THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: J 4415/18

In the matter between:

MORUFA MOLOTO	**First Applicant**
OLEBILE OBED NTSIMANE	**Second Applicant**

and

KAGISANO MOLOPO LOCAL MUNICIPALITY	**First Respondent**
OLAOTSE THEOPHILUS BOJOSINYANE	**Second Respondent**
ZEBO TSHETLHO	**Third Respondent**

Heard: **23 January 2019**

Delivered: **21 February 2019**

Summary: Application in terms of section 18 of the Superior Courts Act to enforce an order of the Labour Court pending appeal proceedings.

JUDGMENT

PRINSLOO, J

Background

[1] The First Applicant is employed as the First Respondent's (the Municipality) Chief Financial Officer and the Second Applicant is employed as Director: Corporate Support Services.

[2] Clause 6 of the Disciplinary Regulations for Senior Managers (the Regulations) provides for precautionary suspension and sets out how and under which circumstances an employee may be suspended. Regulation 6(1) provides for precautionary suspension in circumstances where it is alleged that a senior manager has committed an act of misconduct and the municipal council has reason to believe that the presence of the senior manager at the workplace may jeopardise any investigation into the alleged misconduct, may endanger the well-being or safety of any other person or municipal property or may be detrimental to the stability of the municipality. Precautionary suspension is also provided for where the senior manager may interfere with potential witnesses or may commit further acts of misconduct.

[3] The Applicants were suspended on 3 September 2018, as a precautionary suspension contemplated in Regulation 6(6)(a) of the Regulations. The said Regulation stipulates that if a senior manager is suspended, a disciplinary hearing must commence within three months after the date of suspension, failing which the suspension will automatically lapse.

[4] It is evident from the suspension letter that the Applicants were suspended while an investigation was conducted, as is provided for in the Regulations.

[5] The Applicants were served with notices to attend a disciplinary enquiry on 19 November 2019 and the disciplinary enquiry was scheduled for 29 and 30 November 2018. Attached to the notices, were the charges the Applicants were to face at the disciplinary enquiry scheduled for 29 and 30 November 2018. On 29 November 2018 the disciplinary enquiry did not commence on account of the fact that the chairperson fell ill.

[6] On 6 December 2018, the Applicants were issued with new notices to attend a disciplinary enquiry scheduled for 10 and 11 December 2018. The new notices embodied the same charge sheet previously issued to the Applicants and the disciplinary enquiry was scheduled for 10 and 11 December 2018.

[7] Also on 6 December 2018, the Applicants filed an application in this Court under case number J 4415/18, *inter alia,* challenging the constitutionality and legality of their suspension. The application was heard on 13 December 2018 when it was struck off the roll for lack of urgency. The Applicants refer to this application as the main application.

[8] On 19 December 2018, the Applicants filed another application (the second urgent application) wherein they sought limited relief pending the finalisation of the main application. The relief sought was for an order reinstating them with immediate effect, pending the main application. Effectively the Applicants sought the upliftment of their suspension. The Respondents indicated that the pending disciplinary proceedings had been postponed *sine die,* pending the finalisation of the main application.

[9] The basis for the application was found in the provisions of Regulation 6(6)(a) of the Regulations, which provides that if a senior manager is suspended, a disciplinary hearing must commence within three months after the date of suspension, failing which the suspension will automatically lapse.

[10] The second urgent application was heard on 8 January 2019 and the Court per Cele J issued an order that the Respondents are ordered to reinstate the Applicants with immediate effect, pending the finalisation of the main application and that they Applicants are to report at work within three days from 8 January 2019.

[11] The Applicants reported for work on 11 January 2019, when they were told by the Second Respondent that they would not be allowed to resume their duties as the Court order of 8 January 2019 would be taken on appeal.

[12] On 11 January 2019, the Respondents served an application for leave to appeal against the order issued by Cele J on the Applicants' attorneys.

[13] The Applicants on 16 January 2019, filed this application and the matter was enrolled for hearing on the urgent roll of 23 January 2019.

The relief sought

[14] The Applicants approached this Court on an urgent basis to reinforce the Labour Court order granted on 8 January 2019 and for the First and Second Respondents (the Respondents) to be compelled to comply with it, failing which they would be in contempt.

