

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

CASE NO: J604/11

In the matter between:

SERVICES SECTOR EDUCATION
AND TRAINING AUTHORITY

First Applicant

IVOR BLUMENTHAL

Second Applicant

UASA THE UNION

Third Applicant

FEDERATION OF UNIONS OF
SOUTH AFRICA

Fourth Applicant

CONFEDERATION ASSOCIATIONS
IN THE PRIVATE EMPLOYMENT
SECTOR ("FEDUSA")

Fifth Applicant

ASSOCIATION OF PERSONNEL
SERVICE ORGANISATIONS OF SOUTH
AFRICA ("APSO")

Sixth Applicant

BEVERLY ANN JACK

Seventh Applicant

LEON GROBLER

Eighth Applicant

CLIVE EDWARD WICKS

Ninth Applicant

SHADRACK MOTLOUNG

Tenth Applicant

FEROZA FAKIR

Eleventh Applicant

and

MINISTER OF HIGHER EDUCATION
AND TRAINING

First Respondent

SIHLE MOON	Second Respondent
SHAKEEL ORI	Third Respondent
NOLWANDLE MANTASHE	Fourth Respondent
MZWAMADODA WISEMAN DINWA	Fifth Respondent
ASHLEIGH CLAIRE VAN GREUNEN	Sixth Respondent
KIM VELTMAN	Seventh Respondent
PATRICK MAKHUBELA	Eighth Respondent
PAM SNYMAN	Ninth Respondent
ADENE PRINGLE	Tenth Respondent
JOYCE MHLONGO	Eleventh Respondent
JOYCE DIMAKATSO SEEMA	Twelfth Respondent

Date of judgment : 8 June 2011

Date of hearing : 27 May 2011

JUDGMENT
APPLICATION FOR LEAVE TO EXECUTE

A.C BASSON J:

1] In terms of the Notice of Motion, the applicants pray that the

judgment handed down on 3 May 2011 be executed in the following terms:¹

“1. Allowing this matter to be dealt with as a matter of urgency, and to be heard and decided together with the pending application for leave to appeal.

2. Until the outcome of any application for leave to appeal that may be lodged and pursued by any of the respondents, and until the final outcome of any appeal or appeals that may be pursued by the respondents if they succeed in obtaining leave to appeal, the following shall apply as interim orders:

2.1 The powers, functions and duties conferred upon the Accounting Authority of the first applicant, the Services Sector Education and Training Authority (“Services SETA”), shall be exercised and performed by the members of the Services SETA’s Council as listed in the schedule appearing as Annexure “Y” to the founding affidavit in this matter at page 243 of the paginated record.

2.2 The second respondent, Dr Sihle Moon, shall not perform or exercise any functions, powers, duties or responsibilities, or take any action in relation to the affairs or staff of the Services SETA as chairperson purportedly appointed by the Minister of Higher Education and Training, or as a member of the Council purportedly appointed by the Minister.

2.3 The third to twelfth respondents shall not perform any powers, functions, duties or responsibilities, or take any actions in relation to the affairs of the Services SETA, or in any manner interfere with the activities of the staff of the Services SETA, arising from the purported appointment of those respondents by the Minister of Higher Education and Training as members of

¹ I will refer to this application as the “main application” to distinguish it from the present application.

the Council or in any other capacity, save in their capacity as a member of the Services SETA's Council as listed in the schedule appearing as Annexure "Y" to the founding affidavit in this matter at page 243 of the paginated record.

2.4 Gazette Notice No. 316, in the Gazette No. 34202 of 8 April 2011, shall not be implemented and shall have no force or effect.

2.5 The affairs and operations of the Services SETA shall be administered and governed in accordance with the provisions of the Constitution of the Services SETA as adopted in 2000 and as published by the Minister of Labour in Government Gazette No. 24036 of 22 November 2002.

2.6 The Constitution approved and purportedly implemented by the Minister of Higher Education and Training on or about 8 April 2011 shall have no force or effect and shall not be implemented in relation to the governance and administration of the Services SETA.

2.7 The second applicant, Dr. Ivor Blumenthal, shall be reinstated in his position as Chief Executive Officer of the Services SETA, and the respondents are interdicted from interfering with the resumption of office by the second applicant as Chief Executive Officer, and his fulfilment and discharge of his functions, powers and duties, and those of all other employees of the Services SETA.

3 The first respondent and, to the extent that any of them may oppose this application, the second and further respondents, shall pay the costs of this application, jointly and severally, the one paying the other to be absolved.

