

EMPLOYMENT LAW

ALERT

30 MAY 2022



INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

To stay or not to stay, in relation to the enforcement of default arbitration awards

Recently, in *Denel SOC LTD v NUMSA obo Petersen*, the Labour Court (LC) considered an urgent application to stay the enforcement of a default arbitration award which had been certified by the director of the Commission for Conciliation, Mediation and Arbitration (CCMA). The case affords valuable insight and direction of employment jurisprudence when it concerns the certification and enforcement of default awards.



FOR MORE
INSIGHT INTO
OUR EXPERTISE
AND SERVICES

To stay or not to stay, in relation to the enforcement of default arbitration awards

Recently, in *Denel SOC LTD v NUMSA obo Petersen*, the Labour Court (LC) considered an urgent application to stay the enforcement of a default arbitration award which had been certified by the director of the Commission for Conciliation, Mediation and Arbitration (CCMA). The case affords valuable insight and direction of employment jurisprudence when it concerns the certification and enforcement of default awards.

The dispute arose when Denel placed an employee, Petersen, on suspension on 21 October 2019, following allegations regarding the mishandling of its intellectual property rights. Petersen challenged his suspension and referred an unfair labour practice dispute to the CCMA. Conciliation failed and a request was made for arbitration. When Denel failed to attend the arbitration hearing despite prior notice via email, the Commissioner continued with the proceedings in Denel's absence and issued a default arbitration award. The Commissioner found that the suspension was substantively unfair and ordered the upliftment of the suspension, the payment of Petersen's outstanding salary to cover the shortfall he had suffered, plus three months' compensation. Once Denel discovered the default award, it launched a rescission application to set the award aside. The CCMA Commissioner refused to entertain the application as it had been launched one day outside the applicable period, which necessitated that a condonation application be brought.

While the condonation application was being launched, Petersen applied to the director of the CCMA to certify the default award and sought to execute on it. The award was certified on 13 April 2022 and on 21 April 2022, the sheriff attached movable property belonging to Denel to satisfy the monetary amount of the default award and any attempts on Denel's part to engage with the sheriff not to proceed with execution until the outcome of Denel's interlocutory applications at the CCMA were rebuffed. Denel then launched an application in the Labour Court to stay the enforcement of the default arbitration award.

STATUS AND APPLICATION OF DEFAULT AWARDS

Before discussing the merits, the court, as an aside, undertook an extensive analysis of the status and application of default awards. First, it considered whether the Labour Court is mandated to deal with all applications for the stay of enforcement of awards that

frequently come before it; then it evaluated the powers of the CCMA to certify awards; and lastly it discussed whether the CCMA or bargaining councils have their own powers to order a stay.

On the first question, the court opined that the mandate of the Labour Court is constrained to those decisions that are pending before it and does not encompass those of other dispute resolution bodies. It held that although section 158(1)(a) of the Labour Relations Act 66 of 1995, as amended (LRA) empowers the court to make any appropriate order, which may include urgent interim relief such as staying the enforcement of an arbitration award, those powers must be exercised only when so mandated by the LRA. In other words, the court had no mandate to stay the enforcement of decisions pending before other statutory bodies like the CCMA.

To stay or not to stay, in relation to the enforcement of default arbitration awards

CONTINUED

On the question of the powers of the CCMA director to certify awards, the court found that default arbitration awards are not deserving of certification as they are not final in nature. This view is supported by the wording of section 143(3) of the LRA, which provides that an arbitration award may only be enforced if the director has certified that the arbitration award is an award as envisaged in subsection (1) which envisages that an award that has been issued is final and binding in nature. The court held that although default awards are binding, they are not final. A decision is only final if it resolves the substantial portion of a dispute (*Zweli v Minister of Law and Order of RSA* [1993] All SA 365 (A)). Since a default award does not dispose of all matters submitted for arbitration, it is not final and is thus incapable of certification.

Last, the court noted that the CCMA and relevant bargaining councils are mandated and empowered to hear and determine applications seeking to stay enforcement of a default award pending the CCMA or bargaining council's decision on any

interlocutory point. This is because a stay application occurs as the result of the CCMA or council performing its arbitral functions, and any proper performance of these functions requires the relevant body to have the authority to stay the operation of a default arbitration award while its decision over the award is pending.

