



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Reportable

Case No: J 690/14

In the matter between -

MIKATEKO FLOYD CHAUKE

Applicant

And

PAN SOUTH AFRICAN LANGUAGE BOARD

First Respondent

MXOLISI ZWANE

Second Respondent

Heard: 08 April 2014

Date of Judgment: 10 April 2014

Summary: Application to declare Judgment executable consequent leave to appeal. Principles applicable when considering application to have judgment executable notwithstanding leave to appeal.

JUDGMENT

MOLAHLEHI J

- [1] On 28 March 2014, the Court per Lagrange J having found that the applicants' application was urgent made the following order:

“b. The respondents’ suspension of the first to fifth applicants on 19 March [2014] is set aside and the respondents must allow the said applicants to return to work with effect from 31 March 2014, pending the outcome of the unfair labour practice dispute referred to the Commission for Conciliation, Mediation and Arbitration is set out in Annexure “KFC 24-30 to the founding affidavit.”

[2] It is common cause that the respondent did not comply with the Court order and thus the applicants remained suspended. In the meantime the respondent filed an application for leave to appeal against the judgment.

[3] The applicant has on the other hand applied to have the judgement given effect in terms of rule 11 of the Rules of the Labour Court read with rule 49 (11) of the High Court's Rules. The applicants in this respect seek to have the judgement implemented despite the leave to appeal filed by the respondent. Rule 49 (11) of the High Court Rules provides 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 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 the application of a party, otherwise directs.”

[4] Mr Nowosentz, for the respondent, argued that the matter was not urgent because the dispute referred to in the judgement is scheduled for conciliation the day after the hearing in this matter which is on 9 April 2014 at the CCMA offices. This was not disputed by Mr Faku, for the applicants. He however contended that, there was no prospect of success in the leave to appeal because the order made was interim and not final. He correctly pointed out that as a general principle of our law interim orders are not appealable.

[5] As concerning the prospect of success Mr Nowosentz contended that the respondent has prospect of success on leave to appeal because the decision

of the Lagrange J was in conflict with other decisions such as MEC for Education: Northwest v Gradwell's,¹ where the Court held that:

"[46] Disputes concerning alleged unfair labour practices must be referred to the CCMA or a bargaining council for conciliation and arbitration in accordance with the mandatory provisions of section 191(1) of the LRA. The respondent in this case instead sought a declaratory order from the Labour Court in terms of section 158(1)(a)(iv) of the LRA to the effect that the suspension was unfair, unlawful and unconstitutional. A declaratory order will normally be regarded as inappropriate where the applicant has access to alternative remedies, such as those available under the unfair labour practice jurisdiction. A final declaration of unlawfulness on the grounds of unfairness will rarely be easy or prudent in motion proceedings. The determination of the unfairness of a suspension will usually be better accomplished in arbitration proceedings, except perhaps in extraordinary or compellingly urgent circumstances. When the suspension carries with it a reasonable apprehension of irreparable harm, then, more often than not, the appropriate remedy for an applicant will be to seek an order granting urgent interim relief pending the outcome of the unfair labour practice proceedings. (Footnote omitted)

- [6] Turning to principles governing applications of this nature, it is trite that the judgement or the order of the Court is upon the filing of leave to appeal suspended pending the outcome of the appeal. In other words the operation or execution of a judgement or order is suspended pending the outcome of the appeal. The court may however on application direct that, that judgement or order be given effect or be executed notwithstanding the application for leave to appeal.
- [7] It is trite that in considering an application to have the judgement or order implemented despite the leave to appeal, the Court has a discretion to exercise which it does by taking into account the factors set out in *South*

¹ (2012) 8 BLLR 747 (LAC).

Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd, per Corbett JA in the following terms:²

“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. This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments. 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.”

