

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASE NUMBER: J1891/99

In the matter between:

NATIONAL POLICE SERVICES UNION

Applicant

and

**THE NATIONAL COMMISSIONER OF THE
NATIONAL POLICE SERVICES & OTHERS**

Respondents

J U D G M E N T

MARCUS AJ:

I. On 14 January 1999, the applicant to whom I shall refer as "the Union" brought an urgent application in this court in which it sought the following relief:

(a) Declaring a decision taken at a meeting of the second respondent on 11 April 1997 setting a threshold of representativeness for qualification for registration as an employee organisation in terms of the South African Police Service Labour Regulations published under Government Gazette 1489 dated 27 September 1995 to be invalid;

(b) Declaring the "deregistration" of the applicant in terms of clause 6(7) of the South African Police Service Labour Regulations R1489 of 27 September 1995 to be null and void;

(c) Declaring the applicant to have complied with the requirements of Regulation 1489 of 27 September 1995 for registration as an employee organisation

(d) Interdicting and restraining the first respondent from withdrawing the registration of the applicant as an employee organisation.

II. The matter came before Landman J who granted certain interim relief pending the finalization of the matter. At that stage answering affidavits had not been filed. The interim relief granted by Landman J was that pending finalization, the Union could represent its members at disciplinary inquiries.

III. On 3 February 1999 and after the filing of answering and replying affidavits the matter was argued before Van Niekerk AJ. Judgment was delivered on 10 February 1999. The application was dismissed. There was no order as to costs.

IV. On 24 February 1999 Van Niekerk AJ granted leave to appeal. A notice of appeal was duly filed with the registrar on 17 March 1999. Subsequent to the filing of the notice of appeal, the Union claims that it has experienced "constant problems" with its recognition within the South African Police Services. It claims to have been refused permission to assist and represent members at disciplinary hearings, to hold meetings, to attend and take part in meetings of the second respondent, to attend provincial negotiation meetings, to use facilities of the employer and to represent members in respect of grievance proceedings. The Union complains that it has encountered particular problems in KwaZulu-Natal where, so it is alleged, the third respondent has issued a circular informing members of the Service that the Union's application to court was unsuccessful, but omitting to mention that the matter is on appeal. In consequence the Union alleges it is losing support and that its members are confused and dissatisfied.

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V. The Union now seeks urgent relief in the following terms:

"1. The decision by the first respondent to withdraw the recognition of the applicant with effect from 20 December 1998 is suspended pending the outcome of the appeal under case number J115/99 to the Labour Appeal Court;

2. The first respondent is ordered to afford the applicant its full organisational rights that it had up until 20 December 1998 pending the outcome of the appeal under case number J115/99 to the Labour Appeal Court;

3. The first respondent is ordered forthwith to instruct all appropriate members under his command to recognize all organisational rights of the applicant as from the date of the order;

4. The first respondent is ordered to ensure that the applicant is afforded its full organisational rights at all levels in the South African Police Services;

5. The first respondent is ordered to ensure that all circulars and/or memoranda and/or letters informing members within the South African Police Services of the "deregistration of NAFOSU" forthwith to be withdrawn and all relevant parties to be informed of the correct position with regard of the status of the applicant

within the South African Police Services pending the applicant's appeal in this matter;

6. The second respondent is ordered to allow the applicant its full organisational rights within the South African Police Services."

VI. I would have preferred more time to deal with the issues that have arisen but this is not possible due to the exigencies of the situation. The attitude of the Commissioner of Police is reflected in a letter dated 26 April 1999 written on his behalf which states:

"The normal procedure is that the status quo as at the time of the court order against which the appeal is lodged is retained. At the time of the judgment in this application NAPOSU was deregistered by the National Commissioner. There was, however, an interim order granting NAPOSU the right to represent its members at disciplinary hearings and they also still had their stop order facilities as a result of an agreement between the parties. In our opinion the status quo at the time of the judgment, which will continue until the appeal is heard, is the following:

1. NAPOSU is deregistered by the National Commissioner;
2. NAPOSU retains the right to represent their members at disciplinary hearings;

3. *NAPOSU retains its stop order facility.*

Apart from 2 and 3 NAPOSU has no further organisational or other rights. The effect of leave to appeal can never be to grant NAPOSU the relief which was refused in the first instance."

VII. In the founding affidavit there is a bald allegation to the effect that the Union has been refused permission to assist and represent members at disciplinary hearings. The answering affidavit, on behalf of the respondents, says the following in this regard:

I. *"It is correct that the applicant, subsequent to the application for leave to appeal, was refused trade Union rights within the South African Police Service by virtue of the fact that it had been properly deregistered. The first respondent, however, allowed the applicant to assist its members in disciplinary proceedings and to collect membership fees by virtue of stop orders against policemen's salaries. The aforesaid measures were implemented merely as an indulgence towards the applicant and not as a right."*

VIII. Mr Ellis, who appeared on behalf of the respondents, gave the assurance that the position with

regard to representation at disciplinary proceedings and the collection of membership fees would continue. It is thus not an issue in the present matter.

