

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

**Not Reportable
Case No: J 2896/2018**

In the matter between:

REGISTRAR OF LABOUR RELATIONS

Applicant

and

SIPHO ERIC SONO N.O.

**(Administrator of the Chemical, Energy, Paper,
Printing, Wood and Allied Workers' Union)**

First Respondent

**CHEMICAL, ENERGY, PAPER, PRINTING,
WOOD AND ALLIED WORKERS' UNION
(Under administration)**

Second Respondent

WELILE NOLINGO

Third Respondent

THAMSANQA VUMANI MHLONGO

Fourth Respondent

LUCA MASHENGO & OTHERS

**Fifth to Thirty Third
Respondents**

Heard: 29 December 2022

Delivered: 4 January 2023

JUDGMENT

WHITCHER J

Introduction

[1] On 7 December 2022, pursuant to an application brought by the applicant (the Registrar of Labour Relations) to extend the period of appointment of the first respondent as the appointed administrator of the second respondent in terms of section 103A of the Labour Relations Act (LRA)¹ and various applications by the third to thirty-third respondents, Snyman AJ delivered a judgment with the following order:

- 1.1 The administration order of 4 June 2020 in terms of which Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union (CEPPWAWU) is placed under administration in terms of section 103A is extended to 12 December 2023.
- 1.2 Mr Sipho Eric Sono (Sono) is appointed as the administrator of CEPPWAWU for the period ending 12 December 2023.
- 1.3 The provisions of the entire paragraph 3, including all subparagraphs thereof, of the administration order granted on 4 June 2020, shall equally and without exception apply to Sono in the course of his tenure as administrator in terms of this order.
- 1.4 Save for paragraph 6 of the administration order of 24 March 2022 in terms of which no order as to costs was made, the entire administration order of 24 March 2022 is substituted with the following order:
 - (a) Sono shall appoint an experienced and reputable facilitator to ensure that congresses be convened in terms of the constitution of CEPPWAWU for the purposes of electing a new national leadership of CEPPWAWU.
 - (b) The congresses contemplated by paragraph [a] of this order shall be convened and then concluded prior to 30 September 2023.

¹ Act 66 of 1995, as amended.

- (c) The control, management and affairs of CEPPWAWU shall be handed to the new leadership elected in terms of paragraph [a] of this order, upon expiry of the period of administration under this order on 12 December 2023, unless extended further by this Court on application by the Registrar.
- (d) Sono shall be required to consult with interested parties when deciding the proper and effective governance and administration requirements to be put in place for CEPPWAWU.

[2] Snyman AJ dismissed the application for an order reinstating the individual respondents that had been dismissed by the previous administrator.

[3] The learned Judge gave detailed reasons for his orders, which he also summarised as follows:

‘[109] In summary, it is simply not competent to afford the individual applicants who were dismissed, the relief sought in prayer 5 of part B of the notice of motion, for two main reasons. First, this Court has no jurisdiction to entertain an unlawful dismissal claim, and where it comes to an unfair dismissal claim the individual applicants are compelled to follow the prescribed dispute resolution processes under the LRA in the absence of truly exceptional circumstances, which does not exist in this case. Where it comes to Zako and Mpofu who have the judgment of 8 September 2021 in their favour, which judgment stands and is operative, the issue is one of enforcement which is *lis pendens* before the Labour Appeal Court.

[110] Where it comes to the relief sought under prayer 6 of part B of the notice of motion, it is simply not competent for the individual applicants² to approach this Court under section 103A of the LRA to remove Sono as administrator and request this Court to appoint Soobedaar in his stead. Only the Registrar, in this case, had the competence to approach this Court to seek this kind relief.

² The individual applicants here were variously members, employees and office bearers of the trade union.

[111] Where it comes to the application by the Registrar to extend the appointment of Sono as administrator for a period of 12 months as from 12 December 2022, there is simply no feasible reason, even exercising a discretion based on what would be just and equitable, for such an order not to be granted. I am therefore convinced that Sono be appointed for a further 12 months' period, as requested by the Registrar.'

[4] On 12 December 2022, a notice of leave to appeal against the judgment was filed by a party purporting to be CEPPWAWU and the third to thirty third respondents.

[5] The Registrar of Labour Relations, with a supporting affidavit from the first respondent, seeks leave to put into operation and execute the order of Snyman AJ pending the appeal process. The application is opposed by the third to thirty-third respondents.

