IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: J 771/10

In the matter between:

MATHE ZANDILE **Applicant**

and

THE MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS **Respondent**

JUDGMENT

LAGRANGE, J

Introduction

1. This matter concerns an application to execute a judgment handed down by Pillay J on Friday, 7 May 2010, setting aside the Applicant's precautionary suspension by the Respondent on 30 March 2010 on the ground that was unlawful.

2. To give effect to the court's finding that the suspension was unlawful, the court permitted the Applicant to resume duty with the Respondent, which she did on Monday 10 May 2010.

3. However, on the same day, the Respondent filed a notice of its application for leave to appeal, the effect of which was to suspend the judgment of Pillay J,

pending the outcome of the application for leave to appeal, meaning that the Applicant only briefly enjoyed the benefit of the order.

4. This led her to bring the application now before the court on an urgent basis The matter was originally set down to be heard on 14 May 2010, but was postponed to consent of the parties until 19 May 2010.

5. Apart from opposing the application, the Respondent also brought an application to strike out certain averments made by the Applicant in her replying affidavit which I will address in the course of evaluating the merits of the application below.

Legal Principles

6. The principles governing the execution of a judgment despite a pending appeal were set out in ***South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*** **1977 (3) SA 534 (A)**:

> "The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised (see Voet, 49.7.3; Ruby's Cash Store (Pty.) Ltd. v Estate Marks and Another, supra at p. 127). This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments (cf. Fismer v Thornton, 1929 AD 17 at p. 19). In exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, inter alia, to the following factors:
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> (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
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> (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;
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> (3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment

but for some indirect purpose, e.g., to gain time or harass the other party; and

(4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be."[1]

The potentiality of irreparable harm or prejudice to the Respondent

7. The respondent cites four instances of the harm it anticipate suffering in consequence of the applicant's return to work, which it submits is indicative that the applicant did not intend to 'return quietly to the office'.

8. The first relates to the Applicant sending an email to the Minister's Personal Assistant advising her that she is reporting certain conduct of officials in the Department of Water Affairs to the Public Protector and the Auditor-General. The respondent does not object to such a report being made but objects to what it understands to be the threatening tone of the letter. The email was sent on Sunday 9 May before the applicant returned to work, making use of a subordinate's computer, her own having been confiscated when she was suspended. The Applicant defends her right to send the email in terms of her rights under the Protected Disclosure Act pursuant to her belief that disciplinary action is being taken against her as a result of making protected disclosures in relation to her project.

9. The Respondent identifies this as prejudicial because it demonstrated that the Applicant has contact and access to her subordinates outside office hours.

10. The third instance of prejudicial conduct identified by the Respondent concerns second to an SMS the applicant sent to a subordinate requesting him to meet with her on her return to work on Monday and requesting him to withdraw a 'revenue indaba agenda' as there was no need for it, followed by the remark 'the game is over'. The Respondent argued this indicated a belligerent approach by the Applicant which was threatening. The Applicant contends that she merely postponed the meeting because she was not satisfied

[1] At 545B-G. See also ***Julies v County Fair Foods (Pty) Ltd*** **1999 (20) ILJ 368 (LC)** at 369-370

that preparation for it were in place and certain reports she had requested from the subordinate concerned were still outstanding.

11. Lastly, the Respondent notes that the Applicant will be in the same building as her subordinates and was in charge of the WTE Efficiency Drive Project having five directors and 'about 60 people' under her supervision, which would enable her to unduly influence them during the ongoing investigation and disciplinary process. The Applicant responds that she had 200 employees under her supervision and had complied with the directive not to be involved in the project any longer, as evidenced by her email of 11 March 2010 confirming her willingness to abide by the directives of the Director General and Chief Financial Officer in that regard.

The potentiality of irreparable harm or prejudice to the Applicant

12. By contrast the Applicant cites the fact that in all likelihood the leave to appeal hearing is unlikely to be heard before the end of May or June, which would mean that in the interim she would be deprived of the enjoyment of her right to not suffer the consequences of unlawful suspension.

13. In her replying affidavit the Applicant sought to expand on another form of prejudice she would suffer in relation to her ongoing MBA studies. The Respondent objected to her claims that her studies required her to be at work and pursue her skills failing which she would be required to pay back the costs of her MBA to her employer. Mr Notshe, for the Respondent, argued that these averments raised fresh issues in reply and for that reason ought to be struck out in keeping with the requirements of Rule 7(5)(b) of the Labour Court rules. Mr Bruinders, for the Applicant, argued that the issue of prejudice relating to the applicant's MBA studies was prefaced in her replying affidavit in the original application to set aside her suspension. It is true that in that affidavit the applicant alludes to her MBA studies in the context of talking about her reputation and the importance of her professional advancement, but there is no indication there of the associated financial

liability which could arise from that study commitment as a result of her suspension. In terms of the general principle that an applicant should not make out a case in reply and applying the principles in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** **1984 (3) SA 623 (A)** at 634 – 5, I have not taken account of the averments objected to by the Respondent in reaching my decision.