4. Granting further or alternative relief."

[2] The deponent to this application – Mr. Shadrack Motloun – is the tenth applicant in this application. He was originally cited as the twelfth respondent in the main application. He has now however

made common cause with the other parties cited originally as the applicants (in the main application). Motlouni is the Divisional Manager: General Sectors in UASA (the Union and the third applicant in this application). Mr. Clive Edward Wicks - originally cited as the sixth respondent in the main application - also now makes common cause with this application and so also Ms. Ferosa Facky - the thirteenth respondent in the main application who is now cited as the 11th applicant in this application.

The purpose of this application

[3] The purpose of this interlocutory application is to seek leave for the orders granted in the main application to operate on an *interim* basis, pending the outcome of this application for leave to appeal, any further applications for leave to appeal that may be lodged by the respondents, and (if leave to appeal is to be granted by this Court or any other higher Court) pending the outcome of any appeal that might in due course be heard. At the outset, I must point out that should this Court be inclined to grant this application, it is only inclined to do so pending the outcome of any proceedings before the *Labour Appeal Court* assuming that the respondents successfully petition the Labour Appeal Court to grant leave to appeal should the application for leave to appeal be dismissed.

[4] This application is not opposed despite the fact that the respondents had ample opportunity to do so. The respondents

were, however, granted leave to oppose the application for leave to execute in respect of the orders granted in prayers 9 and 10 of the Notice of Motion in the main application. Those two prayers concern the position of the second applicant – Dr. Ivor Blumenthal (“Blumenthal”). The respondents have since filed an answering affidavit in respect of the prayers that affect Blumenthal. As will be pointed out hereinbelow, it was originally anticipated that the application in respect of Blumenthal would be argued on 4 June 2011. The matter was not argued as the Court was informed that the attorneys on behalf of Blumenthal have withdrawn as attorneys of record in light of the fact that Blumenthal has resigned with effect 31 May 2011. The applicants therefore did not persist with seeking the execution of prayers [9] and [10] of the judgment.

Submissions on behalf of the applicant

[5] The applicants submitted that it is necessary to seek leave for the required relief in order to avoid uncertainty, prejudice and inconvenience which would otherwise arise if no interim order was to be granted pending the outcome of the process of applications for leave to appeal and any (further) appeals that might be pursued by the respondents.²

[6] It was further submitted that, in light of the fact that there are no reasonable prospects of success for the appeal for which leave

²See paragraph [3] *supra*.

is sought by the respondents (which was at the time of this application also argued) as well as the potential irreparable harm or prejudice which may be sustained by either applicants or respondents if leave to execute is granted or refused, and the balance of hardship or convenience, that this application should be granted.

The application for leave to appeal

[7] In respect of the application for leave to appeal it was submitted that there are no reasonable prospects of success should the application for leave to appeal be granted or, in the alternative it was submitted that those prospects are at best for the respondents extremely slim. I will not specifically deal with the merits of the application for leave to appeal in this judgment. For purposes of deciding this application I, however, incorporate my findings in respect of the application for leave to appeal herein.

Submissions

[8] It was submitted on behalf of the applicants that there is a practical need for the orders as prayed for in the Notice of Motion. More in particular, it was submitted that the considerations of potential prejudice or hardship and the balance of convenience strongly favour granting the relief sought. More in particular the applicants advanced the following submissions in support of granting of the relief:

- (i) The affairs of the Services SETA have for many years been governed by the Constitution duly adopted in 2002 and published in the Government Gazette in 2002 by the Minister of Labour (referred to in the judgment in the main application as the “2002 Constitution”).
- (ii) The affairs of the Services SETA are governed in terms of the 2002 Constitution by the members of the (Services SETA) Council who were elected by the members of the Services SETA itself and in accordance with what is required by the relevant provisions of the Skills Development Act.
- (iii) The members of the Accounting Authority (the SETA Council) have been appointed by the Services SETA as required by the enabling legislation and not by the Minister. More in particular, the relevant employees including the CEO Dr. Ivor Blumenthal (the second applicant) were duly appointed in terms of the provisions of the enabling statute and in accordance with the 2002 Constitution. (See, however, paragraph [16] hereunder where I

deal with the position of Blumenthal.)

- (iv) The Services SETA has been severely disrupted by the actions taken by the respondents and in particular by the actions of Dr. Moon and other members of the new Council (referred to as the “Minister’s Council” in the main application) who were purportedly appointed by the Minister of Higher Education and Training (the first respondent).
- (v) Further disruptions and confusions have risen from the purported imposition of the new Constitution by the Minister.
- (vi) Dr. Moon has taken various actions against Dr. Blumenthal most notably his suspension as CEO. (See, however, paragraph [16] hereinbelow in respect of Blumenthal.)
- (vii) Various other actions have been taken by Dr. Moon and other members of the Minister’s Council which have caused and continued to cause major disruptions in the affairs of the (Services) SETA.
- (viii) The appointments of the Minister’s Council and the appointment of Dr Moon are invalid as

was found by this Court in the main application.