IX. The principal contention advanced by the Union is that the letter written on behalf of the Commissioner incorrectly reflects the legal position. The applicant states that the correct legal position is as follows:

"At the time of the lodging of the application for interim relief the applicant was attacking the validity of the decision taken by the first respondent to deregister it with effect from the 20th of December 1998. Furthermore the validity of a failure by the first respondent to recognize the joint application by the applicants and other registered trade Unions to register it was being attacked as being invalid. These decisions by the first respondent are the subject of the appeal pending before the Labour Appeal Court. I have been advised that these decisions by the first respondent are as a result of the pending appeal suspended pending the outcome of the appeal. It therefore follows that the position which should apply to the applicant is that which was in place as on the 20th of December 1998 on which date the applicant was purported to have been deregistered by the first

respondent."

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In the alternative the Union applies to suspend the decisions in question pending the appeal to the Labour Appeal Court.

X. For purposes of the present application, I am not called upon to consider the correctness of the judgment of Van Niekerk AJ. That is a matter for the Labour Appeal Court. The relief sought before Van Niekerk AJ was declaratory and interdictory. The two remedies are closely interrelated. An interdict is in the nature of a declaration of rights. (See Van der Lith v Alberts & Others, 1944 TPD 17 at 24.) Ordinarily, once a court has granted a declaratory order, a public body would be expected to give effect to its terms. In this way a declarator usually serves the same purpose as an interdict although where the declaratory order is ignored, it can be enforced by a mandatory or

prohibitory interdict (cf Estate Agents v Lek 1979 (3)
SA 104(A) at 1065H-1066B.)

XI. Appeals to the Labour Appeal Court are governed by section 166 of the Labour Relations Act 66 of 1995 ("the Act"). That section is silent on the affect of noting an appeal save that section 166(3) provides that "leave to appeal may be granted subject to any conditions that the court may determine".

XII. Rule 30 of the Rules of the Labour Court, which concerns applications for leave to appeal, makes no reference to the affect of noting an appeal.

XIII. The position in the Labour Court may be contrasted with that which pertains in the High Court where Rule 49(11) and (12) of the Uniform Rules provides:

I. *"49(11) 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 or application, unless the court which gave such order, on the application of a party, otherwise directs.*

49(12) *If the order referred to in sub - rule (11) is carried into execution by order of the court the party requesting such execution shall, unless the court otherwise orders, before such execution enter into such security as the parties may agree or registrar may decide for the restitution of any sum obtained upon such execution, the registrar's decision shall be final."*

XIV. I do not suggest that the absence of similar provisions in the Act and Rules of the Labour Court would necessarily preclude the Labour Court from achieving the same result as that contemplated in Rules 49(11) and (12) of the Uniform Rules. The power conferred by section 166(3) of the Act to grant leave to appeal subject to conditions as well as this court's inherent powers conferred by section 151, might well be capable of being utilized to similar effect.

XV. It seems to me, however, that the present is not a case in which I should exercise such powers, assuming that I possess them. The Union has been refused inter alia an interdict by Van Niekerk AJ. It is now in effect seeking from me an order granting the very interdict which has been refused.

XVI. An analogous situation arose in Constantinides v Jockey Club of South Africa, 1954 (3) SA 35(C). The headnote captures the essence of the facts. It reads:

I. *"After the Race Meeting Stewards had found that applicant trainer had been a party to helping a jockey to contravene Rule 102(F) and to make a bet and that he was guilty of misconduct punishable under Rule 71(F) by a decision of the Head Executive Stewards, his licence was cancelled and he was subjected to certain other penalties. The court dismissed an application by him for an interim interdict restraining the Club acting in any way upon this decision pending the decision of an action to be instituted by him to have the said decision set aside but granted leave to appeal. Applicant then applied for an order suspending the execution of the judgment until the Appeal Court had given its decision in the contemplated appeal."*

On these facts, Herbstein, J held at 53E-H:

"What the applicant is seeking is not a stay of execution for, as is correctly pointed out by Mr Charles, the only portion of the order on which execution could be levied is that which relates to costs. What is being sought is an interdict restraining the Jockey Club from acting upon its decision made on the 1st December 1953 until an Appeal Court shall have decided on the correctness or otherwise of the judgment

given by me in the main application. That Appeal Court will have to decide whether I was correct in holding that the applicant failed to show either a clear right or a prima facie right which would justify the court in granting the relief claimed in that main application, namely, an interim interdict restraining the respondent from acting upon its decision. For the time being and until the higher court has decided that I was wrong, I must act on the basis that my judgment is correct. I must therefore decide whether this is a case in which I should exercise my discretion to grant an interim interdict and so prevent the respondent from acting upon its decision. On the main application I held that the applicant made out no case for an interdict. It seems to me that I would be stultifying myself and frustrating that judgment if I now held that the applicant is entitled to an interim interdict pending the decision on the appeal."