² 1977 (3) SA 534 (AD) at 545C-G

- [8] In considering whether it should be ordered that the judgment in question should be given effect despite the leave to appeal account should be taken of the nature of that judgement.
- [9] Before dealing with the essential aspects of that judgement, I need to point out that I do not agree with Mr Nowesentz that, that the judgement is in conflict with that in Gladwell's case. It is clear that the Court in this matter intervened in the suspension of the applicants on the basis that the conduct of the respondent was unlawful and also amounted to occupational detriment as envisaged in the Protection of Disclosure Act 26 of 2000.
- [10] Turning to the issue of the prospect of success, in the leave to appeal, I am in agreement with Mr Faku that the prospects are weak when regard is had to the nature of the order made by the Court. The court uplifted the suspension of the applicants and ordered their reinstatement, "pending the outcome of the unfair Labour Practice referred to the CCMA." In arriving at that conclusion the Court reasoned:

"[24] Given the respondent's failure to provide any substantiation of a sufficient reason to justify the suspension decision, coupled with the *prima facie* evidence that it may be for an improper motive which may also entail the suspension being found to be unlawful and, or alternatively an unfair labour practice in terms of section 4(2)(b) of the PDA on account of amounting to an occupational detriment, I am satisfied that the applicants have established a right though open to some doubt, to interim relief to stay the imposition of suspension on the basis that there is reason to believe that it was initiated for an improper purpose which would render it unlawful, or that the suspensions amount to occupational detriments.

- [25] In the circumstances I consider it would be appropriate to uplift the suspensions at least pending the outcome of the CCMA proceedings arising from the unfair labour practice referral which would obviously also entail at least the conciliation of the PDA related version of the unfair labour practice.

[26] Although the CCMA may not adjudicate on an unfair labour practice claim relating to an occupational detriment under the PDA, the first stage for considering that dispute is conciliation of the alleged unfair labour practice at the CCMA.³ The upshot of that might be that one or more strands of the unfair labour claim arising from the suspension may be settled, or the applicants might abandon the unfair labour practice claim relating to an occupational detriment and pursue only an ordinary unfair labour practice claim on the substantive and procedural unfairness of the suspensions, or they may elect to refer the claim based on an alleged occupational detriment to the Labour Court for adjudication. In any event there would be an outcome of the dispute referral, at which juncture the ongoing status of the suspensions could be reconsidered in the light of the developments to date. I do not think it would be wise to extend the upliftment of the suspensions beyond that point, because if the employer wished to resume the suspensions at that stage, assuming that option is still open to it, the circumstances prevailing then might be different, and might require reconsideration of whether the upliftment of the suspensions should be extended further.”

[11] It is common cause that the CCMA conciliation hearing is scheduled to take place the day after this hearing, that is on 9 April 2014. The proper reading of the judgement in my view is that the order made by the Court was interim pending the CCMA conciliation, which as stated is to take place a day after the hearing in this matter.

[12] Mr Faku sought to persuade the Court that the suspension was made pending the outcome of the arbitration hearing. In this respect he relies on the last part of paragraph 25 of the judgement which reads as follows:

“. . . at least pending the outcome of the CCMA proceedings arising from the unfair labour practice referral.”

³ See s 4(2)(b) of the PDA.

- [13] In my view the interpretation given to the judgement Mr Faku is with due respect incorrect. It is in my view apparent from the reading of the judgement that the Court envisaged that the uplifting of the suspension of the applicants was pending the outcome of the conciliation proceedings and not that of the arbitration. From the reasoning of the Court it could never have been intended to be pending the outcome of the arbitration proceedings because “beyond that point” the employer would have no power to extend the suspension further. The employer would beyond the arbitration point be bound by the determination made in the arbitration award which in law would be final and binding on both parties.
- [14] In light of the above I am of the view that the balance of convenience would not favour granting an order as prayed for by the applicants in the circumstances where such order is to take effect for a day only because after interim order made by Lagrange J would lapse. In the circumstances of this case I see no reason why costs should not follow the results.

Order

- [15] In the premises the applicant's application is dismissed with costs.

Molahlehi J

Judge of the Labour Court of South Africa

Appearances:

The Applicant: Mr Faku

Instructed by Faku Attorneys

For the Respondent: Adv L Nowesentz

Instructed by Mokoena Attorneys.