



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 3380/17

In the matter between:

MIKEVA CASH AND CARRY (PTY) LTD
MASSCASH (PTY) LTD

First Applicant

Second Applicant

and

JAN ANDRE MARX

Respondent

Heard: 19 December 2017

Delivered: 22 December 2017

JUDGMENT

TLHOTLHALEMAJE, J.

Introduction:

- [1] On 12 December 2017, a full judgment and order was handed down by Lagrange J under case number J2720/17, in the following terms;

"Order

- [1] The matter is heard as one of urgency and any non-compliance with the forms and service provided for in the Labour Court rules is condoned.
- [2] The respondent is interdicted and restrained until 30 April 2019 ('the restraint period') and within the municipal area Mossel Bay ('the prescribed

area') from being engaged or obtaining business interests, whether directly or indirectly, in any capacity whatsoever in:

- 2.1 the business conducted under the name and style of Hyper Meats t/a The Meat Spot situated at the premises located at 4 Mossel Street, Mossel Bay, Western Cape province;
- 2.2 any business which is the same as or similar to or competitive with the business of the first applicant.

[3] During the restraint period the respondent is interdicted within the prescribed area from directly or indirectly:

- 3.1 soliciting orders from prescribed customers of the applicants, as defined in the fixed term agreement concluded between the 1st applicant and the respondent on 16 April 2014 ('the agreement') for prescribed goods and/or prescribed services as defined in the agreement;
- 3.2 canvassing business in respect of prescribed goods and/or prescribed services, as defined in the agreement, from prescribed customers of the applicants as defined in the agreement;
- 3.3 selling or otherwise supplying prescribed goods and/or prescribed services, as defined in the agreement, to prescribed customers of the applicants as defined in the agreement;
- 3.4 rendering any prescribed services, as defined in the agreement, to prescribed customers as defined in the agreement;
- 3.5 encouraging, enticing, inciting or persuading any manager or employee of applicants to terminate his or her employment with the applicants;
- 3.6 furnishing any information or advice to any manager or employee of the applicants or using any other means, whether directly or indirectly designed, or in the ordinary course of events calculated to result in such manager or employee terminating his or her employment by the applicants and/or becoming employed more

directly or indirectly interested in or associated with any other company, close Corporation, firm, undertaking or concern.

- [4] The respondent is interdicted and restrained from using any confidential information of the applicants or disclosing it to any third party including the entity trading under the name and style of hyper meat t/a the Meat Spot.
 - [5] The respondent must pay two thirds of the applicants' costs.
 - [6] The applicant must pay the travel and accommodation costs incurred by the respondent as a result of the matter being set down in Johannesburg".
- [2] On 18 December 2017, the applicants approached the Court on an urgent basis to seek an order directing that the above judgment not be suspended and be declared operative pending the determination of the application for leave to appeal delivered by the respondent on 13 December 2017, any subsequent petition to the Labour Appeal Court for leave to appeal against the Judgment and any subsequent appeal.
- [3] The background to the dispute between the parties is fully ventilated by Lagrange J in his judgment. For the purposes of this application, it is sufficient to point out that it is common cause that the first applicant (Mikeva), conducts a wholesale, retail butchery, fruit and vegetable cash and carry business from a store in Mosselbay.
- [4] Mikeva has been operating since 2014, having purchased the business from the respondent (Marx) and his wife as a going concern in April 2014. Marx was in turn employed by Mikeva as its Perishables Manager, until he left its employ on 30 April 2017. Marx in September 2017 opened a wholesale and retail butchery business trading as 'Hyper Meat t/a The Meat Spot, in direct competition with Mikeva and from premises approximately 200 metres from Mikeva's store in Mosselbay. This had led to an urgent application that resulted with the Lagrange J's judgment.
- [5] The applicants approached this Court on an urgent basis in terms of section 18 (1) and 18 (3) of the Superior Courts Act¹, read together with Rule 49 of

¹Act No 10 of 2013

the Uniform Rules of the High Court of South Africa, and section 158 (1) (a) (iii) of the Labour Relations Act², read together with rules 11 (3) and 11 (4) of the Labour Court Rules. The application followed upon correspondence sent Marx to give an undertaking that he would abide by the order granted by Lagrange J to avoid the applicants from approaching the Court in contempt proceedings. A response received from Marx's attorneys of record was that he had ceased to conduct business under the name and style of Hyper Meats t/a The Meat Spot. Marx thereafter delivered an application for leave to appeal against the whole judgment and order of Lagrange J on 13 December 2017.

