

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA10/19

In the appeal between:

ROAD TRAFFIC MANAGEMENT CORPORATION

Appellant

And

TASIMA (PTY) LTD

Respondent

Heard: 08 March 2019

Delivered: 15 March 2019

Coram: Coppin JA, Murphy and Savage AJJA

JUDGMENT

MURPHY AJA

- [1] This is an appeal in terms of section 18(4) of the Superior Courts Act¹ ("the Act") against an order of the Labour Court (Prinsloo J) ordering the operation and execution of an earlier Labour Court decision by Steenkamp J, later upheld by this Court, and which is now the subject of an application for leave to appeal to the Constitutional Court.

The background

- [2] The respondent ("Tasima") was the entity responsible for the development, operation, management, control, and maintenance of the electronic National Traffic Information system ("the eNaTIS system") and various services in relation to it.
- [3] The eNaTIS system is a complex network of nationwide remit, pivotal to the implementation of road traffic policy and legislation. It is self-financing through transaction fees, which accrue to the state. Tasima operated the system for nearly 15 years.

¹ Act 10 of 2013.

- [4] The eNaTIS system and the rendering of eNaTIS services was the sole business of Tasima, representing the entirety of its business and revenue generation. All of its employees were dedicated solely to the eNaTIS system and the rendering of the eNaTIS services. The employees were the 5th to 84th respondents in the urgent application referred to below.
- [5] Pursuant to an order of the Constitutional Court on 23 June 2015, the eNaTIS system and services were transferred from Tasima to the appellant (“the RTMC”).² After various negotiations and interactions, the RTMC took physical transfer of the eNaTIS system on 5 April 2017. However, it refused to accept transfer of any of the employees. Tasima thus instituted an urgent application before the Labour Court to compel such a transfer.

The application in terms of section 197 of the Labour Relations Act³ (“LRA”)

- [6] On 25 May 2017, after hearing argument, the Labour Court (Steenkamp J) made the following order:

‘63.1 It is declared that with effect from 5 April 2017, the contracts of employment of the 5th to 84th respondents transferred automatically from the applicant (Tasima (Pty) Ltd) to the first respondent (the Road Traffic Management Corporation) in accordance with the provisions of section 197 of the Labour Relations Act (Act 66 of 1995).

63.2 The RTMC is directed to pay the 5th to 84th respondents from 5 April 2017 to the date of the final determination of the order in subparagraph 1 above:

63.2.1 on a monthly basis on or before that the contracts of employment of the employees transferred automatically to RTMC the 25th of each

² *Department of Transport v Tasima* 2017 (2) SA 622 (CC).

³ Act 66 of 1995.

month, the amounts set forth under the column headed “Monthly CTC excl 13th cheque, annual bonus, overtime, standby allowance, birthday voucher and night shift allowance” as set out in Annexure “C” to Annexure “FM 11.6” to the founding affidavit of Fannie Lynen Mahlangu; and

63.2.2 on an annual basis, any additional amounts making up the column headed “Annual Total CTC” as set forth in that schedule.”

- [7] On 21 December 2018, this Court partly upheld the decision of Steenkamp J. However, as the legal *causa* of the transfer was in fact the order of the Constitutional Court of 23 June 2015, it held that the declaratory order in paragraph 63.1 of the Labour Court’s judgment should be amended accordingly. It held further that the Labour Court had erred in granting the order in paragraph 63.2 by reversing the principle of suspension on appeal before an appeal was noted, thus pre-empting the RTMC’s right to address the issues of suspension and interim execution in an appropriate application. The order in paragraph 63.2 impermissibly circumvented the jurisdictional requirements of section 18 of the Act. Had the learned judge simply ordered payment of the salaries as relief consequential upon the declaratory order, the situation might have been different. He erred in making the order one pending the outcome of subsequent appeals.

- [8] In paragraph 57 of its judgment, this Court, therefore, ordered:

‘1. The appeal in respect to paragraph 63.1 of the order of the Labour Court is dismissed with no order as to costs; save that the effective date of the transfer of the employees’ contracts is amended from 05 April 2017 to 23 June 2015.

