

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN**

Case No: C149/2022
OF INTEREST TO OTHER JUDGES

In the matter between:

MZUKISI LUBABALO NDARA

Applicant

and

**ACTING NATIONAL COMMISSIONER FOR THE
DEPARTMENT OF CORRECTIONAL SERVICES**

First Respondent

**DEPUTY MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

Second Respondent

**GOVERNMENT OF THE REPUBLIC OF
SOUTH AFRICA**

Third Respondent

DEPARTMENT OF CORRECTIONAL SERVICES

Fourth Respondent

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICE**

Fifth Respondent

**DEPARTMENT OF PUBLIC SERVICE AND
ADMINISTRATION**

Sixth Respondent

**DIRECTOR-GENERAL OF THE DEPARTMENT OF
PUBLIC SERVICE AND ADMINISTRATION**

Seventh Respondent

**MINISTER OF PUBLIC SERVICE AND
ADMINISTRATION**

Eighth Respondent

Date of Set Down: 22 March 2023

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 14h00 on 23 March 2023.

Summary: (Application to stay a writ – Labour court empowered to entertain such an application pending the outcome of an application to condone the late filing of the record in appeal proceedings before the LAC)

JUDGMENT

LAGRANGE J

Introduction

- [1] This is an urgent application to set aside the issuing of a writ of execution and notice of attachment in execution issued by the Registrar of the Labour Court on 31 January 2023 or alternative relief. In the closing paragraph of the founding affidavit the respondents ask, in the alternative, for the writ to be stayed pending the outcome of an appeal to the labour court. The application is opposed.

Brief background

- [2] I do not intend to set out all the facts but only those which are necessary for the purposes of the judgement.
- [3] On 29 April 2022 judgement was handed down in an urgent application in favour of Mr Ndara declaring his termination of service on 30 April 2022 by the Department unlawful and restoring the *status quo ante* in order for consultations to take place as to the early termination of his five-year employment contract. The respondent were also ordered to refund the applicant R 254,468.44 within ten days of the judgement on the grounds that it had unlawfully deducted the same from his remuneration in contravention of section 34 of the Basic Conditions of Employment Act 75 of 1997.

- [4] On 13 May 2022, the respondents applied for leave to appeal against the judgment, which was granted on 28 June 2022. Whilst the application for leave to appeal was pending, the applicant referred a claim for contractual damages for the remainder of his five year fixed term contract, apparently accepting the respondents' repudiation thereof.
- [5] On 20 July 2022 the respondents filed the notice of appeal against the entire judgement.
- [6] In early September 2022, the applicant brought an urgent application in terms of Section 18 of the Superior Courts Act 10 of 2013 to enforce the original judgement in his favour despite the pending application for leave to appeal. This application was dismissed on 19 September 2022.
- [7] On 22 September 2022, the respondents served the record of appeal on the attorneys who had represented the applicant in the original application and leave to appeal application. The final date for filing the record was in fact 21 September 2022, and accordingly the appeal had lapsed for non-compliance with Rule 5(17) of the Labour appeal Court rules.
- [8] On 22 September the applicant's current attorneys of record noted the failure of the respondent's to file the record by 21 September and called upon the respondent's to give effect to the original order in the applicant's favour. The respondents claim they only became aware of the withdrawal of the applicant's original attorney of record after they had served the record on them. On 29 September the respondents advised the applicant that the record had been returned to them by his erstwhile attorneys and he should make an arrangement to collect the record from the state attorney.
- [9] The applicant also notified the respondents that he intended to return to work on 3 October 2022. The respondents advised that they did not intend to implement the judgement as the appeal was "currently pending before the

Labour Appeal Court” and that a directive was awaited from the registrar of that court to file heads of argument.

[10] On 4 October 2020 to the registrar of the LAC withdrew the directive mentioned on the basis that the appeal had lapsed. On the same day the respondent’s applied for condonation for the failure to file the record timeously.

[11] An application by the applicants for an *ex parte* order of contempt against the respondents for non-compliance with the original judgement was dismissed on 11 November 2022.

