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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 1684/15

In the matter between:

Charl WENUM **Applicant**

and

MAQUASSI HILLS **Respondent**

LOCAL MUNICIPALITY

Heard: 13 December 2016
Delivered: 17 January 2017
Summary: Leave to execute pending petition to appeal judgment reinstating applicant. Superior Courts Act s 18.

JUDGMENT

STEENKAMP J

Introduction

[1] This is an application to execute a judgment pending a petition for leave to appeal by the respondent, brought in terms of s 18 of the Superior Courts Act.[1]

[2] In a judgment handed down on 15 June 2016, Baloyi AJ ordered the Municipality (the respondent) to reinstate the applicant, Mr Wenum, in his position of Chief Financial Officer. The Municipality applied for leave to appeal. It was refused. On 2 December 2016 the Municipality petitioned the Labour Appeal Court for leave to appeal. The applicant brought this application on 6 December. It was heard on 13 December 2016.

Background facts

[3] Wenum was dismissed. He brought an urgent application in two parts to reinstate him. On 27 August 2015 Lagrange J granted an interim order ordering the Municipality to pay him pending the return date. Whitcher J extended it to 4 December 2015. On that day the main relief was argued before Baloyi AJ. He only handed down judgment on 15 June 2016. The Municipality stopped paying Wenum. It applied for leave to appeal on 2 July 2016. Wenum applied for execution of the judgment pending that application. Lagrange J heard the application to execute on 21 July and dismissed it on 22 July 2016. Baloyi AJ dismissed the application for leave to appeal on 4 December 2016, together with costs on a punitive scale. The Municipality petitioned on 2 December 2016.

Evaluation / Analysis

[4] Section 18 of the Superior Courts Act states:

"**18. Suspension of decision pending appeal**

(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

[1] Act 10 of 2013.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

(4) If a court orders otherwise, as contemplated in subsection (1)—

(i) the court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules."

[5] Before considering whether the applicant has passed the hurdle set out in s 18(2), the Court needs to consider two preliminary points raised by the Municipality, viz urgency and a claim of *res judicata.*

Urgency

[6] The Municipality argues that the applicant has not demonstrated urgency. I disagree. It delivered its petition after hours at 17:13 on Friday 2 December 2016. The applicant lodged this application on Tuesday 6 December to be heard a week later, on Tuesday 13 December. He acted with alacrity. And the nature of the application is such that it is urgent. Notwithstanding the order reinstating him, and the Court refusing leave to appeal, his reinstatement has been suspended. I am satisfied that the matter needed to be heard on an urgent basis.

Res judicata?

[7] Mr *Makgato*, for the Municipality, argued that the application should not be heard, based on the principle of *res judicata.* He argued that Lagrange J had already, on 15 June 2016, ruled against execution. But that ruling was made pending the application for leave to appeal. Baloyi AJ dismissed the application for leave to appeal on 4 November 2016. This fresh application to execute is brought pending the petition. It does not arise from the same cause of action.

Exceptional circumstances?

[8] This Court dealt with the application of s 18 of the Superior Courts Act a few days before this application was heard. In *Luxor Paints (Pty) Ltd v Lloyd*[2] Van Niekerk J held that it applied to this Court. I agree, and align myself with his reasoning:

> '[9] As at the date of the present hearing, the Labour Appeal Court had not yet made a ruling in respect of the petition for leave to appeal, nor had it made any ruling in respect of the application for leave to appeal filed in terms of s 18(4).
>
> [10] The first issue to be determined is the application of s 18 of the Superior Courts Act to this Court. Section 18 regulates the suspension of decisions pending appeal. In general terms, the operation and execution of a decision (other than a decision not having the effect of a final judgment) is suspended pending the outcome of an application for leave to appeal or appeal (see s 18(1)). The court may order otherwise (see s 18(3)) if it is established on a balance of probabilities that the applicant will suffer irreparable harm if the court does not so order, and that the other party will not suffer irreparable harm if the court so orders. (See *Incubeta Holdings (Pty) Ltd & another v Ellis & another* 2014 (3) SA 189 (GJ).) If the court orders that the operation or execution of an order is not suspended, the court must record its reasons for doing so. The aggrieved party has an automatic right of appeal to the next highest court, which must deal with the matter 'as a matter of extreme urgency' (s 18 (4) (iii)).

[2] [2016] LALCJHB 505 (9 December 2016).

[11] Of particular importance in the present matter is s 18 (4) (iv), which provides that pending the outcome of the urgent appeal, the order to execute is automatically suspended, pending the outcome of the appeal. It follows that if s 18(4) is applicable, the order granting the applicant leave to execute was automatically suspended on 9 November 2016, when the notice of appeal was filed.