2. The appeal in respect of paragraph 63,2 of the order of the Labour Court is upheld with costs.’

- [9] The effect of the order of this Court is that the only extant order of the Labour Court, as amended, now reads:

‘It is declared that with effect from 23 June 2015, the contracts of employment of the 5th to 84th respondents transferred automatically from the applicant (Tasima (Pty) Ltd) to the first respondent (the Road Traffic Management Corporation) in accordance with the provisions of section 197 of the Labour Relations Act (Act 66 of 1995).’

The application in terms of section 18(3) of the Act

- [10] The RTMC has applied to the Constitutional Court for leave to appeal this Court’s order declaring that the employees’ contracts have transferred to the RTMC in terms of section 197 of the LRA. The application for leave to appeal has the effect of suspending the operation and execution of the order of this Court (and the amended order of Steenkamp J).⁴

- [11] Additionally, in the interim, the RTMC has refused to accept the employees (the fifth to eighty-fourth respondents in the urgent application) as its employees or to pay them their monthly remuneration. Tasima accordingly brought - in its own name and on behalf of the employees – an urgent application in terms of section 18(3) of the Act to enforce the order of this Court.

- [12] The relevant part of section 18 of the Act reads:

⁴ Section 18(1) of the Act.

‘(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.”

[13] Section 18(4) of the Act provides that if an order is made under section 18(1), the aggrieved party has an automatic right of appeal to the next highest court and the order under section 18(1) will be suspended, pending the outcome of such appeal.

[14] The Act applies to superior courts which are defined in section 1 of the Act to mean the Constitutional Court, the Supreme Court of Appeal, the High Court and any court of a status similar to the High Court. Section 151(2) and section 167(3) of the LRA provide that the Labour Court and the Labour Appeal Court are superior courts with authority, inherent powers and standing, in relation to matters under their jurisdiction, equal to that of the High Court and Supreme

Court of Appeal respectively.⁵ Section 18(3) of the Act is thus applicable to appeals under the LRA.

- [15] In paragraph 2.1 of its notice of motion for relief under section 18 of the Act, Tasima sought an order that paragraph 57.1 of this Court's order, read with paragraph 63.1 of the Labour Court's order, "operates and is extant until the determination of all present and future leave to appeal applications and appeals" against this Court's order. It in addition in paragraph 2.2 of the notice motion sought an order that:

'[T]he first respondent take transfer of the fifth to eighty fourth respondents as its employees, on terms no less favourable than their contracts of employment with the applicant.'

- [16] The order sought in paragraph 2.2 of the notice of motion goes beyond the declaration of rights granted in paragraph 57.1 of this Court's order, read with paragraph 63.1 of the Labour Court's order. The relief sought is consequential relief *ad factum praestandum* – an order to perform some act. As an alternative to the relief sought in paragraph 2.2 of the notice of motion, in paragraph 3 of the notice of motion, Tasima also sought an order similar to that granted by Steenkamp J in paragraph 63.2 of his judgment. And, as a further alternative, in paragraph 4 of the notice of motion, it sought an order directing the payment of salaries as set forth in an annexure to the notice of motion. The relief sought in paragraphs 3 and 4 being consequential relief *ad pecuniam solvendam*, also goes beyond mere declaratory relief.

- [17] Prinsloo J held that Tasima had satisfied the three requirements for the securing of section 18(3) relief; namely: i) exceptional circumstances justifying

⁵ See *Luxor Paints (Pty) Ltd v Lloyd* (2017) 38 ILJ 1149 (LC) and in *Wenum v Maquassi Hills Local Municipality* (2017) 38 ILJ 1213 (LC).

reversing the ordinary rule of suspension; ii) proof on a balance of probabilities that it (and the employees) will suffer irreparable harm if the operation and execution of the order is not given interim effect; and iii) that the RTMC will not suffer irreparable harm if the order is immediately put into operation.