(ix) It would be inappropriate and unjustified to allow Dr. Moon and the other members of the Minister's Council (whose appointments have already been found to be invalid by this Court) to continue to occupy the offices of the Services SETA and impose instructions and continue to take actions which interfere with the proper and smooth functions of the Services SETA.

(x) There exist considerable uncertainty, confusion, and panic amongst the members of the staff of the Services SETA as a result of the confusion in respect of which is the validly appointed Council and who is the validly appointed chairperson of the Council.

(xi) As a result of the foregoing the proper functioning of the Services SETA, which is to provide an important service which is to train unskilled workers to acquire skills and ultimately to obtain employment are severely affected by this confusion.

(xii) The appointment of Dr. Moon and that of the other persons appointed by the Minister (whose appointments have been held to be invalid by this Court) is neither constructive nor conducive to the smooth running of the Services SETA.

(xiii) The affairs of the Services SETA were appropriately and effectively administered before the unlawful actions taken by the Minister and Dr Moon.

(xiv) Should the appointment of Dr Moon and the Minister's Council be allowed to stand especially in light of the fact that the appointment of Dr Moon and the Minister's Council have been found to be invalid, it would have a seriously disruptive effect on the smooth functioning of the Services SETA, its operations and the morale of the staff.

[9] In summary it was therefore submitted that serious and irreparable prejudice would result not only to the applicants (who are major stakeholders and interested parties in the SETA and recognised as such by the SDA) but also to the staff of the Services SETA should the order as prayed for in the Notice of Motion not be

granted. Should the order not be granted, the smooth running of the Services SETA and its beneficiaries would also be compromised and hampered. It was therefore submitted that the affairs of the Services SETA would be better served in the interim by allowing the *status quo ante* to be restored, especially in the face of the finding that Dr. Moon and the Minister's Council were invalidly appointed and especially in light of the fact that the Services SETA previously, for many years, was properly functioning under the leadership of the Council established by the members and in terms of the 2002 Constitution. If no interim relief is granted in the form of leave to execute the said orders, serious prejudice, inconvenience and hardship would result to the operations of the Services SETA, its personnel and the beneficiaries of the services it provides.

Legal position

[10] Rule 49 (11) of the Uniform Rules of the High Court provides that “*where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on application of a party otherwise directs.*”

[11] Although the noting of an appeal normally suspends an order pending the outcome of an appeal, section 166 of the Labour

Relations Act 66 of 1995 (“the LRA”) is silent on the effect of the noting of an appeal to the Labour Appeal Court. Rule 30 of the rules of the Labour Court, which provides for applications for leave to appeal, likewise make no reference to the effect of a noting of an appeal. Section 166(3) of the LRA, however, provides that “*leave to appeal may be granted subject to any conditions that the court may determine*”. The Labour Court in *NAPOSU v National Commissioner of the National Police Services and Others*,³ accepted that, although a similar provision as the one referred to *supra* is not contained in the Rules of the Labour Court, that does not necessarily preclude the Labour Court from achieving the same result as that contemplated in Rule 49(11) and (12) of the Uniform Rules of the High Court. The Court also held that the (Labour) Court may grant leave to appeal subject to certain conditions in terms of the Labour Court’s inherent powers conferred to the Court by section 151 of the LRA.

[12] In light of the foregoing, I will now briefly set out the principles to be taken into account in deciding whether or not to grant the application for leave to execute pending an appeal. In this regard the Court was referred to the decision in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*.⁴ In that case the Court confirmed that it is accepted at common

3 [1999] 10 BLLR 1068 (LC) at para 14.

4 1977 (3) SA 534 (A) at 545A to 546A.

law that, generally speaking, the execution of a judgment is automatically suspended upon the noting of an appeal with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto except with the leave of the Court which granted the judgment. In order to obtain such leave the party in whose favour the judgment was given must bring a special application to this Court

“Whatever the true position may have been in the Dutch Courts, and more particularly the Court of Holland (as to which see Ruby's Cash Store (Pty) Ltd v Estate Marks and Another, [1961 \(2\) SA 118 \(T\)](#) at pp. 120 - 3), it is today the accepted common law rule of practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the Court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make special application. (See generally Olifants Tin "B" Syndicate v De Jager, 1912 AD 377 at p. 481; Reid and Another v Godart and Another, 1938 AD 511 at p. 513; Gentiruco A.G v Firestone SA (Pty.) Ltd, [1972 \(1\) SA 589 \(AD\)](#) at p. 667; Standard Bank of SA Ltd . v Stama (Pty.) Ltd, [1975 \(1\) SA 730 \(AD\)](#) at p. 746.). The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from (Reid's case, supra at p. 513). 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. Fisser 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:

- (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;*
- (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;*
- (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.....*

....