[15] This relief is sought on the basis that the order of Cele J is an interim order and therefore not appealable and because it is an interim order, its operation and execution had not been stayed as a consequence of the filing of the application for leave to appeal.

[16] In the alternative and in the event that this Court finds that the order of Cele J is final and its operation and execution had been stayed by virtue of the filing of the application for leave to appeal, the Applicants seek an order wherein they are granted leave to execute the order of Cele J, pending the determination of the Respondents' application for leave to appeal and any intended appeal, should leave to appeal be granted.

Interim or final order

[17] The first issue to be decided is whether Cele J's order of 8 January 2019 is an interim or final order.

[18] Cele J issued an order that the Respondents are ordered to reinstate the Applicants with immediate effect, pending the finalisation of the main application and that they are to report at work within three days from 8 January 2019.

[19] The interlocutory application dealt with the Applicants' precautionary suspension, pending a disciplinary hearing, on the basis that Regulation 6(6)(a) provides that a suspended senior manager's disciplinary hearing must commence within 3 months after the date of suspension, failing which the suspension will automatically lapse. The Applicants' case was that their suspensions lapsed on 4 December 2018 and as the disciplinary enquiry had not commenced before the expiry of the three-month period, they have the right to be reinstated upon the expiry of the three-month period.

[20] Cele J accepted the Applicants' interpretation of the said regulation and they were reinstated. It is evident from the Respondents' application for leave to appeal that Cele J's interpretation of the word 'commence' as used in regulation 6(6)(a) is the subject of the application for leave to appeal. The

Respondents' case is that 'commence' should be interpreted to mean the external manifestation of an intent to proceed with the disciplinary process and as such the disciplinary proceedings against the Applicants commenced by virtue of the notices and charge sheets that were served on them on 19 November 2018, prior to the expiry of the three-month period.

[21] The Applicants' case is that the order is an interim order as the challenge in respect of the validity of the municipal council's resolution to place the Applicants on precautionary suspension, remains the subject of the main application.

[22] The Respondents' case on the other hand is that the order granted by Cele J is final in effect, notwithstanding the fact that it was issued in respect of an interlocutory application, filed separate from the main application. This is so because the order disposed of the municipality's resolution to place the employees on precautionary suspension and because the Court interpreted the word 'commence' finally.

[23] In determining whether an order is final, it is not merely the form of the order that must be considered, but also and predominantly, its effect[1].

[24] In my view the order issued by Cele J is indeed final in effect as it uplifted the suspension of the Applicants pending the main application and there remains no issue to be decided at any future point on the upliftment of the suspension. The question as to whether the Applicants' suspensions lapsed in the instance where it was found that the disciplinary hearing had not commenced within the prescribed period, had been finally determined.

[25] Having found the order to have a final effect, the first part of the relief sought by the Applicants falls away and needs no further consideration. What remains to be considered is the Applicants' application to enforce the Court

[1] *Cronshaw v Coin Security Group (Pty) Ltd* 1996 (3) SA 686 (A) at 690 E-F.

order, notwithstanding the application for leave to appeal filed by the Respondents.

Point *in limine*

[26] Before dealing with the merits of this application, I have to consider the point *in limine* raised by the Respondents.

[27] The Respondents submitted that as the order of Cele J is final and falls within the ambit of section 18(1) of the Superior Courts Act[2], the Applicants may seek appropriate relief at the hearing of the application for leave to appeal and the Court hearing the application for leave to appeal may consider the suspension of the order of 8 January 2019.

[28] The Respondents submitted that this application is therefore premature and ought to be dismissed and be referred to the Court hearing the application for leave to appeal.

[29] The point *in limine* so taken by the Respondents lacks merit for a number of reasons. Firstly, section 18 of the Superior Courts Act does not prescribe the procedure the Respondents want to advance as a reason why this application is premature. There is nothing in section 18 that stipulates when such an application should be brought and that it should only be considered by the Court hearing the application for leave to appeal.

[30] Secondly, it is certainly not the practice in this Court that section 18 applications are only considered at the hearing of the application for leave to appeal and that only the Court dealing with the application for leave to appeal, may consider the section 18 application.