- [6] The urgency of this matter was placed in dispute on the basis that the application was premature. I will address the issue of the procedural nature of the relief sought in due course. For now, I accept that given the nature of the application before Lagrange J, the issues that were ventilated at those proceedings, the nature and scope of the final order issued, the matter ought to be treated as urgent.

The application of section 18 of the Superior Courts Act³ 10 of 2013.

- [7] The applicant correctly pointed out that the Rules of this Court, together with the provisions of the Labour Relations Act are silent in regard to the status of the final orders issued by the Court in circumstances where an application for leave to appeal has been lodged. The *lacuna* is somehow addressed in the provisions of Rule 11 (3) and 11 (4) of the Rules of this Court, which provide that the Court may then adopt any procedure that it deems appropriate in the circumstances.
- [8] Flowing from several decisions in this Court⁴, which are in contrast to the approach adopted earlier in *L'Oréal South Africa (Pty) Ltd v Kilpatrick*⁵, there

² Act 66 of 1996

³ Act 10 of 2013

⁴ *Luxor Paints (Pty) Ltd v Lloyd* (2017) ILJ 1149 (LC); *Wenum v Maquassi Hills Local Municipality* (J 1684/15, 22 July 2016); *Fidelity Security Services (Pty) Ltd v Naidoo and Another* (J1837/2015) [2016] ZALCJHB 70 (3 February 2016); *Tshepo Joseph Matseba v Liberty Group Limited Case no: J 2920/16* (Delivered on 14 December 2016; *South African Maritime Safety Authority ('SAMSA') v Muroro Dziruni Case No: J 1818/17* (Delivered on 15 December 2017)

⁵ (2015) 36 ILJ 256 (LC) at paragraphs 13 and 21 where Snyman AJ held that;

"The simple fact is that the SC Act does not directly apply to the Labour Court and Labour Appeal Court. The Labour Court is not established in terms of the SC Act, but in terms of

can be no doubt that by virtue of the Labour Court being a superior Court and thus subject to the Superior Courts Act, section 18⁶ of that Act finds application in this Court. This is so to the extent that there is no conflict between the provisions of that Act and those of the Labour Relations Act in terms of which this Court was established, within the contemplation of section

the LRA. In terms of section 151(1) of the LRA: 'The Labour Court is hereby established as a Court of law and equity.' And further, in terms of section 151(2): 'The Labour Court is a superior Court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a Court of a Division of the High Court of South Africa has in relation to matters under its jurisdiction'. As to the relevant powers of the Labour Court, section 158(1), provides that: 'The Labour Court may- (a) make any appropriate order, including- (iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of *this Act*; (iv) a declaratory order'. Finally, and generally, the Labour Court has the power to deal with all matters necessary or incidental to performing its functions in terms of the LRA or any other law. This makes the Labour Court certainly comparable if not identical to any High Court when exercising duties and functions under its jurisdiction, but this must also mean that the Labour Court is governed by the provisions of its own statute (the LRA) and not the SC Act." (Authorities omitted)

And,

"It is accordingly my conclusion that the SC Act does not apply to the Labour Court or Labour Appeal Court. However, selected provisions from such Act may from time to time be imported or adopted by the Labour Court where the same is complimentary to the Labour Court's own rules, provisions and processes. This the Labour Court does by virtue of its own powers in terms of Section 158(1) of the LRA referred to above, and Rules 11(3) and (4) of its own Rules. The Labour Court therefore imports what it wants, and needs, from the SC Act, only where it is in the interest of proper administration and process in the Labour Court."

⁶ Which provides:

18. Suspension of decision pending appeal

- (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.
- (4) If a Court orders otherwise, as contemplated in subsection (1)-
 - (i) the Court must immediately record its reasons for doing so;
 - (ii) the aggrieved party has an automatic right of appeal to the next highest Court;
 - (iii) the Court hearing such an appeal must deal with it as a matter of extreme urgency; and
 - (iv) such order will be automatically suspended, pending the outcome of such appeal.
- (5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules."

2 (3) of that Superior Courts Act⁷. To the extent that the LRA or the Rules of this Court are silent on the status of final orders pending appeal proceedings, there can be no talk of any such conflict.