14. The Respondent counters that as the Applicant is being paid while on suspension there is no real demonstrable prejudice she is suffering.

15. It seems the principal complaint about the prejudice suffered by the Applicant concerns the fact that if she is eventually vindicated in due course following the outcome of an appeal, it will be an empty consolation because the benefit of enjoying the right to be back at work on account of her unlawful suspension cannot be meaningfully remedied at that point. The remedy for an unlawful suspension is aptly the restoration of the employee to the workplace, which reverses the effect of the unlawful action. The benefit flowing to an employee who successfully overturns an unlawful suspension is not one that can easily be remedied in retrospect.

16. Mr Notshe suggested that the Applicant might have recourse to a claim for constitutional damages or ordinary damages, and that she had prospect of obtaining relief from her referral of her suspension to the relevant bargaining council. The latter claim is one relating to the unfairness of her suspension in terms of the Labour Relations Act and as I understand it is distinguishable from the present matter which turned on the unlawfulness of her suspension. Mr Notshe did not elaborate on what basis the Applicant might have a claim which would entitle her to constitutional damages if she is ultimately successful and it is not readily apparent where such a claim might lie.

17. In weighing up the relative prejudice to the parties, it is notable that Respondent does not provide a factual basis which demonstrates there is a basis for a real apprehension the applicant will interfere with the investigation

into her former project or that she will interfere with witnesses. It is this type of prospective harm which an employer can rightly rely on to implement a precautionary suspension after giving the employee an opportunity to respond to such concerns. Insofar as the Applicant took certain actions on the eve of her return to work those appear to relate to her previously stated interest in making known her concerns about certain practices and decisions which she believes are the real reasons behind her suspension. Nowhere in its answering affidavit does the Respondent adduce any evidence that the Applicant is unlikely to adhere to her undertaking not to interfere with the investigation or that any potential witnesses will probably be intimidated or influenced by her.

18. Moreover, I was advised that charges have now been served on the Applicant and it would seem reasonable to believe that the investigatory phase is over so any potential risk that might have existed of her compromising the investigation by virtue of being at work should no longer be a consideration, in the absence of any evidence to the contrary.

19. The fact that the Applicant may be raising her concerns about alleged improper conduct of others or querying the wisdom and justifiability of some decisions taken is not the kind of activity that a precautionary suspension, in my view, is intended to prevent. In the absence of demonstrable prejudice to the employer's ability to investigate and present the charges against her, or of a basis for a reasonable apprehension that such prejudice will arise on account of her being at work, I believe the prejudice to the Applicant of remaining suspended, even if she is ultimately successful, outweighs the prejudice the Respondent will suffer if she remains at work and its action is vindicated on appeal.

Merits of Application for Leave to Appeal

20. In the absence of the reasons for Pillay J's judgment it is not possible to assess this factor in any depth. The claim made by the Applicant her suspension was unlawful seems to have rested primarily on the Respondent's failure to afford the Applicant a hearing before the suspension was imposed, which does not appear to be in contention. If that was the basis for the decision then the Respondent's prospects of success might not be particularly good. Be that as it may, in this instance I must rely on assessing the balance of prejudice to the parties in arriving at a decision.

21. It must be mentioned that this is an interlocutory order, and may be corrected, altered or set aside at any time before final judgment if changing circumstances warrant it.[2]

Order

22. Accordingly,

    a. The Applicant's non-compliance with the Rules relating to form, service and times, is condoned and the applicant is permitted to bring the application as an urgent application in terms of Rules 8(1) and (2);

    b. The Applicant is granted leave to execute the judgment of Pillay J dated 7 May 2010, pending leave to appeal and appeal;

    c. Respondent is directed to pay the costs of this application, including the costs of two counsel.

[2] See *Southern Cape* (supra) at 550H

ROBERT LAGRANGE

JUDGE

LABOUR COURT

Date of Hearing: 19 May 2010

Date of Judgment: 20 May 2010

Appearances

For the Applicant:

T Bruinders, SC assisted by K M Millard

Instructed by Xulu Liversage Incorporated Attorneys

For the Respondent:

S V Notshe, SC assisted by M C Baloyi

Instructed by the State Attorney