[2] Act 10 of 2013

[31] Lastly, the Respondents submitted that the application ought to be dismissed and referred to the Court hearing the application for leave to appeal. It is not my understanding that a dismissed application could be considered by another Court, except on appeal. The notion to 'dismiss' and thereafter 'refer' the same application to another Court is an impossible one.

[32] There is no merit in the Respondents' point *in limine* and as such it has to fail.

The applicable principles:

[33] Section 18 of the Superior Courts Act regulates the circumstances under which a party may apply for an order that departs from the ordinary consequence of filing an application for leave to appeal. The default position is that 'the operation and execution of a decision which is the subject of an application for leave to appeal is suspended pending the decision of the application or appeal'.

[34] The provisions of section 18 of the Superior Courts Act apply to the proceedings of this Court.

[35] In general terms the operation and execution of a decision (other than a decision not having the effect of a final judgment) is suspended pending the outcome of an application for leave to appeal or appeal. The court may however order otherwise if it is established on a balance of probabilities that the applicant 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[3].

[36] Section 18 of the Superior Courts Act provides that:

[3] *Luxor Paints (Pty) Ltd v Lloyd and Another* (2017) 38 ILJ 1149 (LC).

‘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.’

[37] The provisions of section 18 of the Superior Courts Act introduced a two-fold test of which the requirements call for an enquiry firstly as to whether ‘exceptional circumstances’ exist and secondly whether the applicant showed the presence and the absence of irreparable harm on a balance of probabilities.

[38] The Applicant must prove on a balance of probabilities that it will suffer irreparable harm should the order for leave to execute or enforce not be granted pending the appeal and that the respondent, who seeks leave to appeal, will not suffer irreparable harm if leave to execute is granted pending appeal.

Analysis

[39] The question is whether or not a proper case has been made out to grant leave to put the order issued by Cele J on 8 January 2019 into operation pending an appeal process.

Exceptional circumstances

[40] The first issue to be decided is whether there are exceptional circumstances.

[41] The Applicants' case is that exceptional circumstances exist for the enforcement and execution of the order of Cele J pending the Respondents' application for leave to appeal or any consequent appeal to the Labour Appeal Court (LAC). The exceptional circumstances set out by the Applicants are as follows: the relief granted is time-sensitive, they stand to suffer financial prejudice in relation to their right to qualify for a performance bonus, which cannot be quantified in their absence, the effect of an appeal process negates the relief they were granted and renders it academic and lastly they remain suspended, a position that will remain for a protracted period.

[42] It is evident that in the papers before me the issues of exceptional circumstances and irreparable harm are intertwined and the papers are

certainly not a model of clarity and are by no means a showcase of drafting skills.

[43] Be that as it may, in the opposing affidavit, the Respondents denied that the Applicants showed any exceptional grounds why the order of Cele J ought not to be suspended pending the application for leave to appeal.

[44] What constitutes 'exceptional circumstances' had been considered in *Incubeta Holdings (Pty) Ltd and another v Ellis and Another*[4] and the Court held that exceptionality must be fact-specific and circumstances which are or may be 'exceptional' must be derived from the actual predicaments in which the given litigants find themselves. The Court held that:

> 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'

[45] *Incubeta*[5] has been quoted with approval by the Supreme Court of Appeal (SCA)[6] and it is clear that the determination of whether exceptional circumstances exist, is a fact specific enquiry and each case has to be decided on its own facts as there is no definition of exceptional circumstances.

[46] It is evident from the opposing affidavit that the Respondents did not dispute the Applicants' averments that the relief granted is time-sensitive, that the

[4] 2014 (3) SA 189 (GJ) at para 27.
[5] Ibid.
[6] See: *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA), *University of the Free State v Afriforum and Another* 2018 (3) SA 428.

effect of an appeal process negates the relief that they were granted and that they remain will suspended for a protracted period. It was also not disputed that the Applicants have the right to qualify for a performance bonus in terms of their applicable performance agreements and conditions of employment Regulations.

[47] The Applicants' suspension was uplifted and for the suspension to remain in place, pending the finalisation of the appeal or the main application, will indeed create the predicament of being left with no relief in circumstances where it is undisputed that the relief granted is time-sensitive. *Incubeta*[7] has held this to be sufficient to cross the threshold of exceptional circumstances and I cannot see any reason why the same principle does not apply *in casu.*

Irreparable harm

[48] I turn to deal with the second leg of the enquiry: 'irreparable harm'.