- [9] The answering affidavit was deposed to by Marx's attorney of record on his behalf, and certain procedural requirements were raised in regard to the reason the order to execute should not be granted. It was common cause that Marx had a day after the Lagrange J's order was issued, lodged a Notice of application for leave to appeal. It was argued on his behalf that once he had lodged that application despite his earlier undertaking that he had ceased to trade, he was entitled to carry on trading. It was further submitted on his behalf that in terms of paragraph 15.2 of this Court's Practice Manual, Marx was required to file his submissions in respect of the leave to appeal within 10 days, which had commenced on 13 December 2017. Those submissions had not been filed as the *dies* was on 29 December 2017, and according to the arguments, there was no need to hear this application as set down by the applicant, more specifically since it is the holiday season, and attorneys were not easily available.
- [10] Further arguments advanced on behalf of Marx were that if the leave to appeal was granted, then this application would fail, and conversely, if the application for leave to appeal was to fail, then this application should succeed. To this end, the argument was that this application prejudged the application for leave to appeal and should be dismissed pending the leave to appeal hearing wherever these intertwined questions can be determined.
- [11] As to whether it is a requirement that a complete cause of action (leave to appeal in this case) must be in motion prior to approaching the Court in terms of section 18 of the Superior Courts Act is an issue that was addressed by Kathree-Setiloane J in *Fidelity Security Services (Pty) Ltd v Mogale City Local*

⁷ Which provides that;

'The provisions of this Act relating to Superior Courts other than the Constitutional Court, the Supreme Court of Appeal or the High Court of South Africa, are complementary to any specific legislation pertaining to such Courts, but in the event of a conflict between this Act and such legislation, such legislation must prevail.'

*Municipality and Others*⁸. The nub of that decision is that because the relief which is sought with such applications is procedural or interlocutory rather than substantive in nature, it was not necessary for the applicant to have a complete cause of action. Second, the interpretation that the applicants in this case must wait until Marx has filed his complete application in respect of the leave to appeal has the result that the applicants in this case as the successful party, cannot approach this Court until the period of 10 Court days has lapsed (since the notice was filed). During this *interim* period, the applicants are expected to do nothing as they cannot enforce its favourable order. On this approach, this would effectively prevent the applicants from approaching the Court to assert their rights flowing from the favourable order, and prevent the Courts from taking appropriate steps to ensure proper compliance with its orders. This approach cannot be countenanced on the reasoning of Kathree-Setiloane, as it would lead to an outcome that could not have been intended by the Legislature; is inflexible and formalistic in the extreme; constitutes an unconstitutional limitation of the right of access to Court in terms of s 34 of the Constitution; and is inconsistent with the principle that when interpreting statutes “*a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the [provision]*”.⁹

[12] In the light of the above, the applicant in this case was within its rights to approach the Court with an application to execute its favourable order. It was not a requirement for it to wait until the full application for leave to appeal was properly before the Court, and there is further no requirement that the application for leave to appeal and the application to execute should be heard simultaneously as they are intertwined.

[13] An application to execute can be brought at any time if it is apparent that the other party has no intention to comply with a Court order. The only issue for consideration is whether the application is urgent, (an issue already disposed of in this case). Furthermore, and in line with a further exposition of the provisions of section 18 by Van Niekerk J in *Fidelity Security Services (Pty)*

⁸ 2017 (4) SA 207 (GJ)

⁹ At paragraphs 9 - 25

Ltd v Naidoo and Another, an applicant is required in an application for leave to execute, to demonstrate that the facts and circumstances of the particular application are exceptional and warrant a deviation from the normal rule¹⁰. This required the applicant to show that the facts and circumstances of its particular case are uncommon, unusual and/or out of the ordinary to the extent that a departure from the ordinary rule that an appeal suspends the operation of the judgement in order appealed against should not apply. Furthermore, the applicant was required to prove on a balance of probabilities that it will suffer irreparable harm should the order for leave to execute not be granted pending the appeal. Finally, the applicant must prove on a balance of probabilities that the respondent in the application for leave to execute will not suffer irreparable harm if leave to execute is granted pending appeal¹¹.