[18] Prinsloo J made the following orders⁶:

‘1. Paragraph 57.1 of the Labour Appeal Court Order of 21 December 2018, read with paragraph 63.1 of the Labour Court order, dated 25 May 2017, operates and is extant until the final determination of all leave to appeal applications and appeals against the Labour Appeal Court order;

2. The Road Traffic Management Corporation (First Respondent) is ordered to comply with the Labour Court’s order of 21 December 2018, read with paragraph 63.1 of the Labour Court order, dated 25 May 2017, by taking transfer of the Fifth to Eighty Fourth Respondents, excluding those listed in annexure B to the Applicant’s notice of motion, within 24 hours of this order being granted.’

[19] Hence, the learned judge granted the declaratory relief sought in paragraph 2.1 and the *ad factum praestandum* relief sought in paragraph 2.2 of the notice of motion, but not the alternative relief in paragraphs 3 and 4 of the notice of motion.

The appeal in terms of section 18(4) of the Act

[20] The RTMC has invoked its automatic right of appeal to this Court in terms of section 18(4) of the Act.

⁶ Paragraph 125 of the judgment

- [21] Counsel for the appellant, Mr. Redding SC, and counsel for the respondent, Mr. Franklin SC, presented cogent and well-reasoned arguments pertaining to the requirements of section 18 of the Act. It is not necessary to canvass them all. For the narrow reasons that follow, the order of Prinsloo J granting consequential relief pending the appeal to the Constitutional Court cannot stand.
- [22] The only order extant after the variation of the order of Steenkamp J on appeal is the declaratory order declaring that with effect from 23 June 2015 the contracts of employment of the employees have transferred automatically from Tasima to the RTMC in accordance with the provisions of section 197 of the LRA. The declaratory order is of the kind contemplated in section 21(1)(c) of the Act which confers jurisdiction on all superior courts, including the Labour Court, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.
- [23] The employees in this case may well have a claim for consequential relief compelling the RTMC to accept the tender of their services (*ad factum praestandum*) and to pay remuneration to them under the transferred contracts of employment (*ad pecuniam solvendam*). However, neither Steenkamp J nor this Court on appeal granted any consequential relief.⁷ As stated, the only order subject to the application for leave to appeal to the Constitutional Court is the declaratory order. It is the operation and execution of that order which has been suspended by virtue of section 18(1) of the Act. And, thus, it must follow logically that only that order can be made operational or executable in terms of section 18(3) of the Act.

⁷ The order in paragraph 63.2 was intended to be interim pending the determination of all appeals.

[24] Counsel submitted that the amended declaratory order necessarily implies the contemplated consequential relief. But that proposition is not free from difficulty in the peculiar circumstances of this case.

[25] Under the common law, the courts did not have the power to grant declaratory orders without consequential relief.⁸ However, over time, the courts have accepted that a declaration of rights may be granted even if other consequential relief which has not been sought could have been granted.⁹ It is therefore permissible for a declaratory order to be sought and granted in advance of suing under a different cause of action for consequential relief such as the payment of remuneration.¹⁰ In *Cape Town Municipality v Allianz Insurance Co Ltd*,¹¹ where the plaintiffs claimed a declaration as to the defendant's liability in terms of an insurance policy, the court was prepared to grant the declaration of rights even though the plaintiffs needed to institute a further action to obtain payment of the amount claimable under the policy. It held that such an approach is not contrary to the rule that a party can sue only once upon a single cause of action.¹² Likewise, it is possible to seek a limited declaratory order that a contract of employment is extant between parties and to proceed by further action for payment of remuneration.¹³

[26] Courts accordingly should hesitate to infer consequential relief from the terms of an order merely granting declaratory relief. And this is particularly so in instances where an applicant seeks to reverse the ordinary rule of suspension and to execute an order subject to appeal. The reversal of the rule of suspension is an exceptional remedy granted only if the jurisdictional pre-requisites have been strictly established.

⁸ *Geldenhuys and Neethling v Beuthin* 1918 AD 426 at 439-441.

⁹ *Safaris Reservations (Pty) Ltd v Zululand Safaris (Pty) Ltd* 1966 (4) SA 165 (D) at 171; *Standard Bank of SA Ltd v Trust Bank of Africa Ltd* 1968 (1) SA 102 (T) at 105.

¹⁰ *Lawson & Kirk (Pty) Ltd v Phil Morkel Ltd* 1953 (3) SA 324 (A) at 333.

