



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 498/13

In the matter between -

MAYOR: GREATER TAUNG LOCAL MUNICIPALITY

First Applicant

SPEAKER: GREATER TAUNG LOCAL MUNICIPALITY

Second Applicant

COUNCIL: GREATER TAUNG LOCAL MUNICIPALITY

Third Applicant

GEATER TAUNG LOCAL MUNICIPALITY

Fourth Applicant

And

MPHO SIMON MOFOKENG

Respondent

In re:

MPHO SIMON MOFOKENG

Applicant

And

MAYOR: GEATER TAUNG LOCAL MUNICIPALITY

First Respondent

SPEAKER: GREATER TAUNG LOCAL MUNICIPALITY

Second Respondent

COUNCIL: GEATER TAUNG LOCAL MUNICIPALITY

Third Respondent

GEATER TAUNG LOCAL MUNICIPALITY

Fourth Respondent

Date heard: 13 June 2013

Date delivered: 18 June 2013

Summary: Stay of the judgment /order upon filing of leave to appeal.

Principles governing leave to execute judgment despite leave to appeal or where leave to appeal granted, then appeal.

JUDGMENT

MOLAHLEHI J

- [1] This is an urgent application for leave to execute the judgment made by R Lagrange J on 24 May 2013 under case number J 567/13, in terms of which the resolution made by the fourth applicant extending the fixed term contract of the respondent, Mr Mofokeng was declared null and void. This application is consequent to leave to appeal launched by the respondent in this interlocutory application.
- [2] The legal consequences of leave to appeal is that the judgment made by R Lagrange J on 24 May 2013, is automatically suspended pending the outcome of the appeal. The respondent filed the leave to appeal soon after the judgment declaring the extension of his contract to be null and void was made.
- [3] The essence of the present application is to declare the judgment made by R Lagrange J executable or enforceable despite the leave to appeal, in

terms of rule 49 (11) of the Uniform Rules of the High Court¹ read with rule 11² of the Rules of this Court.

- [4] The issue that served before the Court which is the subject of the leave to appeal concern the resolution by the fourth applicant in terms of which the contract of the respondent was extended. It appears common cause that the fixed term contract was extended on a month-to-month basis.
- [5] On 24 April 2012 the applicant took a decision to advertise the position of the municipal manager. The decision to advertise the position was subsequently rescinded during June 2012 and another resolution known as resolution 34/2012 was adopted. The essence of that resolution was to extend the already expired fixed term contract of the respondent.
- [6] It is apparent that the extension of the respondent's contract did not receive support from certain members of the council. It was as a result of this that the deputy Mayor prepared a report regarding this matter which was presented before the council at the beginning of this year. The report

¹ Rule 49 (11) of the Superior Court Practice reads as follows: Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of Court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal application, unless the Court which gave such order, on application of a party, otherwise directs.

² Rule 11 of the Labour Court Rules reads as follows: interlocutory applications & procedures not specifically provided for in other rules

1. The following applications must be brought on notice, supported by affidavit:
 - (a) Interlocutory applications;
 - (b) other applications incidental to, or pending, proceedings referred to in these rules that are not specifically provided for in the rules; and
 - (c) any other applications for directions that may be sought from the court.
2. The requirements in subrule (1) that affidavits must be filed does not apply to applications that deal only with procedural aspects.
3. If a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any procedure that it deems appropriate in the circumstances.
4. In the exercise of its powers and in the performance of its functions, or in any incidental matter, the court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act.

recommended that the resolution regarding the extension of the contract of the Municipal Manager needed to be review and that the vacant position be advertise.

- [7] The respondent instituted urgent proceedings in this Court seeking an order to interdict the intention to rescind the decision recorded under resolution 34/2012. The outcome of the proceedings was that the interim order calling on the applicants to show cause why it should not be interdicted from rescinding resolution 34/2012 was made on 11 March 2013 by Moshoana AJ.
- [8] Resolution 34/2012 which is the subject matter of this case reads as follows:
- '(a) That Council takes note of the content of the report is tabled.
 - (b) That Council approves rescinding of Council resolution number 5/2012 liC which is resolved to "advertise the position of the municipal manager and appoint Mr Mofokeng on a month – to-month fixed term contract" as it was misled and ill informant of the contractual obligations of Mr Mofokeng's employment contract.
 - (c) That Council approves the renewal of employment contract of Mr Mofokeng which must be linked to the term of office of Council and must not exceed one year of the next election.
 - (d) That the Mayor be delegated to enter, finalise and employment and performance contract and report to Council for ratification..
 - (e) That on good cause shown, comparisons be sought from the MEC for Local Government and Traditional Affairs as pay legislated requirements.
 - (f) That upon realisation of (d) above, the position be sealed with immediate effect...'

- [9] On the return date the matter came before R Lagrange J, who after considering whether to confirm or discharge the interim order held that:

'In this case, the dispute has been drawn out since February this year and no date had been set for the hearing of the applicant's controversial claim. The Council has been paying the applicant his salary and claims that his appointing staff, which the applicant does not deny. He also occupies a key position as the accounting officer of the Council. Moreover, he is performing the functions of Municipal Manager without a performance agreement in place, contrary to the provisions of section 57. . .'

- [10] Section 57 of the Systems Act requires amongst others that a Municipal Manager should be appointed only in terms of a written contract and a performance contract which has to be concluded within sixty days after the appointment into the position of the Municipal Manager.