Application to the facts:

- [14] Applications for the enforcement of restraint of trade agreement and undertakings are by their very nature urgent¹². In this case, and as it was correctly pointed out, it is not necessary to deal with the merits of the matter. Central to Lagrange J's order is that having treated the application as urgent, Marx was interdicted and restrained until 30 April 2019, and within the municipal area of Mossel Bay, from being engaged or obtaining business interests, whether directly or indirectly, in any capacity whatsoever in the business conducted under the name and style of Hyper Meats t/a The Meat Spot, and in any business which is the same as or similar to or competitive with the business of the applicants. The interdict and restraint extended to confidential information and solicitation of the applicants' customers or use of trade connections.
- [15] Notwithstanding the differences in approach between the various decisions referred to¹³ and *L'Oréal South Africa (Pty) Ltd v Kilpatrick*, and to the extent that in the latter decision it was acknowledged that the provisions of section

¹⁰ The 'threshold factual test' referred to in *Incubeta Holdings (Pty) Ltd and another v Ellis and another* 2014 (3) SA 189 (GJ)

¹¹ At para 6

¹² *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another* 2009 (3) SA 78 (C) 89A.

¹³fn 4

18 (1) and 18 (3) were applicable in this Court, the parties in this case agreed that they could not quarrel with the legal principles extrapolated in that regard by Snyman AJ with particular reference to restraint of trade disputes. In this regard, Snyman AJ held that;

“In the case of a restraint of trade interdict, it is the immediate protection of the protectable interest of the applicant that is critical to the application even having any purpose. It is all about the elimination of continued risk, which in the case of a protectable interest relating to confidential information can only be achieved by interdicting employment of the individual respondent with the competitor where such respondent is so employed (which is the case in the current matter). If an applicant manages to pass the quite substantial hurdle of convincing a Judge to exercise the Judge’s discretion in the applicant’s favour, it is in my view untenable that all this effort and the very objective that needs to be achieved is thwarted by the respondent party simply proceeding with an appeal. It is, in my view, the nature of restraint of trade proceedings that in itself must contemplate ‘exceptional circumstances’. As the Court said in *Incubeta Holdings*, which I agree with:

‘Do these circumstances give rise to ‘exceptionality’ as contemplated? 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’.’¹⁴

[16] It cannot be doubted that in light of the Lagrange J’s order, if the judgement is not executed, Marx will continue with business as usual to the detriment and prejudice of the applicants. The submissions in respect of the leave to appeal are yet to be filed. The Notice in regard to the leave to appeal and any subsequent submissions are or were to be filed during Court recess, and the likelihood of the leave to appeal being considered by Lagrange at any time before the next Court term in the new year are as remote as it can be. In the event of the leave to appeal being unsuccessful, it is more than likely that Marx will petition the Labour Appeal Court, despite his attorneys of record having no current instructions in that regard. In the unlikelihood of such a

¹⁴ At para 46

petition being granted, by the time the matter comes before the Labour Appeal Court, it would have become moot as the period of the restraint would have come and gone ¹⁵.

- [17] The very purpose of the order and judgment of Lagrange is to protect the interests of the applicants, and to the extent that such an order was granted on an urgent basis, to allow Marx to continue with business as usual pending the application for leave to appeal will effectively erode the urgency of that relief, open the applicants' protectable interests to abuse and effectively render the judgment and order nugatory.
- [18] I agree with the contentions made on behalf of the applicants that indeed there are exceptional circumstances that prevail in this matter that requires that the execution order be granted. On their uncontested version, Marx in the light of his misguided approach has continued to use and disclose the applicant's confidential information, thus defeating the very object of the relief granted. It is uncontested that Marx remains in a position to conduct business under the name and style of Hyper Meats t/a The Meat Spot, in direct competition with the applicants. It further remains uncontested that he had also approached the applicants' suppliers, customers and employees. Such conduct effectively erodes or tramples upon the very interests which the Court sought to protect with the relief it had granted.
- [19] The submissions made on behalf of Marx were to the effect that the applicants would not suffer irreparable harm on the basis that he keeps detailed records of all sales and all input and output costs for management purposes. It was argued that should he not be successful in the appeal, it would be easy to quantify alleged damages in a damages trial. This tender, it was argued on his behalf, made this application redundant.
- [20] Other than the above tender, it was submitted that on the contrary, he would suffer immense prejudice and harm which is real and immediate, in that he is in possession of perishable stock that must be sold, and further that he

¹⁵ The facts and circumstances of *Ball v Bambalela Bolts (Pty) Ltd and Another* (2013) 34 ILJ 2821 (LAC) are a case in point

employed employees that may have to be retrenched. It was contended that the harm to him in the event of the appeal succeeding far outweighed the harm to the applicants in the event of this application not being granted and the appeal itself being dismissed.

