) SA 292 (C)
[3] see *Road Accident Fund v Strydom* supra at 301C-D
[4] *Erasmus v Sentraalwes Kooperasie Bpk* [1997] 4 All SA 303 (O) at 307
[5] *Road Accident Fund v Strydom* supra at 304 B-G
[6] section 143(2) of the LRA

suffered financial hardship in consequence of having been dismissed. This Court is, then, regularly asked to assume that an employee in these circumstances will have difficulty repaying any amount already paid if the challenge to the underlying cause of action later succeeds.

16. There is no closed list of factors that may be relevant to the question whether the interests of justice require a stay of execution. But there are a number of other considerations, in addition to those raised by the Applicant, that are frequently of importance in applications of this nature. These include:

16.1 Whether the attack on the underlying cause of action was brought in time[7], and whether its prospects of success are strong. This Court's roll is regularly burdened with a large number of applications of this kind, brought on an urgent basis in the face of steps taken to execute an award, when the attack on the underlying award was brought out of time, or when the attack clearly has little or no prospects of success. The interests of justice will seldom warrant a stay in these circumstances.

16.2 The interest of all parties in securing finality. The dispute resolution system established by the Labour Relations Act provides parties with easily accessible remedies. In return, they must exercise their rights quickly. The time periods for doing so – 30 days for a referral to conciliation in the case of most disputes, and 90 days thereafter for a referral to adjudication – are considerably shorter than ordinary prescription periods. Speedy dispute resolution is a core to one of the LRA's primary objects, the effective resolution of labour disputes. This is one of the ways in which the LRA seeks to advance economic development, social justice and labour peace.[8]

16.3 The cost to all parties of a delay in finality, and the cost to all parties of instituting or opposing further proceedings, whether in this Court or elsewhere, to attack the underlying cause of action or to stay execution pending any such attack. Many Applicants come to this Court by way of urgent application, with counsel and attorneys briefed, in circumstances where the amount of the judgement debt is likely to be less than or, perhaps, little more than the cost of doing so. The position is far worse if one takes into account the overall cost of the attack on the

[7] As to which, see the dictum in *Dumah v Klerksdorp Town Council* 1951 (4) SA 519 (T) at 522E

[8] LRA section 1; and see, for example, the statements in this regard in the as yet unreported decision of the Supreme Court of Appeal in Shoprite Checkers (Pty) Ltd v CCMA and others (case no 315/08) at paragraphs [28] and [34]. The same point has been made in numerous decisions of this Court.

underlying cause of action which is usually the basis of the application to stay. It is difficult to conceive what the commercial justification is for litigation of this kind, and one fears that all too often litigants are acting on inadequate or inappropriate legal advice.

16.4 The risk of injustice being done to the less powerful party to the dispute. The stronger financial position of most employers enables them to mount attacks on the underlying cause of action which the employee party is frequently powerless to oppose or to expedite. This may lead to an outright abuse of the dispute resolution system.

17. In the present matter, the Applicant sought to stay execution of payment of the amount of R15 264 in terms of an arbitration award that was made in September 2004. The stay was sought pending either the outcome of an application to this Court brought in October 2004, and which it has done nothing to prosecute since then, or alternatively an application to rescind the relatively recent certification of the award in terms of section 143(1) of the LRA.

18. In my view it would be contrary to the interests of justice to stay the execution of the award in the present matter. In reaching this conclusion I have taken account of the considerations referred to above. I have had regard in particular to the following considerations relevant to the present matter:

18.1 The application to rescind the certification of an arbitration award under section 143 of the LRA under section 144 has, in my view, little or no prospect of success. The act of certification under section 143(1) does not constitute a ruling or award, and no new line of attack is opened up for a party aggrieved by the outcome of arbitration proceedings when the award is certified. An award must be certified if it is not an advisory award and if it is on the face of it a final and binding award.

18.2 As regards the contention that the award has prescribed, I am aware of previous decisions of this Court in which similar contentions have been upheld. In general, the point has been raised when a party has approached this Court on application to dismiss a review application or for appropriate declaratory relief. The point is raised here in support of an application to stay enforcement of an arbitration award, pending a rescission application in which the prescription point is raised. In the matter before me, which concerns an application to stay

execution, this Court must determine where the interests of justice lie. It seems to me that a grave injustice would be done if an employee in whose favour an arbitration award has been made should forfeit his claim because he fails to attempt execution while a review application is pending. It seems to me that an employee may quite reasonably await the outcome of the review proceedings before executing the award, and should not be compelled to seek to execute in the face of a review application. It would lead to a grave injustice if an employee who has not been shown to have given up his interest in an award should be met with a plea of prescription when, once it becomes clear that the review is not being prosecuted within a reasonable time, he seeks at last to claim the benefits of the award. This would open the door to serious abuse of this Court's process by employers who may institute review proceedings merely to avoid their obligations to comply with arbitration awards.

18.3 As far as the review application is concerned, this was brought more than four years ago. The Applicant has failed to prosecute the review application timeously or within a reasonable period.

18.4 The amount of the judgment debt, R15 264, does not warrant the scale of litigation initiated by the Applicant on various fronts. While the Applicant is undoubtedly free to marshall whatever resources it wishes to oppose payment, this Court is entitled to take into account the commercial efficacy of these attacks in deciding where the interests of justice lie in the context of a stay application such as the present one.

19. The wisdom of the course of action which the Applicant has taken, and the likely cost of that course of action, suggest either that its actions are designed to frustrate the ultimate implementation of the award; or that it is being very poorly advised as to the ultimate commercial viability of the various legal steps that it is taking.

20. In certain circumstances the enforcement of an arbitration award may have wider implications for an employer's business. In the present circumstances no such consideration is evident.

21. For these reasons I am not satisfied that real and substantial justice requires a stay in execution of the amount payable under the arbitration award.

22. As far as costs are concerned, it is not clear to me from the file for what reason costs

were granted at the interim stage of these proceedings. Although there was no appearance on behalf of the Second Respondent at the hearing of the matter, an answering affidavit was delivered and it appears that the Second Respondent did incur certain costs in the proceedings. Were it not for the fact that the Applicant was awarded costs when the interim order was granted, I would have been inclined to make no order as to costs. In light of the conclusion to which I have come as to the merits of the application, I consider that it would be just and equitable to order that the Applicant pay such costs as the Second Respondent in fact incurred in the matter.

23. I make the following order: the application is dismissed with costs.

Date of hearing:	13 March 2009
Date of judgment:	17 April 2009
For the Applicant:	I Strydom, instructed by Geldenhuys Attorneys
For the Respondents:	no appearance