[12] The respondents obtained a copy of the writ on 20 February 2023 and launched this application on 2 March 2023. Originally it was set down for hearing on 9 March 2023 but was postponed by agreement of the parties to 22 March 2023.

[13] The condonation application and leave to appeal application are enrolled for hearing before the Labour appeal Court on 9 May 2023, just over two weeks’ hence.

[14] The applicant opposes the application on the grounds summarised briefly as follows:

14.1 The application is not urgent and the respondents have a suitable remedy which can be entertained at a later stage, in due course. He argues that the respondents will only be prejudiced by the attachment and sale of assets if they do not comply with the monetary portion of the original order. Such financial harm is insufficient to warrant the matter been heard as one of urgency. Moreover, in the event the original judgement is overturned on appeal the respondents can recover any payment made in subsequent proceedings and will also have a claim against the applicant’s pension entitlements.

- 14.2 The respondents ought to have realised that they were exposed to the risk of the applicant seeking execution of the judgement as soon as it became apparent that they had not lodged the record of appeal timeously. They could have launched the condonation application urgently and applied for an expedited hearing of the condonation application or reached an agreement with the applicant on the execution of the order.
- 14.3 There is no appeal pending as it is deemed to have been withdrawn when the record was lodged late. The filing of the condonation application does not revive the appeal unless condonation is granted. Accordingly, the original judgement in the applicant's favour is not suspended pending the hearing of the condonation application.
- 14.4 The respondents failed to make out a case that the writ issued is unlawful or invalid.
- 14.5 Insofar as the respondents did ask for alternative relief in the form of a stay of the execution of the writ, which the applicant denies, , the labour court has no jurisdiction to stay enforcement of the judgement on the basis that proceedings are pending in another court. The applicant argues that the labour court as a creature of statute is limited to its power to stay in order for execution of an arbitration award under section 145 (3) of the Labour Relations Act, 66 of 1995 (the LRA).
- 14.6 For the court to order a stay of execution there must be a real and substantial injustice that would result if the stay were not granted and the underlying *causa* is the subject of an ongoing dispute, neither of which apply in this instance. In respect of the latter requirement, the applicant's argued that although the respondent seeks leave to appeal against the whole of the judgement including the order compelling it to repay deductions from the applicant's salary, it made out no grounds for such relief in its application for leave to appeal.

Evaluation

- [15] Firstly, it is not the job of this court to consider the merits of the condonation application for the late filing of the record of appeal nor of the leave to appeal itself. Those are matters enrolled before the LAC for determination shortly. In passing, I note that even though the respondents did not apply for an expedited hearing before the LAC, in effect that is what is happening.
- [16] All this court has to determine, if urgency is warranted, is whether execution of part of the court's order should be stayed pending the outcome of the proceedings due to take place on 9 May 2023, in the course of which the LAC will decide if the late filing of the record should be condoned and, if the appeal is reinstated, to decide the outcome of the appeal. I agree with the applicant that until such time as condonation is granted for the appeal application to proceed there is no pending appeal application. Therefore, in principle, the applicant is entitled to seek enforcement of the judgement as there is no live appeal pending. See *Myeni v Organisation Undoing Tax Abuse and Another* (15996/2017) [2021] ZAGPPHC 56 (15 February 2021) at para [18]. In that case the applicant's right to file an application for leave to appeal against the judgment of the court *a quo* had lapsed¹. Accordingly, in this case where an application for leave to appeal was filed timeously, but the record was filed slightly late and despite the judgment of Rabkin-Naicker J refusing to enforce her original judgment pending the outcome of the appeal, there is no longer an appeal pending in the strict sense and accordingly, the judgment is capable of enforcement.
- [17] I agree with the applicant that the respondents have not established that the writ issued by the Registrar is invalid. The question is whether this court should nevertheless stay the execution of the writ, which is not to question the status of the original judgement but simply whether to pause its execution to allow the condonation application to be determined by the LAC.

¹At para [15].