Although most of the cases just cited dealt with the exercise of the Court's discretion under a statutory provision or Rule of Court, the statute or Rule concerned did not prescribe the nature of the discretion except in broad general terms (e.g. secs. 36 and 39 of Proc. 14 of 1902 (T) empower the Court to give directions as and the same general approach would be appropriate to the exercise of a discretion under the aforementioned rule of practice”.

The Labour Court has adopted a similar approach in labour litigation.⁵

[13] In deciding the present interlocutory application, the papers

⁵ See in this regard *Julies v County Fairfoods (Pty) Ltd* [1998] 12 BLLR 1301 (LC) at para 6 and *NAPOSU v National Commissioner of the National Police Services and Others* [1999] 10 BLLR 1068 (LC) at para 19.

filed in the main application were also taken into account. From those papers it is apparent that not only will the interested parties (as identified in the judgment but also in the enabling legislation) suffer prejudice but also the staff and the beneficiaries of the SETA as a result of the actions of the Minister by imposing a Constitution (the Minister's Constitution) which does not comply with the relevant provisions of the SDA but also by the appointment of the Minister's Council and the appointment of Dr. Moon as the chairperson of the said Council. In the judgment in the main application (ad paragraph [34]) the Court pointed out and accepted that confusion and uncertainty are created by the fact that there are two competing constitutions, two competing Councils and by the fact that there are two chairpersons - one for each council: One appointed by the members to the Council and one by the Minister. I am, particularly on this point, persuaded that the balance of convenience and the need to avoid irreparable harm militate in favour of granting leave to enforce the judgment. I am furthermore persuaded that if such relief is not granted the untenable position of uncertainty created by the competing councils, constitutions and chairpersons will continue to apply. It is certainly not conducive to the proper functioning of the SETA to allow it to operate in limbo especially if regard is had to the important function that it performs. The Court also cannot ignore the fact that the (Services) SETA has been operating and has been

functioning well over many years under the 2002 Constitution and under the auspices of a Council elected from time to time by the members of the Services SETA comprising of equal representatives from organised labour and organised business. I am further persuaded by the argument that the stakeholders (the applicants in the main and in the present application) and the constituencies which they represent are entitled in terms of the SDA to take an active and controlling part in the governance of the (Services) SETA. From the papers in the main application and from the fact that all the stakeholders are applicants in both the main application and this application, it is clear that Dr. Moon (the second respondent) does not represent any of the stakeholders nor does he enjoy the support of the stakeholders who have come to the Labour Court to have his appointment be declared invalid. Lastly, I have dealt with the prospects of success in the application for leave to appeal. As already pointed out, I incorporate the judgment in respect of the prospects of success as part of this judgment. In light of the conclusions reached in that application, especially in respect of the validity of the Minister's Council and the validity of the appointment of Dr. Moon which were not seriously attacked, I am of the view that it would give rise to an untenable situation if the Minister's Council and Dr. Moon be allowed to continue to operate in circumstances where the appointment of the aforesaid were made

invalidly and/or in contravention with the relevant provisions of the enabling statute. In this regard I reiterate and incorporate herein what has already been held by this Court in the main application.

[14] One last point, it was submitted that the orders now being sought to execute is substantially different from the orders the applicants sought (and that was granted) in the main application. Mr. Kennedy has persuaded me that they are not and that they are in substance the same as those granted in the main application.

Application for leave to execute in respect of Dr Ivor Blumenthal (orders [9] and [10])

[15] The application to execute the relief sought in relation to prayers [9] and [10] of the order has been withdrawn in light of the resignation of Blumenthal with effect from 31 May 2011.

Costs

[16] In light of the fact that this application is unopposed (except for the orders sought in respect of Blumenthal which was subsequently withdrawn), I am of the view that there should be no order as to costs.

Order

[17] In the event the following order is made:

- (i) The application is granted in terms of prayer 2 of the Notice of Motion excluding the order sought in terms of prayer 2.7 of the Notice of Motion.

- (ii) The order granted in terms of prayer (i) of this order is granted on an interim basis only pending the outcome of any proceedings before the Labour Appeal Court in the event that the respondents successfully petition the Labour Appeal Court for leave to appeal.
- (iii) No order as to costs.

AC BASSON, J

For the applicant : WR Mokhari SC

P Malindi SC

Adv Zulu

Instructed by: the State Attorney

For the respondent: Paul Kenndy SC

Instructed by: Edward Nathan Sonnenbergs Attorneys

LABOUR COURT