



**IN THE HIGH COURT OF SOUTH AFRICA
KWA-ZULU NATAL LOCAL DIVISION, DURBAN**

CASE NO.: 11174/15

In the matter between:

NAYESAN REDDY

Applicant

And

LERENDAREN REDDY

First Respondent

SHERIFF OF THE COURT, DURBAN COASTAL

Second Respondent

SHERIFF OF THE COURT, DURBAN NORTH

Third Respondent

FIRST NATIONAL BANK LTD

Fourth Respondent

Coram: Koen, J

Heard: 14 March 2016

Delivered: 24 March 2016

O R D E R

The application is dismissed with costs.

J U D G M E N T

KOEN J:

[1] The Applicant claims *inter alia* the following relief in respect of an order directing him to make certain interim payments to the First Respondent:¹

‘2.

That the Respondents are called upon to show cause to this Honourable Court on the day of 2016 at 9H30 a.m. or soon thereafter as the matter may be heard, why an order in the following terms should not be made final.

- 2.1 That the Writ issued on 26 February 2016 be and is hereby set aside;
- 2.2 That all attachments made in execution of such Writ be and are hereby set aside;
- 2.3 That the First Respondent pay the costs of the Application;
- 2.4 Any other relief that may be granted by the Court.

3.

The Orders contained in paragraph 2.1 and 2.2 *supra* are to operate as Interim Orders pending finalisation of the Application and/or the Appeal to the Natal Provincial Division against the Order of Court dated 4 February 2016² and the Appeal to the Supreme Court of Appeal against the Order of Court dated 9 February 2016.’

[2] The relevant background facts giving rise to the above application are briefly as follows. On 3 March 2016 the Second Respondent at the instance of the First Respondent attached the banking account of City Plumbers and Builders, a partnership between the Applicant and the First Respondent, held with the Fourth Respondent. This attachment was made pursuant to a writ of execution for payment of the amounts of R76 983,58 and R76 983,58 said to be ‘in respect of orders granted by the Honourable Justice Madondo on the 2nd and 9th of February 2016’.

¹ The Second and Third Respondents are respectively the Sheriff for the Durban Coastal area and the Sheriff for the Durban North area. The Forth Respondent is First National Bank Limited.

² There is no ‘order of court dated 4 February 2016’ as foreshadowed in paragraph 3 of the Notice of Motion. Presumably that reference should be ‘2 February 2016’ being the judgment giving rise to the writ.” It is only the order of 2 February 2016 that directed the interim payments.

[3] The relevant part of the order granted by Madondo J on 2 February 2016 reads as follows:

‘1. That a rule nisi do issue, calling upon the Respondents to show cause to this Court on the 23 day of February 2016, at 9:30 a.m. also soon thereafter as counsel may be heard, why, pending the outcome of an application to review and set aside the first and second respondents decision dismissing the applicant from his employment, an order in the following terms should not be granted:

1.1 The first respondent³ acting personally or through the second respondent⁴ is hereby interdicted and restrained from withholding payment to the Applicant⁵ of his salary and other benefits for the month of January 2016 and the following months that were last paid to him in December 2015 and which include the following:

1.1.1 Basic salary R40 000,00;

1.1.2 Vehicle instalment R16 739,10;

1.1.3 Vehicle instalment R25 392,48;

1.1.4 Vehicle insurances R 4 294,00;

1.1.5 Vehicle tracking instalment R558,00.

1.2 The First Respondent is ordered to pay the salary and other benefits referred to in para 1.2 above to the Applicant for January 2016, forthwith;

1.3 ...’

[4] The material part of the order of 9 February 2016 reads as follows:

‘The application for leave to appeal is dismissed with costs, such costs on attorney and client scale against 1st Respondent.’⁶

1.

That a rule nisi do issue, calling upon the Respondents to show cause to this Court on the 17th day of February 2016 at 9:30 a.m. or so soon thereafter as counsel may be heard, why, an order in the following terms should not be granted:

1.1 The interim order granted in the above matter, by this court on 2nd February 2016, will not be suspended by any application for leave to appeal or the noting of any appeal against such order;

1.2 The First Respondent is hereby ordered to comply with the set order granted by this court, on 2nd February 2016 forthwith;

1.3 The First and Second Respondents are in contempt of court for not having complied with the said order on 2nd February 2016 which they were obliged to do;

1.4 ...

1.5 ...

1.6 ...

³ The applicant in this application.

⁴ One D. Nundkissore.

⁵ The first respondent in this application.

⁶ The applicant in this application.

2.

That the order described in paragraphs 1.1, 1.2 and 1.4 above shall have immediate effect pending the outcome of this application.
Costs is granted against 1st Respondent with costs on attorney and client scale.'