[12] The applicant contends that the provisions of s 18(4) of the Superior Courts Act do not apply to this court and in doing so, relies on the judgment by Snyman AJ in *L'Oréal South Africa (Pty) Ltd v Kilpatrick and another* (2015) 36 *ILJ* 256 (LC)). In that judgment, the court held that the provisions of the Superior Courts Act do not apply to this court, at least not in relation to s 18 of that Act. Having said that, Snyman AJ accepted that 'selected provisions' from the Superior Courts Act may from time to time be imported into or adopted by this court where these are complementary with this Court's rules, provisions and processes (at para 21).

[13] What this conclusion ignores is the definition of 'Superior Court' in s 1 of the Superior Courts Act. The definition extends to the 'Constitutional Court, the Supreme Court of Appeal, the High Court and any other court of a status similar to the High Court.' Section 151 of the Labour Relations Act establishes this court as a court of law and equity, and as a superior court that has the authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that of a division of the High Court. There can be no question therefore that this court falls within the definition of a 'Superior Court' for the purposes of the Superior Courts Act. The fact that this court is established in terms of the Labour Relations Act and not the Superior Courts Act, a state of affairs to which Snyman AJ appeared to attach some significance, is neither here nor there.

[14] But it does not necessarily follow that the Superior Courts Act always prevails. Section 2(3) of the Superior Courts Act reads as follows:

The provisions of this Act relating to Superior Courts other than the Constitutional Court, the Supreme Court of Appeal or the High Court of South Africa, are complementary to any specific legislation pertaining to such Courts, but in the event of a conflict between this Act and such legislation, such legislation must prevail.

[15] What this subsection recognises is the existence of superior courts (such as this court) that are established by other, specific legislation, and the potential for conflict between that legislation and the Superior Courts Act. But the scope of the exception that s 2(3) represents is limited by the existence and extent of any conflict between the Superior Courts Act and the specific legislation to which the section refers. If there is no conflict, it follows that the default position is that established by the Superior Courts Act.

[16] As Snyman AJ observed, there is no specific provision in the Labour Relations Act, (or the Rules of this Court or the Labour Appeal Court) regulating the status of orders that are subject to an appeal or application for leave to appeal. There is therefore no conflict between the Labour Relations Act and the Superior Courts Act in relation to this matter. I share the concerns expressed by Lagrange J in *Wenum v Maquassi Hills Local Municipality* (J 1684/15, 22 July 2016) where he said, at paragraph 9 of the judgment:

"Having regard to section 174 of the LRA and sections 2 (3) and 18 (1) and (2) of the Superior Courts Act, I do not believe that section 2 (3) of the Superior Courts Act renders section 18 of that Act inapplicable to the effect of leave to appeal been granted by this court, as there is no obvious conflict between s 174 of the LRA and s 18 of the Superior Courts Act. Insofar as the judgment in L'Oréal suggests that the Superior Courts Act does not apply to the Labour Courts unless provisions are imported in the exercise of the courts' management of their processes and procedures, I believe that proposition is stated too widely."

[17] In my view, (and contrary to what Snyman AJ held) the fact that this court has over the years 'borrowed' from other statutes to address lacunae in its own Rules and in the Labour Relations Act, does not justify the conclusions either that the Superior Courts Act does not apply to this court, or that this court is at liberty to import or adopt provisions of the Superior Courts Act on a selective and ad hoc basis.

[18] The interpretation adopted in *L'Oréal* flies in the face of what is clearly a limited exception established by s 2(3) of the Superior Courts Act to the effect that other specific legislation trumps only in the event of a conflict with that Act. It is an interpretation that fails to resonate with the plain meaning of the words used in s 2(3) and, to use the analysis by Wallis

JA in *Natal Joint Municipal Pension Fund v Edumeni Municipality* 2012 (4) SA 593 (SCA) (at para 18), it is an interpretation that is likely to lead to insensible or unbusiness-like results and which undermines the express purpose of the Superior Courts Act. That Act gives effect to the constitutional imperative of rationalising the structure, composition and functioning of the courts and the creation of a uniform framework for judicial management. That purpose would be frustrated, if not undermined, should the Superior Courts Act be held to be inapplicable to this court. Insensible and unbusiness-like results would be inevitable should this court be empowered selectively to decide, on an ad hoc basis, which of the provisions of the Superior Courts Act it wishes to adopt and apply and which it prefers to ignore. The constitutional imperative and statutory purpose to which I have referred have as their touchstone considerations of certainty.

[19] While I appreciate that one should not lightly depart from a prior judgment that is in point, in my view, the approach adopted in *L'Oréal* is incorrect and I decline to follow it.

[20] That being so, in terms of s 18(4) of the Superior Courts Act, the first respondent had an automatic right of appeal against the leave to execute order, pending the outcome of any petition filed in terms of Rule 4 of the Labour Appeal Court's Rules.'