Of course, since none of these three questions were properly before the court, the court noted them as side statements only and left them open for consideration in future matters. However, they illustrate the point that the law appears poised to divest the Labour Court of a mandate to hear applications for the staying of default awards and leave that mandate for a decision to be made by the relevant statutory body itself. It is further poised to halt the certification of default arbitration awards due to any lack of finality.

MERITS

On the merits of this particular case, the court proceeded from the premise that the Labour Court could entertain a stay if this was warranted. It held that

regardless of the merits or demerits of Denel's rescission application, or Denel's prospects of success, this was not relevant for the purpose of the stay application. The sheriff was at the door attaching Denel's property and this was taking place at a time when Denel was exercising its rights to have the default award rescinded. Petersen was adamant that the goods be attached and sold in execution. What mattered most was that there was an ongoing dispute regarding the award in question, and it was therefore in the interests of justice that its operation be stayed. It held that the primary analysis concerned an analysis about which of the parties would suffer the most harm from granting or refusing the stay. In this case, the balance favoured Denel as it stood to lose property that was in the process of attachment, which it might not have otherwise been able to retrieve and recover.

**FIONA LEPPAN, KGODISHO PHASHE
AND LISO ZENANI**

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



Aadil Patel

Practice Head & Director:
Employment Law
Joint Sector Head:
Government & State-Owned Entities
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com



Anli Bezuidenhout

Director:
Employment Law
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com



Jose Jorge

Sector Head:
Consumer Goods, Services & Retail
Director: Employment Law
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com



Fiona Leppan

Joint Sector Head: Mining & Minerals
Director: Employment Law
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com



Gillian Lumb

Director:
Employment Law
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com



Imraan Mahomed

Director:
Employment Law
T +27 (0)11 562 1459
E imraan.mahomed@cdhlegal.com



Bongani Masuku

Director:
Employment Law
T +27 (0)11 562 1498
E bongani.masuku@cdhlegal.com



Phetheni Nkuna

Director:
Employment Law
T +27 (0)11 562 1478
E phetheni.nkuna@cdhlegal.com



Desmond Odhiambo

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com



Hugo Pienaar

Sector Head:
Infrastructure, Transport & Logistics
Director: Employment Law
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com



Thabang Rapuleng

Director:
Employment Law
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com



Hedda Schensema

Director:
Employment Law
T +27 (0)11 562 1487
E hedda.schensema@cdhlegal.com



Njeri Wagacha

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com



Michael Yeates

Director:
Employment Law
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com



Mohsina Chenia

Executive Consultant:
Employment Law
T +27 (0)11 562 1299
E mohsina.chenia@cdhlegal.com



Faan Coetzee

Executive Consultant:
Employment Law
T +27 (0)11 562 1600
E faan.coetzee@cdhlegal.com



Jean Ewang

Consultant:
Employment Law
M +27 (0)73 909 1940
E jean.ewang@cdhlegal.com



Ebrahim Patelia

Legal Consultant:
Employment Law
T +27 (0)11 562 1000
E ebrahim.patel@cdhlegal.com

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



Asma Cachalia
Senior Associate:
Employment Law
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com



Jordyne Löser
Senior Associate:
Employment Law
T +27 (0)11 562 1479
E jordyne.loser@cdhlegal.com



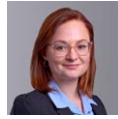
Tamsanqa Mila
Senior Associate:
Employment Law
T +27 (0)11 562 1108
E tamsanqa.mila@cdhlegal.com



Christine Mugenyu
Senior Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E christine.mugenyu@cdhlegal.com



Dylan Bouchier
Associate:
Employment Law
T +27 (0)11 562 1045
E dylan.bouchier@cdhlegal.com



Abigail Butcher
Associate:
Employment Law
T +27 (0)11 562 1506
E abigail.butcher@cdhlegal.com



Rizichi Kashero-Ondego
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E rizichi.kashero-ondego@cdhlegal.com



Biron Madisa
Associate:
Employment Law
T +27 (0)11 562 1031
E biron.madisa@cdhlegal.com



Peter Mutema
Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E peter.mutema@cdhlegal.com



Kgodisho Phashe
Associate:
Employment Law
T +27 (0)11 562 1086
E kgodisho.phashe@cdhlegal.com



Tshepiso Rasetlola
Associate:
Employment Law
T +27 (0)11 562 1260
E tshepiso.rasetlola@cdhlegal.com



Taryn York
Associate:
Employment Law
T +27 (0)21 481 6314
E taryn.york@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2022 11153/MAY