- [21] There are obvious difficulties with Marx's belated 'tender'. The first is that effectively he is saying to the applicants that he should be allowed to ignore the Court's judgment and continue with business as usual to the detriment of their interests. He is further inviting the applicants to trust him to keep a proper account of his sales and all input and output costs, so that they can be able to claim damages from him at a later stage. The obvious difficulty with this tender is that the applicants have already approached the Court and secured an order they sought in order to protect their interests. It being so, why would they want to pursue further litigation and claim damages from Marx when the very essence of that Court order is to prevent the very same damages that they may suffer had they not secured the order? Effectively then, a claim for damages in such cases is a non-starter. Worst still, it would be foolhardy for the applicants to trust Marx to keep information that may be used against him in the near future, more specifically in circumstances where he had shown no inclination whatsoever to keep to his undertakings.
- [22] The judgment and order having been obtained on 12 December 2017, if indeed Marx had stocked substantial perishables from that date that he cannot dispose of as at the hearing of this matter, it is apparent that he had no intentions whatsoever to consider himself bound by the order of this Court. He cannot therefore complain about the very consequences he should have foreseen when adopting the approach that it was business as usual after the Court order was obtained.
- [23] The tried, tested and cynical argument that '*employees will be retrenched or would suffer if the order is granted*' is gratuitously abused in this Court to gain sympathy in circumstances where a party is the direct cause of the very suffering that vulnerable employees would be subjected to as a result of an adverse Court order. That argument is in most instances self-serving. Inasmuch as the Court should be sensitive to the plight of the vulnerable

employees concerned, this by all accounts cannot be used as justification to deny the applicants an order which the merits of their initial application and the interests of justice dictate they should be entitled to.

- [24] I have further had regard to the submissions made in regard to the merits of the leave to appeal. It is not the purpose of this judgment to make a pronouncement on the merits of the leave to appeal. Having studied the Lagrange J's judgment however, and the full and detailed reasons for that order, it can be said that *prima facie*, Marx's prospects of success with the application for leave to appeal appear remote.
- [25] To conclude then, the applicants have discharged the onus of showing exceptional circumstances in this case, and have also demonstrated on a balance of probabilities, the irreparable harm they would suffer if the order to execute is not granted as opposed to Marx, whose contentions in regard to any harm to him are not only self-serving but also indicate that the alleged harm is self-inflicted.
- [26] The applicants are in possession of a favourable judgment and order enforcing the restraint provisions against Marx. The interests of justice and fairness dictate that the applicants should be able to enjoy the protection of that order whilst Marx pursues his rights in respect of the leave to appeal. It would be iniquitous to hold otherwise, as that favourable order if not immediately executed, will be rendered meaningless. The applicants have accordingly made out a case for the relief sought as per their Notice of Motion.

Costs:

- [27] The applicants sought a cost order in the event that they were successful. Having had regard to considerations of law and fairness, I see no reason why costs should not be awarded, particularly in view of different messages sent by Marx upon receipt of the Court order on 12 December 2017. He had upon a request by the applicants, made an undertaking that he had ceased to operate his business under the name and style of Hyper Meats t/a The Meat Spot. Hardly a day later he had filed his notice to file an application for leave

to appeal, and as highlighted in the founding affidavit, he had continued to trade as if the Court order did not exist, on the misguided notion that he was entitled to do so. Considerations of law and fairness in these circumstances dictate that he should be burdened with the costs of this application.

Order:

[28] In the premises, the following order is made;

1. The matter is heard as one of urgency and any non-compliance with the forms and service provided for in the Labour Court rules is condoned.
2. The Judgment and Order handed down by Lagrange J on 12 December 2017 is not to be suspended, and is declared operative pending the determination of the application for leave to appeal delivered by the Respondent on 13 December 2017, any subsequent petition to the Labour Appeal Court for leave to appeal against the judgment, and any subsequent appeal.
3. The Respondent is ordered to pay the costs of this application.

E. Tlhotlhemaje

Judge of the Labour Court of South Africa

Appearances:

For the First and Second Applicants: Mr. F Malan of Edward
Nathan Sonnenbergs INC

For the Respondent: Adv. J Moorcroft

Instructed by: Viljoen-French & Chester INC

LABOUR COURT