[18] Is the application urgent? Whether there is intrinsic merit in the condonation application pending before the LAC or not, the respondents do have a right to apply for condonation for the late filing of the record. I agree, in due course, that the respondents could launch other proceedings to recover moneys paid out in the interim to the applicant but it is not clear it is probable that the applicant will be in a position to readily reimburse the respondents if the condonation is granted and the appeal is upheld. The difficulties and very need to recover a payment already made will be obviated if the respondents are successful in the condonation proceeding before the LAC, which will be heard shortly. The prejudice to the applicant of having to wait a few more weeks for finality on the status of the lapsed appeal is not obviously so significant given the elapse of time since judgment was handed down in his favour. I take note of the argument that in their application for leave to appeal the respondents did make out a case why the order to repay deductions from the applicant's salary should be set aside, but they had applied for leave to appeal against all of the judgment. Again, I believe that is a matter for the LAC to determine if the appeal ultimately proceeds and in principle the correctness of the judgment on which the monetary order rests is the subject matter of a dispute.

[19] In the circumstances, I am of the view the right to recover moneys subsequently in due course is not an adequate substitute for the right to have the condonation application heard particularly given the proximity of the hearing of that application. It also seems determination of the condonation application is more likely to minimise the prospect of unnecessary further litigation over execution of the judgment, whatever the outcomes of that application is.

[20] However, on the basis of the decision of this court in *Denel SOC Ltd v National Union of Metalworkers of SA on behalf of Petersen & another* (2022) 43 ILJ 2303 (LC), the applicant argued that this court does not have the power to stay the execution of its own judgments pending the outcome of proceedings in another forum. As I understand the judgment, the court reasoned that since the Labour Court is a creature of statute it has no inherent power to stay execution of an arbitration award except in the case of proceedings pending before it, such as permitted under s 145(3) of the LRA when a review application is

pending². In *Dene* the court was seized with whether or not to stay execution of a certified default award pending the outcome of a condonation application for the late filing of an application to rescind the default award. However, in the result, the court actually did stay the execution of the default judgment despite the aforementioned reasoning which the applicant has relied on. In fact, the court actually stayed the execution of the default award on the assumption that s 145(3) did mandate it to stay execution of an award pending the decision of another dispute-resolution body³. Consequently, I do not understand the reasoning in *Dene* relied on by the applicant to be the *ratio* of the court's decision because it still exercised its discretion to stay execution of the award, even though the condonation of the late filing of the rescission application was pending before the CCMA.

[21] To the extent that the applicant argues that s 145(3) of the LRA does not refer to this court staying the execution of its judgment pending a decision in another court, I cannot agree that this court is more constrained in exercising its powers over its own process than the ordinary high courts are. That much is clear from s 151(2) of the LRA, which states that: "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." In my understanding that would include authority over the execution of its judgments, under which an application to stay a writ of execution of a judgment resorts. In the circumstances, I cannot agree this court has no authority to stay the execution of a writ issued in respect of one of its own judgments pending the outcome of proceedings in another forum.

[22] Lastly, while I accept that an appeal is not currently pending before the LAC, what is pending is a decision on a condonation application which will settle the issue whether an appeal is pending. In my view it would be churlish and inappropriate for this court to allow execution of the judgment to proceed in the

² At paras [13] to [15].

³ At para [32].

knowledge that a higher court is seized with the very question of the judgment's enforceability in proceedings soon to be held.

[23] While the respondents are ultimately successful, their conduct resulting in the need to bring this application is not blameless and it would not be appropriate in my view to award costs in their favour.

[24] In light of the reasoning above the following order is made.

Order

[1] The application is heard as one of urgency and non-compliance with the Rules of this court pertaining to time periods and service is condoned.

[2] The execution of the writ issued by the Registrar on 21 January 2023 is stayed pending the outcome of the pending condonation application for the late filing of the record enrolled before the Labour Appeal Court on 9 May 2023 under case number CA 14/2022.

[3] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

Representatives

For the Applicant

F Sangoni instructed by Ximbi Ncolo
Inc.

For the Respondents

J V.D Schyff and C A Daniels
Instructed by State Attorney Cape
Town