[5] The founding affidavit refers to these two orders as follows:

'In short, two orders of court were granted. The first on 2 February 2016 which is being taken on appeal to the Supreme Court of Appeal. The second granted on 9 February 2016 is the subject matter of Annexure "B" supra.'⁷

The Applicant further concedes in his founding affidavit that these were 'interim orders'. That concession is plainly correctly made, particularly in respect of the order of 2 February 2016, when regard is had to its terms.

[6] The Applicant's case however is that the operation and execution of these orders have been suspended. He relies for that proposition on the provisions of s 18 of the Superior Courts Act No. 10 of 2013 ('the Act') which he maintains 'specifically precludes any execution of a judgment or order upon the lodgement of an appeal'.

[7] Section 18 of the Act provides:

'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.
- (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.

⁷ Annexure "B" is headed 'Notice of appeal in terms of s 18(4)(ii) of Act 10 of 2013'. It purports to be a notice of appeal in respect of the order of 9 February 2016, although no application for leave to appeal on the grounds foreshadowed in that notice appears to have been granted by Madondo J against his order of 9 February 2016. It seems that the Applicant believes the notice to be competent in terms of s 18(4)(ii) of the Superior Courts Act.

- (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’.

[8] The effect of s 18(2) is clearly that absent a direction to the contrary granted by the court in exceptional circumstances, the default position is that the operation and execution of an interlocutory order not having the effect of a final judgment, are not suspended.

[9] *Mr Gunase* who appeared on behalf of the Applicant, accepted that the orders were interlocutory orders. That concession is correctly made. He contended however that they were not interlocutory orders ‘not having the effect of a final judgment’, but indeed were interlocutory orders having the effect of a final judgment, and hence that their execution would not be ‘not suspended pending the decision of the application or appeal’, and thus being suspended, could not be executed upon.

[10] Regardless as to whether they were orders ‘...having the effect of a final judgment’ or not, a precondition for s 18 (1) or (2) of the Act to apply is that the order concerned must be the ‘subject of an application for leave to appeal or of an appeal’. In this regard the position regarding the two orders is as follows:

- (a) The order of 2 February 2016:
 - (i) If that order was an interlocutory order not having the effect of a final judgment, then its execution would not be suspended irrespective of whether an appeal was pending in terms of s 18(2) of the Act, or whether no appeal was pending, and it could be executed upon;

- (ii) If the order of 2 February 2016 was an interlocutory order having the effect of a final judgment, then it would fall under s 18(1) and its operation and execution would be suspended pending the decision of an application for leave to appeal or an appeal, provided such an application or appeal were pending. The Applicant had filed an application for leave to appeal against the order dated 2 February 2016 but that application was dismissed by Madondo J on 9 February 2016 with costs on the attorney and client scale. No 'decision of the application or appeal' as contemplated in either s 18(1) or s 18(2) was therefore pending in respect of that order when the writ was issued on 26 February 2016. The operation and execution of the order of 2 February 2016 was therefore not suspended when the writ was issued.
- (b) The order of 9 February 2016:
No application for leave to appeal was brought against the order of 9 February 2016 and hence no 'decision of the application or appeal' was pending in respect of that order and its operation and execution, if in any way relevant, could not be suspended.

[11] It seems however that the Applicant's reasoning proceeds on the basis that the order of 2 February 2016 directing the interim payments was an interlocutory order having the effect of a final judgment, *ergo* an order as contemplated in s 18(1), and that paragraph 1.1 of the rule *nisi* issued on 9 February 2016 read with paragraph 2 of that order directing that:

'The interim order granted in the abovementioned matter, by this Court on 2nd February 2016, will not be suspended by any application for leave to appeal or the noting of any appeal against such order'

amounted to an order made 'under exceptional circumstances' that the execution of the order of 2 February 2016 would be suspended pending the decision of an application or appeal against that order i.e. the one granted on 9 February 2016. This construction of the Applicant's contention is consistent with the Applicant having filed a notice on 10 February 2016 in terms of s 18(4)(i) 'for the recording of the reasons for the order granted in terms of s 18(4) on 9 February 2016 by the

Honourable Justice Madondo' and him filing a 'Notice of Appeal in terms of section 18(4)(ii) of Act 10 of 2013' also on 10 February 2016.

[12] Two issues arise from this argument, namely:

- (a) whether the court order dated 2 February 2016 directing the interim payments, is an interlocutory order '...having the effect of a final judgment'; and if so,
- (b) whether paragraph 1.1 of the rule *nisi* issued on 9 February 2016 read with paragraph 2 thereof, is indeed an order made 'otherwise ...under exceptional circumstances' as contemplated by s 18(1), and to which s 18(4) would thus apply.

