



**REPUBLIC OF SOUTH AFRICA**  
**THE LABOUR COURT OF SOUTH AFRICA, DURBAN**  
**JUDGMENT**

Not Reportable

Case no: D1204/2014

In the matter between:

**KWAZULU-NATAL TOURISM AUTHORITY**

**Applicant**

**and**

**NALELI WASA**

**First Respondent**

**NCHUPETSANG ATTORNEY**

**Second Respondent**

**FIRST RAND BANK LIMITED**

**Third Respondent**

**THE SHERIFF: INANDA DISTRICT 2**

**Fourth Respondent**

**Date Heard: 20 February 2015**

**Date Delivered: 4 March 2015**

**Summary: Confirmation of rule *nisi* – the execution of a judgment is automatically suspended upon the noting of an appeal with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the Court which granted the judgment – execution in contravention thereof unlawful and can be interdicted**

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**JUDGMENT**

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Whitcher J

[1] The Applicant is seeking the confirmation of the rule *nisi* granted on the 15 December 2014 in terms of which the First, Second, Third and Fourth Respondents were called upon to show cause if any, on 20 February 2015, why an order should not be granted in the following terms:

- A. That the First Respondent, Naleli Wasa, be and is hereby interdicted and prevented from dissipating or, save as stated in stated in prayer C below, in any other way dealing with sum of R1 294 870.47 (one million two hundred and ninety four rands eight hundred and seventy rands, forty seven cents) or any lesser amount held in account number 563 1003 5435 , an account held with the Third Respondent, received or to be received from the Second Respondent in respect of the execution of the Labour Court judgment under case number J1374/2012.

- B. That the Second Respondent, Nchupetsang Attorneys, be and is hereby interdicted and prevented from dissipating and/or paying over to the First Respondent or , save as stated in prayer C below, in any other way dealing with the amount of R1 294 870.47(one million two hundred and ninety four rands eight hundred and seventy rands, forty seven cents) held in account number 623 732 08505, an account held with the Main Street Branch of the Third Respondent, received from the Fourth Respondent in respect of the execution of the judgment in Labour Court Case Number J1374/2012;
- C. That the First, Second and Fourth Respondents, jointly and severally are directed to repay the sum of R1 294 870.47 (one million two hundred and ninety four rands eight hundred and seventy rands, forty seven cents) to the Applicant's account number 508 412 00012 ("the account"), an account held at the Umhlanga Branch of the Third Respondent being the proceeds of the execution of the Labour Court judgment under case number J1374/2012.
- D. That the Third Respondent is directed to ensure that no monies which are the proceeds of the execution of the Labour Court judgment under case number J 1374/2012, are paid to or for the benefit of the First Respondent by the Second Respondent from the Second Respondent's said account number 623 732 08505 to the First

Respondent's said account number 563 1003 5435 or any other account of the First Respondent.

- E. Directing the First and Second Respondents to pay the costs of this application, jointly and severally, the one paying to be absolved. The Third Respondent and Fourth Respondent, jointly and severally, with the other Respondents, be ordered to pay the costs of the application only in the event of their opposition to the application.
- F. That pending the final determination of this application, paragraphs A, B, C, and D shall operate forthwith as interim orders.

- [2] The Third and Fourth Respondents did not oppose this applications and the Fourth Respondent complied with the order so no orders are sought against these Respondents.
- [3] The context of the dispute and the relief sought is apparent from the chronology of the events which transpired.
- [4] On or about the 8th June 2012, the First Respondent obtained judgment against the Applicant in terms of which the Applicant was directed to *inter alia* pay the First Respondent the sum of R1 159 132.34 and to further refund her the sum of R40 057.89 within 10 days.
- [5] The Applicant served and filed an application for leave to appeal against the whole of the judgment. The application was dismissed on or about the 20th October 2014.