The law

[6] The parties agree that s 18(1) of the Superior Courts Act³ sets the basis for when the power to depart from the default position⁴ comes into play, namely, exceptional circumstances which must be read in conjunction with the further requirements set by s 18(3) that requires an applicant for an execution order to prove on a balance of probabilities that it will suffer irreparable harm if the order is not granted and that the other party will not suffer such harm.

[7] Sutherland J in *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another*⁵ (Incubeta) held that the circumstances which are or may be 'exceptional' must be derived from the actual predicaments in which the given litigants find themselves. Exceptionality is that which is out of the ordinary and of an unusual nature.

[8] On the matter that served before him, a restraint of trade with a short duration, he held:

³ Act 10 of 2013.

⁴ Which is that 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.

⁵ 2014 (3) SA 189 (GJ) at paras [25] – [28].

‘[25] ...

- If the order is not put into operation, the relief will, regardless of the outcome of the application for leave to appeal, be forfeited by Incubeta because the short duration of the restraint will expire before exhaustion of the appeal processes.
- The only value in the relief is to stop the breach and protect legitimate interests during the precise period of the next four and a half months. Unrebutted evidence in the affidavit alleges a breach is taking place at this very time.
- Damages are not an appropriate alternative remedy precisely because the very relief obtained is posited on the absence of such a remedy being available...

...

[27] ...In my view the predicament of being left with no relief, regardless of the outcome of an appeal, constitutes exceptional circumstances which warrant a consideration of putting the order into operation. The forfeiture of substantive relief because of procedural delays, even if not protracted in bad faith by a litigant, ought to be sufficient to cross the threshold of ‘exceptional circumstances’.

[28] The plight of the victor alone is probably all that is required to pass muster. Nonetheless, I am not unconscious of the undesirable outcome that relief granted by the court becomes a vacuous gesture. A court order ought not to be lightly allowed to evaporate, a fate which, seems to me, would tend undermine the role of courts in the ordering of social relations.’

[9] The Supreme Court of Appeal in *Knoop NO and Another v Gupta (Execution)*⁶ held at paragraphs [46] and [47] that:

‘[46] Courts have always eschewed any attempt to lay down a general rule as to what constitutes exceptional circumstances. The reason is that the enquiry is a

⁶ 2021 (3) SA 135 (SCA) at paras [46] – [47].

factual one... In the context of s 18(3) the exceptional circumstances must be something that is sufficiently out of the ordinary and of an unusual nature to warrant a departure from the ordinary rule that the effect of an application for leave to appeal or an appeal is to suspend the operation of the judgment appealed from. It is a deviation from the norm. The exceptional circumstances must arise from the facts and circumstances of the particular case. When dealing with someone's removal from office, be it a BRP or a liquidator in relation to a company, or a trustee or an executor, or some other office bearer, the mere fact that the court has held that they should no longer fill that office does not, in and of itself, constitute exceptional circumstances. There must be something more in the circumstances of the particular case that makes the immediate implementation of the removal order necessary.

[47] The need to establish exceptional circumstances is likely to be closely linked to the applicant establishing that they will suffer irreparable harm if the removal order is not implemented immediately. One can readily imagine that an order for the removal of a dishonest BRP will provide grounds for the court to order that the removal order should have immediate operative effect. But unless there is a real and substantial risk of immediate and irreparable harm being suffered while waiting for the enrolment, hearing and outcome of the appeal, the foundation for an execution order will be absent.'[Footnotes omitted]

[10] The opposing respondents contend that Acting Judge Snyman's order is an ordinary administration order that should only be effected once the appeal is complete. They argued as follows:

'In *Knoop v Gupta*, the SCA held that an order removing certain business rescue practitioners from their positions (because they failed to fulfil their duties as BRPs in good faith) should remain stayed because, inter alia, there is nothing inherently exceptional about BRPs failing to fulfil their duties in good faith. On the contrary, an application for the removal of a BRP is a very ordinary application:

[55] ...the complaints [against the BRPs] demonstrated that the circumstances were not exceptional. Were these to constitute exceptional circumstances, an execution order would have to issue in every case of the removal of a BRP under s

139(2) of the Act, and indeed in every removal of a liquidator, trustee, executor or similar office holder. However routine or mundane the grounds of removal, they would always be treated as exceptional.

In the present matter there is nothing exceptional about the re-appointment of Sono as administrator. If the SCA was willing to allow unfit BRPs to stay in their positions pending the appeal (because there is nothing exceptional about such a scenario), then this court must allow Sono's appointment to be stayed pending the appeal (because there is nothing exceptional about such an appointment).'