XVII. In the course of judgment, Herbststein J cited with approval an unreported decision of Murray J in Anschutz v Jockey Club of South Africa. In that case, Anschutz was the holder of a trainer's licence which was withdrawn by the Jockey Club. He obtained an interim interdict restraining the Jockey Club from enforcing

withdrawal of his licence. The interim interdict was discharged and Anschutz sought an extension of the interdict pending appeal. Murray J refused the application. He stated:

XVIII. "After consideration of the argument addressed to me yesterday I have come to the conclusion that I should not exercise my discretion in favour of the petitioner by granting this fresh interdict. The petitioner's counsel placed reliance on the well known authorities which lay down the principles on which the court, the execution of whose judgment has automatically been stayed by notice of appeal, should decide whether or not to direct the execution of the judgment pending the appeal. I do not think these authorities are in point: The present position is entirely different. The present case is not one in which, at the suit of the respondent, the Jockey Club, I had granted an order specifically authorising and declaring it, in view of the lawfulness of its action in withdrawing the licence, to prevent the petitioner from performing certain functions of a trainer, which, until the time of the withdrawal of his licence, he was entitled to discharge. If it is a question of preserving the status quo ante that status consists of the position before the petition in this case was launched. At that time there was no order of court but merely a notification by the respondent that it was not prepared to

allow the petitioner in future to enjoy the rights until then flowing from the contract. I am now asked not to preserve that, but to alter the position by compelling the respondent club to specific performance until the decision in the appeal of a contract which I found to be properly terminated by it."

See also in this regard Laurenco & Others v Ferela (Pty) Ltd, 1998 (3) SA 302(T) and Interkaap Ferreira Busdiens v Chairman National Transport Commission, 1997 (4) SA 687(T).

XIX. In my view, the same approach governs the present application. The Union's argument would lead to absurd consequences. It would entail that where, for example, a court of review declines to set aside a refusal to grant a liquor licence, the noting of an appeal would have the effect of awarding that licence (cf S v Pestana, (1985) (3) SA 275(T) at 282F-I).

XX. There remains the alternative contention that I should suspend the decisions of the first respondent pending the appeal to the Labour Appeal Court. What the Union is seeking, is analogous to leave to execute pending the appeal. The guiding principles are to be found in the judgment of Corbett, JA (as he then was) in

South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd, 1977 (3) SA 534(A) at 545C-G:

I. "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 & Another Supra at p127). The 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 p19). 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 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;

(4) Where there is the potentiality of irreparable harm or prejudice to both applicant and respondent the balance of hardship or convenience, as the case may be."

XXI. In the present case there is nothing in the founding affidavit concerning the prospects of success on appeal. The onus is on the Union to satisfy the court that there are good grounds for the exercise of a discretion in its favour. It may be inferred that the granting of leave to appeal by Van Niekerk AJ is some indication of prospects of success but I have not been asked to reconsider this issue. Indeed, the papers in the original application are not even before me. It seems to me, further, that the third factor mentioned by Corbett JA postulates something different from the test to be applied in an application for leave to appeal. The "application" to suspend the decisions of the first respondent pending the appeal comprises one paragraph in the founding affidavit. It simply states:

"Should this honourable court be of the view that the pending appeal does not have the effect of suspending the decisions of the first respondent that forms the subject matter of the appeal, the applicant applies to this honourable court to

suspend the said decision pending the appeal to the Labour Appeal Court."

XXII. On the papers there is some evidence of prejudice to the Union. What is required, however, is a substantive application so as to enable the respondents to deal with the matter properly.

XXIII. Contrary to the submission advanced by Mr Dorfling, on behalf of the applicant, the factors set out in South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd (supra) are not essentially legal in nature. Questions of hardship and inconvenience are questions of fact. In my view the manner in which the "application" to suspend the decisions of the first respondent pending the appeal has been made, is simply not sufficient to discharge the onus resting on the applicant.

The application is accordingly dismissed with costs.

G J MARCUS

ACTING JUDGE OF THE LABOUR COURT

DATE OF HEARING: 4 JUNE 1999

DATE OF JUDGMENT: 4 JUNE 1999

For the Applicant: Adv D Dorfling instructed by
Nompumelelo Radebe and Ass.

For the Respondent: Adv P Ellis instructed by The
State Attorney