- [6] A petition for leave to appeal was filed and sent to the Second Respondent on or about the 4th November 2014.
- [7] The Second Respondent, on behalf of the First Respondent, issued a Writ of Execution out of the Labour Court on the 20th November 2014. The writ was not served on the Applicant or its attorneys.
- [8] An Application for Condonation for the late filing of the petition for leave to appeal was delivered on the 21<sup>st</sup> November 2014 to the Second Respondent.
- [9] On the 26<sup>th</sup> November, the Fourth Respondent (the Sheriff) attached the bank account of the Applicant.
- [10] The Third Respondent paid the amount over to the Fourth Respondent in terms of the attachment.
- [11] On the 8th December 2014, the Fourth Respondent paid these amounts to the Second Respondent in the form of cheques. On the 9th December 2014, the Second Respondent deposited the cheques into their Trust Account.
- [12] The petition for leave to appeal was granted by the Labour Appeal Court on the 18th February 2015; two days before the return date of the rule *nisi*.
- [13] The interdict application was brought on the following bases, inter alia:
- (i) there is an appeal pending between the Applicant and the First Respondent in the Labour Appeal Court under case number JA 113/2014
  - (ii) the Second Respondent went ahead with the full execution of the judgment despite having been given notice of the Applicant's application for leave to

appeal, petition for leave to appeal and application for condonation for the late filing of the petition.

- (iii) The writ was never served on the Applicant or its attorneys.
- (iv) The Fourth Respondent proceeded directly to the bank account of the Applicant and did not approach the Applicant to demand satisfaction of the Labour Court Judgment as is required by Rule 45 (3) of the uniform Rules of Court.
- (v) The execution is not in accordance with the procedure set out in section 163 of the Labour Relations Act, 1995 read with Rule 26 of the Labour Court Rules.

[14] The First and Second Respondents opposed the confirmation of the rule. Their contentions are dealt with in the findings below.

#### The law

[15] The Applicant cited the following legal authorities in support of their application.

[16] Power of the Labour Appeal Court to grant condonation

Labour Appeal Court Rule 12 provides as follows:

*“The Court may, for sufficient cause shown, excuse the parties from compliance with any of these Rules.”*

[17] An example of a matter where the Labour Appeal Court exercised the power of condonation under Rule 12 is the case of *Gauteng Provinsiale Administrasie v Scheepers & Others* [2000] 7 BLLR 756 (LAC); also see *Peach and Hatton*

*Heritage (Pty) Ltd v Neethling & Others* [2001] 5 BLLR 528 (LAC). Joffe AJA in *Peach and Hatton* <sup>4</sup> stated:

*“Rule 5(17) caters for a specific situation. It is inherent in its application that the appellant becomes aware, during the prescribed period for delivery of the record, that the record will not be filed timeously. There are situations, the instant appeal being an example of but one of them, when Rule 5(17) would not find application. An appellant will not be without a remedy in such a situation. Rule 12(1) of the Labour Appeal Court Rules provides: ‘The Court may, for sufficient cause shown, excuse the parties from compliance with any of these Rules’. This rule has been applied by this court in granting condonation in cases similar to the present one. See in this regard *Classiclean (Pty) Ltd v Chemical Workers Industrial Union & Others* [1999] 4 BLLR 291 (LAC), paragraph 8; *Gauteng Provinsiale Administrasie v Scheepers & Others* [2000] 7 BLLR 756 (LAC), paragraph 3 and *Estate Late WG Jansen van Rensburg v Pedrino (Pty) Ltd* (2000) 21 ILJ 494 (LAC), paragraph 14.”*

#### The effect of lodging a petition for Leave to Appeal

[18] Corbett JA (as he then was) in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*<sup>5</sup> stated:

*“...it is today the accepted common law rule of practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the Court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make special application. (See generally Oliphant’s Tin “B” Syndicate v. De Jager 1912 A.D. 377 at p. 481; Reid and Another v Godart and Another 1938 A.D. 511 at p. 513; Gentiruco A.G. v. Firestone S.A (Pty) Ltd 1972 (1) S.A 589 (A.D) at p. 667; Standard Bank of S.A. Ltd v Stama (Pty) Ltd 1975 (1) S.A. 730 (A.D.) at p. 746. The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from...”.*

[19] The common law position is now contained in Rule 49(11) of the Uniform Rules of Court. Rule 49(11) read as follows:

*‘When an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary any 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.”*

[20] Rule 11 (3) of the Labour Court Rules provides as follows:

*“If a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the Court may adopt any procedure that it deems appropriate in the circumstances.”*

[21] In *Christo Bothma Finansiale Dienste v Havenga & Another* (2010) 31 ILJ 93 LC) at paragraphs [17] and [18] Francis J stated:

*“The Rules of this Court are silent about whether an application for leave to appeal stays proceedings. This Court does not have a similar provision to Rule 49 (11) of the High Court Rules. However, Rule 11 (3) of the Rules of this Court states that if a situation for which the Rules do not provide arises in proceedings or contemplated proceedings, the Court may adopt any procedure that it deems appropriate in the circumstances. I am of the view that Rule 49 (11) of the High Court Rules should also be adopted by this Court.*

*In my view, the filing of a petition to the Judge President of the Labour Appeal Court is equivalent to leave to appeal. The filing of a petition to the Judge President of the Labour Appeal Court stays the enforcement of orders pending the outcome of the petition that is currently serving before the Labour Appeal Court. I am therefore*

*in agreement with the judgment of Marais J and Goldstone J referred to in paragraph [15] above.”*

### Findings

- [22] The Applicant has established a clear right and the infringement of the right. The case law and Rules of Court set out above confirm that the rule of practice in our Courts is that the execution of a judgment is automatically suspended upon the noting of an appeal and that the judgment cannot be executed except with the leave of the Court which granted the judgment.
- [23] It is clear from the chronology of events that the First and Second Respondents issued the Writ of Execution and proceeded to attach and remove monies that belong to the Applicant with full knowledge of the Applicant's application for leave to appeal, the petition for leave and the application for the condonation of the late filing of the petition. They did so in the absence of any leave of the Court to do so.
- [24] The First and Second Respondent contended that they were entitled to infer that the Applicant had abandoned or waived its right to petition for leave to appeal on account of the Applicant's failure to lodge the petition for leave to appeal within the prescribed time. There is no merit in this submission in light of the authority referred to above, particularly the fact that the LAC has the power to grant condonation for the late filing of a petition to appeal and that such a condonation application was served on the Second Respondent on 21 November 2014, the day after they issued the Writ out of the Labour Court. As submitted by the

Applicant, waiver or abandonment cannot be lightly assumed or inferred. It has to be proved. The conduct of the Applicant in serving and filing a petition for leave to appeal and a condonation for the late filing of the petition was not consistent with a party who has abandoned a petition for leave to appeal.

[25] In all these circumstances the execution process was unlawful and the Second Respondent, on the basis of the legal authorities referred to earlier on, ought to have known this and probably did.

[26] The Applicant further established that in the circumstances of this case it has no other remedy. This is particularly so since the First and Second Respondent have shown that they are prepared to pursue the execution in the face of clear rules and law which forbids such action in circumstances such as those which exist in this case. The First and Second Respondents have shown no inclination to comply with the order but instead chose to oppose it on grounds that have no merit in law or fact.

[27] The Second Respondent submitted that there is no prejudice to the Applicant since the money is frozen in its Trust Account and can remain there pending the outcome of the appeal. They contended that this would be the most practical way to deal with the matter since the execution process is complete and a fresh execution process in the event that the appeal fails will incur time and expenses. The problem with these arguments is that the execution in question was unlawful and accordingly the Applicant is entitled to the return and benefit of its money.

[28] The Applicant submitted that the First and Second Respondent's conduct is reprehensible and an abuse of the Court process and so the Court should award costs on an attorney and client scale and such costs should include those occasioned by the employment of two Counsels. The First and Second Respondents should also be directed to pay all reserved costs on an attorney and client scale.

Order

[29] In the event, I confirm the Rule and make the following order:

1. The First and Second Respondents are directed to repay the sum of R1 294 870.47 (one million two hundred and ninety four rands eight hundred and seventy rands, forty seven cents) to the Applicant's account number 508 412 00012 ("the account"), an account held at the Umhlanga Branch of the Third Respondent being the proceeds of the execution of the Labour Court judgment under case number J1374/2012.
2. They are directed to repay the money immediately on receipt of this order.
3. The First and Second Respondents are ordered to pay the costs of this application, including the costs of the rule *nisi* and any costs that may otherwise have been reserved, jointly and severally, the one paying the other to be absolved.

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Whitcher J

Judge of the Labour Court

APPEARANCES:

For the Applicant: MTK Moerane SC and WS Kuboni instructed by Ndwandwe and Associates

For the First and Second Respondent: S Sebola instructed by Nchupetsang Attorneys