[9] Having found that s 18 of the Superior Courts Act applies to this case, the Court needs to consider whether the applicant has shown that he will suffer irreparable harm if the order to execute is not granted, as contemplated by s 18(3). Put another way, has he shown that exceptional circumstances exist? That is the test posited by Van Niekerk J in *Naidoo*[3]:

'Turning next to the application for leave to execute the judgment and order pending appeal. This court is a superior court, and subject to the Superior Courts Act, 10 of 2013. Section 18 of that Act regulates the circumstances under which a party may apply for an order that departs from the ordinary consequence of filing an application for leave to appeal, i.e. that the operation and execution of the judgment and order appealed against is suspended. The approach established by s 18 requires an applicant in an application for leave to execute to show that the facts and circumstances of

[3] *Fidelity Security Services v Naidoo* [2016] ZALCJHB 70 at para 6.

> the particular application are exceptional and warrant a deviation from the normal rule. This has been referred to as a 'threshold factual test' (see *Incubeta Holdings (Pty) Ltd and another v Ellis and another* 2014 (3) SA 189 (GJ)) and requires the applicant to show that the facts and circumstances of its particular case are uncommon, unusual and\or out of the ordinary to the extent that a departure from the ordinary rule that an appeal suspends the operation of the judgement in order appealed against should not apply. Further, the applicant is required to prove on a balance of probabilities that it will suffer irreparable harm should the order for leave to execute not be granted pending the appeal. Finally, the applicant must prove on a balance of probabilities that the respondent in the application for leave to execute will not suffer irreparable harm if leave to execute is granted pending appeal. (See *Incubeta Holdings (supra*); and the unreported judgment by Murphy J in *Coetzer and ERB Technologies v Actom (Pty) Ltd*, A 269/2015).'

[10] Not surprisingly, Mr *Makgato* argued that no exceptional circumstances exist in this case. Wenum is simply deprived of an income in the interim; should the petition fail, he will be reinstated retrospectively. And even if it succeeds, the Labour Appeal Court may still find in his favour and the same consequences will follow. Any harm that he may suffer now is not irreparable. And financial harm is not exceptional.

[11] On the other hand, as Mr *Scholtz* argued, Wenum has a final order in his favour. Leave to appeal has been refused. The harm he suffers is not only financial; he also suffers harm to his reputation and career for so long as the Municipality refuses to reinstate him in terms of the judgment of Baloyi AJ. The Municipality, on the other hand, does not stand to suffer irreparable harm: if it reinstates him in the interim, it can make use of his services, his skills and experience. It will have the benefit of continuity. And even if it is successful in its petition and in a consequent appeal, it can recover the money paid to Wenum in the interim.

[12] On the evidence before me, the applicant has exhausted his surplus funds. He faces bankruptcy. His family may be destitute. It is so that the harm he suffers is purely financial --- something that our courts do not often consider to be exceptional. But in this case, the applicant is in the unusual position that leave to appeal has already been refused. Baloyi AJ

expressed the view that the Municipality had made out no case in its application for leave to appeal and that it had "served only the purpose of delaying finalisation of this matter", and that it had no prospects of success on appeal. The LAC should not take long to pronounce on the petition. In the interim, the harm he suffers outweighs that of the Municipality, that is simply called upon to pay him for the services he will render if he is reinstated pending the petition. On balance, I am satisfied that it would be in the interests of justice to rule that the reinstatement order should be executed pending the consideration of the petition.

[13] As Van Niekerk J pointed out in *Harley v Bacarac Trading 39 (Pty) Ltd:*[4]

> 'If an applicant is able to demonstrate detrimental consequences that may not be capable of being addressed in due course and if an applicant is able to demonstrate that he or she will suffer undue hardship if the court were to refuse to come to his or her assistance on an urgent basis, I fail to appreciate why this court should not be entitled to exercise a discretion and grant urgent relief in appropriate circumstances. Each case must of course be assessed on its own merits.'

Conclusion

[14] I am satisfied that the applicant has discharged the onus, on a balance of probabilities, to show that he should be granted the relief sought in terms of s 18(3) of the Superior Courts Act.

[15] With regard to costs, I deem it prudent in law and fairness to rule that the costs of this application be costs in the petition.

Order

[16] I therefore make the following order:

16.1 The applicant is granted leave to execute the judgment and order of Baloyi AJ under this case number, handed down on 15 June 2016, pending the respondent's petition for leave to appeal and any appeal that may follow should the appeal be granted.

[4] [2008] ZALCJHB 78 para 8.

16.2 Costs of this application are to be costs in the petition for leave to appeal.

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Steenkamp J

APPEARANCES

APPLICANT:	W Scholtz (attorney).
RESPONDENT:	M C Makgato Instructed by Phambane Mokone Inc.