- [11] The Court further found that the consequence of the resolution 34/12 was to appoint the respondent on the long and fixed term contract to end his acting status. The appointment would, according to the Court amount to filling of vacant full-time posts through an appointment which was temporary. The Court also found that the approach adopted by the council to have been in contravention of section 54 (4) of the Municipal Systems Act which provides:

"(4) If the post of municipal manager becomes vacant, the municipal Council must-

- (a) advertise the post nationally to attract a pool of candidates nationwide; and

- (b) from the pool of candidates a suitable person who complies with the prescribed requirements for appointment to the post."

[12] The above reasoning and its outcome is challenged by the respondent in his application for leave to appeal on various grounds set out in the application for leave to appeal. The essence of the challenge of the decision of the Court *a quo* is that the Court considered issues which were not properly before it. In this regard the respondent contends that the Court was called upon to consider confirmation or discharge of the interim order and not to interpret the provisions of section 54 of the Municipal Systems Act.

[13] The applicant accepts that the common law rule is that the launching of leave to appeal suspends the decision made by the Court *a quo* pending the outcome of the leave to appeal and where leave has been granted, appeal.

[14] The applicant has however launched this application to suspend or waive the common law rule on a number of grounds. The essential ground upon which the applicant seeks to waive the common law rule in the circumstances of this case, is the implication to administration if the rule was to be upheld. In this respect the applicant contends that it would suffer prejudice, in particular in relation to carrying out its Constitutional mandate of service delivery if the respondent was allowed to continue in his position pending the outcome of the appeal.

Legal principles

[15] It is trite that the execution of a judgment is automatically suspended upon the noting of an appeal, which means pending the appeal judgment cannot

be implemented and no effect can be given to it. The exception to this common law rule is that the judgment against which an appeal has been noted can be executed with the leave of the Court. In this respect the Court may on application and in exercising its discretion order that judgment be executed despite the pending appeal. The factors to take into account in considering an application to stay execution of judgment in light of the noting of an appeal is set out in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*,³ as follows:

“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* [1961 (2) SA 118 (T)] 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:

- (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 1977 (3) SA 534 (A) at 545C-G.

- (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.”

[16] The above was quoted with approval by the Constitutional Court in the matter of *Minister of Health and Others v Treatment Action Campaign and Others* (No 1),⁴ where the Court emphasised the issue of irreparable harm as a factor to take into account in considering execution of judgment pending appeal. In this respect the Court had the following to say:

“Before making an order to execute pending appeal, therefore, a Court will have regard to the possibility of irreparable harm and to the balance of convenience of the parties, as the judge clearly did in this case.”

[17] In the present instance the applicant contends that it would suffer prejudice if its application was not granted because service delivery would suffer more particularly because there is no performance management contract in place for the respondent. If that was to be the case, it would in my view, be of the applicant's own making in that all what the applicant needs to do is to ensure that effective and proper management systems are in place to ensure compliance. The respondent is an employee who should receive instructions from the applicant which would include amongst others that he

⁴ 2002 (5) SA 703 (CC) at page 709 para G

should perform at a particular level, failing which disciplinary steps could be taken against him.

- [18] The applicant has in my view, accordingly failed to show that it would suffer irreparable harm if leave to suspend the common law rule staying the execution of the judgment pending the appeal was not granted.
- [19] The harm or prejudice that is likely to be suffered by the respondent if leave to execute the judgment was to be granted would essentially entail him not receiving his salary pending the appeal. This does not constitute irreparable harm as envisaged by the legal principles. It is therefore my view that, leave to execute the judgment pending the appeal will not result in irreparable harm for the respondent. If successful on appeal the respondent will be entitled to receive back pay from the applicant.
- [20] In light of the above, I am of the view that, there is no potentiality of harm or prejudice to both parties in this matter. And therefore the next issue for consideration in the assessment of whether or not to grant leave to execute the judgment is consideration of the prospects of success in the appeal.
- [21] In his leave to appeal, the Applicant attacks the judgment on several grounds, the essence of which is that, the court in declaring resolution 34/2012 null and void erred in considering issues which were not before it, in particular concerning the interpretation of section 54 of the Systems Act. In applying the established test for determining prospects of success, I have taken into account the submissions made by the parties, the grounds for leave to appeal and the judgment of my learned brother R Lagrange J. I am not convinced that the respondent has prospects of succeeding on

appeal. I am also of the view that, the balance of convenience favours the granting of leave to execute the judgment.

Conclusion

[22] I accordingly find that, the respondent does not have prospects of succeeding on appeal. In addition, I find that the balance of convenience favours the granting of leave to execute despite the appeal launched by the respondent. I do not however believe that it would be fair to allow costs to follow the results.

Order

[23] In the premises, the following order is made:

1. The matter is treated as one of urgency and the rules relating to time frames are dispensed with.
2. The order granted by this Court on 24 May 2013 under case J498/13 shall not be suspended by the respondent's application for leave to appeal which was filed on 27 May 2013.
3. The applicant is granted leave to execute the order granted by this Court under case number J498/13 on 24 May 2013 pending leave to appeal and if granted, appeal.
4. There is no order as to costs.

E Molahlehi

Judge of the Labour Court of

South Africa

Appearances:

For the Applicant: Adv Kela instructed by Ndumiso Voyi Attorneys

For the Respondent: Adv K Lengane instructed by DMS Attorneys

LABOUR COURT