[49] It is trite that the Applicants must prove on a balance of probabilities that they will suffer irreparable harm should the order for leave to execute or enforce not be granted pending the appeal and that the Respondents will not suffer irreparable harm if leave to execute is granted pending the appeal.

[50] I have already alluded to the fact that the papers before me are no example of proper drafting and even on the aspect of irreparable harm, I had difficulty to find the Applicants' averments in support thereof. I however accept that the Applicants' case is presented on the basis that the issues are intertwined.

[51] The Applicants referred to the prejudice they stand to suffer, when in fact they have to convince this Court that they will suffer irreparable harm. Be that as it

[7] *Id* n 4.

may, the Applicants placed reliance on the same factors already alluded to *supra* in support of their contention that they will be prejudiced if the order is not granted.

[52] The factors as presented by the Applicants and not disputed by the Respondents, which I consider relevant in respect of harm or prejudice are that they will remain suspended for a protracted period and that they have the right to qualify for a performance bonus in terms of their applicable performance agreements and conditions of employment Regulations.

[53] In the opposing affidavit, the Respondents denied that the Applicants stand to suffer financial prejudice as they have been on precautionary suspension with pay from the onset. Issue is taken with the Applicants' failure to show that their expectation that they would qualify for a performance bonus, is reasonable and that they failed to address the issue as to why they cannot later claim damages in relation to their inability to qualify for performance bonusses. To this, the Applicants responded that it would be impossible to quantify a claim for damages in relation to a performance bonus as the right to qualify for the performance bonus, is dependent on their presence at the workplace.

[54] Mr Hugo, on behalf of the Respondents, submitted that the Applicants provided no specifics as to their entitlement to performance bonuses and the statements relating to performance bonusses are empty statements. This is so because the Applicants did not state whether they previously qualified for such bonusses, whether there is any reasonable prospect that they may in future qualify or what criteria or the value of the bonus is.

[55] In my view, the Respondents missed the point in respect of the issue of financial prejudice raised by the Applicants.

[56] The arguments submitted on behalf of the Respondents indicate an understanding that the Applicants are claiming a performance bonus and in

the Respondents' view, this is a claim that could be quantified and pursued as a separate claim for damages. That is however not the Applicants' case. Their case is that they stand to suffer financial prejudice in relation to their right to qualify for a performance bonus, which cannot be quantified in their absence. The issue is the right to qualify for a bonus and not the payment of the bonus *per se.*

[57] Absent from work, the Applicants cannot access the right to qualify for a performance bonus and protracted absence will indeed cause irreparable harm in this regard, more so where the claim cannot be quantified and pursued as a claim for damages

[58] Furthermore, the Applicants' contention that pending the appeal process, they will remain suspended for a protracted period is another factor that calls for closer examination.

[59] This is so in view of the fact that in the suspension letter of 3 September 2018, it was specifically stated and made clear that the Applicants were suspended from work while an investigation was conducted into the allegations raised in the letter of intention to suspend. It is significant that in the suspension letter the Respondents recorded that '*The Municipal Council will not keep you suspended for longer than is necessary for it to carry out the investigation and decide on action to be taken…'.*

[60] Evidently, the Applicants were suspended while an investigation was conducted, as is provided for in the Regulations. It was precautionary to allow the investigation to be conducted and for the municipality to decide on the action to be taken.

[61] It is safe to assume that on 19 November 2018, when the Applicants were served with notices to attend a disciplinary enquiry and attached to the notices, were the charges the Applicants were to face at the disciplinary enquiry, the investigation was completed and the municipality had taken a

decision on the action to be taken. Surely the investigation informed the formulation of the charges and the decision that the action to be taken was to charge the Applicants with misconduct and to follow a disciplinary process.

[62] The Applicants' suspension was precautionary and I fail to see why they should remain suspended indefinitely when their suspension, from the onset, was precautionary '*to carry out the investigation and decide on action to be taken.'*

[63] I am satisfied that the Applicants will suffer irreparable harm. This is however not the end of the enquiry. The Applicants must also prove on a balance of probabilities that the Respondents will not suffer irreparable harm if leave to execute is granted pending an appeal process.