[13] As regards the first issue, as to what is meant by an order "not having the effect of a final judgment" Harms AJA in Zweni v Minister of Law and Order⁸ held that in order to qualify:

'... the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings'.

[14] Of further significance are the dicta in M V Snowdelta – Serva Ship Limited v Discount Tonnage Limited⁹ where the court held that 'an interim order has no independent existence, but is conditional upon confirmation by the same court'. It held that the position now is that a judgment or order of court must be final for it to be appealable. If the order granted was capable of being changed on the return date it was interim only and could only be finalised on the return date.

[15] The terms of the order granted on 2 February 2016 must be taken at face value. Relief is granted on an interim basis as part of an interlocutory order pending the outcome of an application to review. Depending on the outcome of that review, the interim orders providing for monthly payments either will or will not be confirmed.

⁸ 1993(1) SA 523 A at 532I - 533 A.

⁹ 2000 (4) SA 746 (SCA) at 752 B.

If not confirmed the amounts paid over to the First Respondent will have to be reversed and repaid.

[16] *Mr Gunase's* argument, as I understood it, was that once the payments had been made, the 'horse has bolted' and that if the review was unsuccessful the applicant would probably have to sue the First Respondent for repayment of all monies paid over on an interim basis. This he contended had 'the effect of a final judgment'.

[17] I cannot, with respect, agree with that submission. The finality or otherwise of the judgment has nothing to do with the manner of performance or the recovery of any performance should the review be unsuccessful but is concerned solely with whether the interim payments directed are susceptible of alteration by this court as a court of first instance, as opposed to a different order following on appeal. Clearly, the interim payments fall within the former category. The direction that the interim payments be made are not definitive of the rights of the parties, and they certainly do not dispose of a substantial portion of the relief claimed in the main proceedings relating to the review. The order was therefore not one having final effect.

[18] However, even if I was wrong in that regard and the order of 2 February 2016 had the effect of a final judgment, it seems to me that the application must also fail on the alternative issue posed for determination.

[19] Paragraph 1.1 of the rule *nisi* read with paragraph 2 of the order of 9 February 2016 is not an order made 'otherwise' in respect of an order 'the subject of an application for leave to appeal or of an appeal, pending the decision of the application or appeal'. The application for leave to appeal in respect of the order of 2 February 2016 had been dismissed and no decision was pending. The next step, assuming it to be an order having final effect and appealable, would have been for the Applicant to petition the President of the Supreme Court of Appeal. Had Madondo J granted leave to appeal, the operation and execution of that judgment (again assuming it to be final in effect) being subject to appeal would have been suspended unless an order was granted in terms of s 18(1) that its operation not be

suspended. Only if an order was granted that its operation was not suspended would there be an order 'as contemplated in subsection (1)' for the purposes of s 18(4) to which the provisions of that subsection, and specifically an automatic right of appeal against the grant of that order (and not a refusal thereof) at the instance of an aggrieved party would lie. There was simply no such order. Paragraph 1.1 read with paragraph 2 of the order granted at the instance of the First Respondent on 9 February 2016 was simply declaratory in nature and a restatement of the general default position which applies in our law.

[20] The Applicant was misdirected in filing a notice in terms of s 18(4)(i) requesting reasons 'for the order granted in terms of s 18(4) on 9 February 2016 ...' seemingly in the belief that he has an automatic right of appeal in respect of that order in terms of s 18(4)(ii) of the Act. The order of 9 February 2016 was not an order made where 'a court orders otherwise' when granting leave to appeal, as contemplated in subsection (1) to which the provisions of s 18(4) could apply.

[21] Accordingly, the application falls to be dismissed.

[22] *Mr Khan SC*, who appeared on behalf of the First Respondent, asked that the application be dismissed with costs on the attorney and client scale and in support of that submission referred to Matshekga and Another v Siphephile¹⁰ where it was held that where an application for leave to appeal had been pursued and handled in a reckless and negligent manner with regard to the procedures and applicable law in what was a clear interim order resulting in the parties having to prepare and appear in court unnecessarily and incurring costs, that the application for leave to appeal should be dismissed with costs on attorney and client scale.

[23] The Applicant in this matter was clearly misdirected and one certainly gets the impression that he resorted to desperate attempts to try and avoid the operation of the orders of Madondo J. That might possibly be indicative of *mala fides* on his part, but on the limited allegations before me, I am not persuaded that such *mala fides* has been established on a balance of probabilities or sufficiently to result in a costs order other than that on the party and party scale.

¹⁰ Case No 366/2011 Limpopo High Court decided on 20 August 2011.

[24] The application is accordingly dismissed with costs.

DATE OF HEARING: 14 MARCH 2016

DATE OF DELIVERY: 24 MARCH 2016

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