Analysis and findings

[11] In my view, the circumstances of this case give rise to 'exceptionality' as contemplated.

[12] Firstly, it is plain from the papers before me that the opposing respondents themselves agreed with the applicant that the Union (CEPPWAWU) needs to remain under administration at least until 12 December 2023.

[13] I say this because, in the appeal notice, there is no challenge, even indirectly to Snyman's order that *"the administration order of 4 June 2020 in terms of which Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union (CEPPWAWU) is placed under administration in terms of section 103A is extended to 12 December 2023"*. There is also no attack on his finding that *"all parties were ad idem that it is justified that CEPPWAWU should still remain under administration and the termination of administration is currently not a viable option or even on the table"*. There is also no attack on his finding that *"it is clear from the no relief sought by the individual applicants in prayer 6 of Part B of the notice of motion that they do not seek the variation of any of the terms of the administration orders granted on 4 June 2020 and 24 March 2022. The notice of motion in fact prays that the terms of these orders continue to apply mutatis mutandis. All that the individual applicants seek is a replacement of the administrator"*. The grounds of appeal are limited to complaints that *"the learned judge should have held that the applicants had the right to propose a new administrator"* and *"the learned judge should have appointed Soobedaar"*.

[14] Secondly, if the order is not put into operation, the relief granted to the Registrar who is put in a position to exercise a measure of supervision over trade unions by the LRA and ensure the proper functioning of trade unions, will, regardless of the outcome of the application for leave to appeal, be forfeited because the short duration of the order and the important and specific mandates therein will expire before exhaustion of the appeal process.

[15] As stated by Sutherland J in *Incubeta*, the plight of the victor alone is probably all that is required to pass muster and a court order ought not to be lightly allowed to evaporate, a fate, which seemed to him, would tend to undermine the role of the courts in ordering of legal and social relations.

[16] Regarding the issue of irreparable harm, it follows from the undisputed fact that the Union needs to remain under administration that, as contended by the Registrar, it is more likely than not that the Union and its members will inevitably suffer irreparable harm without an administrator. An administration order is premised on the existence and prevention of possible irreparable harm to the Union and its members.

[17] As noted by Snyman AJ in his judgment (a finding also not under attack in the appeal):

[55] ...administration of a trade union under section 103A is an alternative to the winding up of a trade union... In terms of section 103(1) of the LRA, a trade union is wound up where there exists a reason, that cannot be remedied, which caused the trade union to be unable to continue to function. It follows that in the case of administration under section 103A, the reason adversely impacting on the ability of the trade union to function is capable of being remedied, and the trade union, for intents and purposes, is capable of being saved.'

[18] I also note that s 103A(5) provides that the Labour Court may, on application by the trade union or registrar, if it is satisfied that an administrator is no longer required, terminate the appointment of the administrator, on appropriate conditions. This means that an abrupt and unceremonious termination with no appropriate

handover process may not be competent and that it may be necessary to terminate the administration on appropriate conditions to prevent harm to the Union and its members.

[19] It is also plain from the order of Snyman AJ, that it is unlikely that the Union and the opposing respondents will suffer irreparable harm if the order is not suspended. The order sets out detailed conditions, safeguards and time periods, designed to address the very concerns raised by the said respondents.

[20] Significantly, the judgment addresses every concern raised by the opposing respondents and references the applicable legal safeguards and recourses available to them to remedy same.

[21] Turning to the dismissed and retrenched employees, I fail to see the logic of their argument that they will suffer irreparable harm if the order is not suspended because they will be excluded from the upcoming Union Congress which the Order mandates Sono to convene. The suspension of the Order does not translate it into a reinstatement order.

[22] Based on the aforementioned considerations, I am satisfied that the Registrar has made out a case for the relief sought.

[23] I therefore make the following order:

Order

1. The order of Snyman AJ of 7 December 2022 under Case Number J2896/2018 shall operate pending the outcome of the appeal process, including the application for leave to appeal and any appeal noted, if at all.
2. There is no order as to costs.

B Whitcher

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Adv T Madima, SC,
instructed by State Attorney, Pretoria

For the First Respondent:

Adv V Mndebele,
instructed by KMNS Inc

For the Third to Thirty Third Respondents:

Adv M Meyerowitz,
instructed by Niehaus Attorneys