

**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT JOHANNESBURG**

**CASE NO: J655/11**

**Not reportable**

In the matter between

**QUICK TRADING (PTY) LTD t/a TC PANEL BEATERS**

Applicant

and

**JONKER, ROSEMARY**

Respondent

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**JUDGMENT**

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**PATHER AJ**

**Brief introduction**

[1] This is an urgent application which was heard on 24 May 2011. These are my brief reasons for the order and may be supplemented if necessary.

[2] The applicant sought urgent relief against the first and second respondents, in the main on the following terms:

"Staying and/or setting aside the writ of execution issued by the Registrar of the Labour Court on or around 29 March 2011 under case number J2551/10, pending the outcome of the rescission application launched in the Dispute Resolution Centre for the Motor Industry Bargaining Council under case number MINT1193N."

The first respondent (Ms Jonker) opposed the application.

**Brief background**

[3] After being dismissed on 5 October 2007, Ms Jonker referred a dispute concerning an unfair dismissal to the Dispute Resolution Centre for the Motor Industry Bargaining Council (DRC). The matter was eventually arbitrated on 20 August 2008.

[4] On the day of the arbitration hearing the applicant's (the respondent in the DRC matter), then legal representative, Mr Stone, applied for the matter to be postponed because according to the respondent a key witness was off sick on that day. Ms Jonker's representative, an official of the union, (the applicant in the DRC matter) opposed the application for postponement. He testified at the hearing that contrary to reports Ms Jonker had telephoned the applicant's place of business during the interval, had asked to speak with the witness and had been informed simply that the witness was not in her office at the time of the telephone call.

[5] Commissioner M H Markus ("the Commissioner") who had been appointed to arbitrate the matter accepted the evidence as being unchallenged.

[6] The application for a postponement was therefore refused. In

this regard the Commissioner under the subheading "Ruling on Postponement Application" says the following:

"When I pointed out to Mr Stone that the uncontroverted evidence of Mr Bekker and his client, which had not been challenged by him during cross-examination, precluded my granting his application for postponement; Mr Stone thereupon withdrew as respondent's representative in the proceedings and I duly directed that the matter proceed in the absence of the respondent, who had advised Mr Stone following his communication to his client of my refusal of a postponement, that it would not be attending the arbitration."

[7] Although the sentence is far too long, the Commissioner's reasoning in this regard is sound and after hearing Ms Jonker's evidence, the Commissioner found that her dismissal was unfair and ordered the applicant to compensate her in the sum of R73 000, being the equivalent of ten months' wages.

[8] On behalf of the applicant it is contended that:

"As soon as practically possible, after becoming aware of the said arbitration award the applicant brought the necessary rescission application in the DRC in order to have the arbitration award set aside and fresh arbitration proceedings heard".

[9] From the Commissioner's statement referred to in paragraph 3 above, it should have been clear to the applicant that an award was pending and that it needed to act with haste in filing any application for rescission of the award. Not even a medical

certificate in respect of the key witness's absence at the arbitration was submitted to the DRC.

[10] Instead the applicant failed to behave proactively, but waited until the respondent attempted to enforce the award over two years later by execution of the writ on 14 April 2011, before enquiring from the DRC what had become of its rescission application, which was apparently launched in December 2008.

[11] As at 21 April 2010 the DRC had no record of the rescission application. It is contended that the only realistic explanation is that the DRC lost the applicant's rescission application. Even if that were true, which this Court finds improbable, the applicant did nothing to expedite the matter.

[12] Given that its application to have the arbitration hearing postponed was unsuccessful more than 2 years previously the applicant would have been expected to ensure that no further delays occur in order to show that its attack of the arbitration award is *bona fide*.

[13] In any event, the award had already been made an order of court on 9 March 2011. After proper service of that application under case number J2551/10, the applicant claims not to have received the application. Ms Jonker's submission that the applicant omitted to oppose the application under case number

J2551/10 is reasonable and probable. That order of the Court stands.

[14] What is clear from the papers is that the Sheriff's attending on the applicant's premises, armed as he was with the writ, caused the applicant to spring into action. Mr Graham on behalf of the applicant argued that Ms Jonker had delayed the prosecution of her claim, as execution of the writ was only attempted on 14 April 2011.

[15] Ms Groenewald on behalf of Ms Jonker countered this by pointing out that the law allows an applicant three years in which to prosecute her claim and that Ms Jonker had acted within the timeframe allowed. I agree.

[16] Despite being successful in the DRC arbitration, Ms Jonker has had to endure further litigation in attempting to enforce the award. There is in my view no further *onus* on her to display any alacrity in the prosecution of her claim other than to do so within three years from the date of the award to avoid its becoming prescribed.

[17] In any event, I am not convinced that the applicant has good prospects of success in either a rescission or a review application in respect of the award. The award in my view is well-reasoned, despite its being based on the version only of

Ms Jonker's.

[18] Furthermore the arbitration proceedings were conducted fairly after the Commissioner had given both parties an opportunity to make representations regarding the application for a postponement. The applicant's conduct from the outset seems to have been aimed at delaying the finalisation of the dispute, which Ms Jonker had referred to the DRC during 2007.

[19] Therefore I make the following order:

1. The application is dismissed.
2. The applicant is to pay the respondent's costs.

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**Pather AJ**

Acting Judge of the Labour Court of South Africa

Date of hearing: 24 May 2011

Date of judgment: 24 May 2011

Appearances:

For the Applicant: D. Graham of Donald Graham Attorneys

For the Third Respondent: A. Groenewald of Anika Groenewald Attorneys