[64] The Applicants' case is that the Respondents will not suffer irreparable harm and this is so because in the affidavit, filed in opposition of the application that was heard by Cele J, the Respondents stated that the fact that the Applicants remain on precautionary suspension, pending the finalisation of their disciplinary hearing, prejudices the municipality as the financial obligation to pay them, remains and their workload has to be performed by other employees.

[65] In answer to this, the Respondents did not deny the fact that they are prejudiced by the financial burden to pay the Applicants and the fact that other employees have to carry their workload. Instead, they did no more than to refer this Court to a timeline of events since August 2018 and to submit that the Applicants' suspensions remain valid.

[66] I have already alluded to the fact that the suspension letters issued to the Applicants, did not suspend them pending finalisation of the disciplinary hearing, but pending the finalisation of an investigation.

[67] The Respondents submitted that the Applicants stand to answer serious allegations in a disciplinary process and they do not want to proceed with such a process, hence they filed the main application. This is disputed by the Applicants who indicated that they are prepared to participate in any lawful disciplinary process.

[68] In view of the aforesaid, I am not convinced that the Respondents will suffer irreparable harm in circumstances where they will have the benefit of the services rendered by the Applicants, which will eliminate the prejudice caused by paying employees who render no service and which will alleviate the increased workload of the employees who have to perform the Applicants' duties in their absence.

[69] In conclusion: it is evident from the circumstances *supra*, that the Applicants would indeed suffer irreparable harm if the order of Cele J is not put into operation and that the Respondents will not suffer irreparable harm if the order is put into operation. The section 18 test is met on both counts of the second leg.

[70] It follows that all the requirements under sections 18(1) and (3) of the Superior Courts Act have been satisfied.

[71] Although the disciplinary proceedings are not an issue before me, it had been mentioned in the affidavits and on the facts placed before me, I fail to see the reason why the disciplinary proceedings had been stayed until the finalisation of the main application. It is certainly in the interest of all the parties that the disciplinary proceedings commence and that the Applicants be afforded their right to be heard and to put up a case in response to the allegations levelled against them. Any further delay in finalising the disciplinary enquiry is not in the interest of the parties, fairness or justice.

Costs

[72] The last issue to be decided is the issue of costs.

[73] Insofar as costs are concerned, this Court has a broad discretion in terms of section 162 of the Labour Relations Act[8] (LRA0 to make orders for costs according to the requirements of the law and fairness.

[74] The Applicants claim that they are entitled to punitive costs because the Respondents should have known that the order of Cele J is not an appealable order, alternatively that the leave to appeal does not stay the execution and enforcement of the order. Furthermore, the application for leave to appeal was launched with the sole aim of preventing the Applicants from returning to work and that the Respondents will in all likelihood not pursue the appeal.

[75] There is no merit in these submissions. I have already dealt with the fact that the order issued by Cele J is appealable and the submission that the Respondents will not pursue their appeal, is nothing but speculation and by no stretch of the imagination can mere speculation constitute justification for a punitive cost order.

[76] The Constitutional Court in *Zungu v Premier of Kwazulu-Natal and Others*[9] has recently confirmed that the rule of practice that costs follow the result does not apply in labour matters, but that the Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court and have their disputes dealt with and, on the other hand allowing those parties to bring to this Court cases that should not have been brought to Court in the first place.

[8] Act 66 of 1995 as amended.
9 (2018) 39 ILJ 523 (CC).

[77] In my view this is a matter where the interests of justice and fairness will be best served by making no order as to costs. The Respondents have the right to file an appeal to the LAC and the exercising of that right made this application necessary. The Respondents acted within their rights to oppose this application and should not be punished with a cost order for doing so.

[78] Accordingly, I make an order as follows:

Order

1. The Labour Court order granted on 8 January 2019 under case number J 4415/18 operates and is extant until the final determination of all leave to appeal applications and appeals against the said order;

2. The First and the Second Respondents are ordered to comply with the Labour Court order handed down on 8 January 2019 within 24 hours of this order being granted;

3. There is no order as to costs.

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Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr W P Scholtz from Scholtz Attorneys

For the First and Second

Respondents:	Advocate M Hugo
Instructed by:	Shuping Attorneys