¹¹ 1990 (1) SA 311 (C) at 332D-333G.

¹² See the discussion of this issue in Herbststein and Van Winsen: *The Civil Practice of the High Courts of South Africa* Volume 2 1437-1438.

¹³ In terms either of the contract or section 32 of the Basic Conditions of Employment Act 77 of 1997.

[27] Our conclusion that Prinsloo J in the circumstances of this case had no jurisdiction or power under section 18(3) of the Act to order consequential relief is reinforced by the principle that execution is ordinarily only available when a *lis* has been definitively and judicially resolved. A *lis* has not been resolved if the amounts owing and payable under the judgment are ascertainable only after a further problem of law has to be decided.¹⁴ A judgment upon which execution is issued must be a judgment from which there can be gathered what money or thing the judgment debtor must deliver.¹⁵

[28] The performance due and amounts payable by the RTMC in this case are not definitively ascertainable. The order of Steenkamp J declared that the contracts of employment of 80 employees had transferred. In its founding affidavit in the section 18 application, Tasima recognised that some of these persons no longer have a right to employment or salaries because they had either retired or resigned. It identified those former employees and reduced the claim to only 68 employees whose salaries it set out in Annexure C to the notice of motion. However, a further complication arises in view of the fact that this Court varied the order of Steenkamp J by setting the effective date of the transfer at 23 June 2015. The founding affidavit in the application in terms of section 18(3) of the Act is silent on which of the 68 employees were in employment in June 2015. In paragraph 20 of its answering affidavit, the RTMC contended that the employees had not put up sufficient facts to establish their standing, including that they were employed by Tasima prior to 23 June 2015 and performed a job connected to the “business” that was transferred to the RTMC. The RTMC accordingly contended that the section 18 application could not be decided until there were additional facts before the Labour Court identifying which employees had transferred. In reply, Tasima pointed out that the order of this Court, amending the order of Steenkamp J,

¹⁴ *De Crespigny v De Crespigny* 1959 (1) SA 149 (N).

¹⁵ *McNutt v Mostert* 1949 (3) SA 253 (t) at 255.

despite varying the effective date of the transfer, had nonetheless declared that the contracts of the 5th to 84th respondents had transferred under section 197 of the LRA. It declined the invitation to identify the employees who took up employment after June 2015

[29] It appears to be common cause that several of the employees were indeed employed by Tasima for the first time after June 2015. An annexure to a letter addressed by Tasima's attorneys to the attorneys of the RTMC dated 11 April 2017 indicates that at least 19 employees took up employment with Tasima after June 2015. That document, while a useful indicator, is of insufficient evidentiary value to determine conclusively which employees have in fact and in law transferred.

[30] While it may be that the amended declaratory order declared that the contracts of all 80 employees transferred, the *lis* cannot be finally decided unless and until proper evidence, precisely identifying the employees who are eligible to be paid remuneration by the RTMC, is placed before the court. It was inappropriate in the circumstances to extend the declaratory order and permit execution of consequential relief not expressly ordered by this Court. Prinsloo J erred in doing so.

[31] That brings us to the question of whether the suspension of the operation and execution of the declaratory order in paragraph 63.1 of the order of Steenkamp J should be reversed in terms of section 18(3). Accepting for the purposes of argument that the circumstances are exceptional, the evidence does not disclose that Tasima and the employees will suffer any harm if the suspension of the operation and execution of the declaratory order is not reversed pending any appeal to the Constitutional Court. In the premises, the pre-requisites of section 18(3) have not been met.

[32] The following orders are issued:

35.1 The appeal in terms of section 18(4) of the Superior Courts Act is upheld.

35.2 The order of the Labour Court is set aside and is substituted with an order dismissing the application.

35.3 The respondent is ordered to pay the costs of the appeal.

JR Murphy

Acting Judge of Appeal

I agree

P Coppin

Judge of Appeal

I agree

K Savage

Acting Judge of Appeal

APPEARANCES:

FOR THE APPELLANT:

Redding SC and K Hopkins

Instructed by Selepe Attorneys

FOR THE RESPONDENT:

A Franklin SC and P McNally SC

Instructed by Webber Wentzel