REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 2920/16

In the matter between:

Tshepo Joseph MATSEBA Applicant

and

LIBERTY GROUP LIMITED Respondent

Heard: 13 December 2016

Delivered: 14 December 2016

SUMMARY: Urgent application to interdict disciplinary hearing pending leave to appeal against previous order dismissing application for interdict. Effect of Superior Courts Act s 18 considered. Application dismissed with costs.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Mr Matseba, is due to attend a disciplinary hearing today, 13 December 2016. He has brought an urgent application on about two hours' notice to prevent the hearing from going ahead.

[2] A similar application was dismissed by Rabkin-Naicker J last week, on Friday 9 December 2016. The applicant applied for leave to appeal against that judgement on the same day. He argues that, given the application for leave to appeal, that order is suspended; and that, therefore, the respondent (Liberty Life Group) is prevented from proceeding with the inquiry.

This application

[3] The applicant seeks the following relief, apart from the matter being heard on an urgent basis:

> 'Interdicting the respondent from restarting *de novo* a disciplinary hearing of Tshepo Joseph Matseba set down for hearing starting the 13th December 2016 until the application for leave to appeal under case no J 2866/16 has been finalised;
>
> Directing that an alleged heard [*sic*] disciplinary hearing which was allegedly [*sic*] postponed on the 12th of December 2016 be interdicted until the application for leave to appeal under case no J 2866/16 has been finalised.'

[4] The matter that he refers to is the one heard by Rabkin-Naicker J on 8 December 2016.

The background and the previous order of this Court

[5] Liberty called the employee to a disciplinary hearing in August 2016. He was unhappy with the chairperson, Ms Zarina Walele. Liberty appointed a new chairperson. The hearing continued in September 2016. The applicant was represented by his attorney of record, Mr Motlatsi Seleke. The hearing continued. The initiator complained about a gross irregularity. Liberty abandoned the hearing and informed the applicant that it would start afresh in December 2016.

[6] The applicant brought an urgent application to interdict the new hearing and to compel Liberty to continue with the part-heard September hearing, in terms identical to this application. It came before Rabkin-Naicker J on 8 December 2016. The next day, 9 December, she issued the following order:

> '1. The application is dismissed.
>
> 2. There is no order as to costs.'

Application for leave to appeal

[7] On the same day, the applicant delivered a notice of application for leave to appeal. Also on the same day, Motlatsi Seleke wrote to the respondent's attorneys, Salijee Du Plessis Van der Merwe Inc (SDV) and informed them of the applicant's instructions "to appeal".

[8] SDV replied on the same day. They noted the intention to appeal and said:

> 'Kindly take notice that there is no interdict barring our client from proceeding with the disciplinary hearing as intended on 12 and 13 December 2016. You were advised of our client's intention to proceed on these dates as per our correspondence on 8 December 2016.
>
> We herein advise you and confirm that the disciplinary hearing shall be proceeding on 12 December 2016 at 10h00 and 13 December 2016 at 11h30 am.'

[9] On Sunday 11 December Motlatsi Seleke wrote to SDV again and said:

> 'We refer to the above matter and confirm that we have now served and filed our client's application for leave to appeal on yourselves [*sic*], the Registrar of the Labour Court and the Judge and her secretary on Friday, 9 December 2016, thereby effectively pending any proceedings which you or your client intends to take.
>
> We also confirm that the writer has telephonically conversed with yourself [*sic*] on Saturday, 10 December 2016 informing you that we have served the application and you responded that you intend to proceed as you have indicated on your letter of 9 December 2016.
>
> We also confirm that the original shall be served on yourselves physically on 12 December 2016. We trust that you as Officers of the Court shall

> respect and uphold the rule of law and abide by our client's application for leave to appeal, failing our instructions are that our client shall hold you and everyone involved personally and professionally liable for infringement of his rights.
>
> We urgently await your undertaking that you shall pend the intended proceedings until the appeal has been ventilated.'

[10] SDV responded on the same Sunday, reiterating that "our client is of the view that your client has no prospects of success to be granted leave to appeal" and that their client intended to continue with the hearing "as there is nothing in law prohibiting our client from continuing with same [*sic*]."

[11] On the first scheduled day of the hearing, Monday 12 December, the applicant "woke not feeling well" and he was granted a day's leave. The respondent's attorney informed his attorney that the hearing had been postponed to 11:30 on Tuesday 13 December.

[12] At about 09:00 on Tuesday 13 December the applicant delivered this application.

Urgency

[13] I agree with Mr *Buirski,* for Liberty, that the urgency is self-created. The respondent and the court were given between one and two hours' notice of this application. The applicant had known since 9 December, four days earlier, that he would apply for leave to appeal; and that, notwithstanding, the disciplinary hearing would proceed. Yet he waited until the morning of the second day of the hearing to bring this application with barely any notice. The application should be struck from the roll for that reason alone. Yet it raises interesting and important issues of law that this Court should pronounce upon, having heard the arguments.

Superior Courts Act s 18

[14] The single argument on which Mr *Moretlwe*, for the applicant, based his case is that the application for leave to appeal suspended the earlier order of this Court; and that, axiomatically, that meant that the hearing set down

for today could not continue and that, instead, the part-heard September hearing had to continue.

[15] That argument finds its genesis in the recently enacted s 18 of the Superior Courts Act.[1] That section 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.'

[1] Act 10 of 2013. The Act came into operation on 22 August 2013.

[16] The provisions of the Superior Courts Act apply to the proceedings of this Court, including s 18.[2]

[17] It will immediately be clear that 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'.

[18] In this case, the applicant has applied for leave to appeal. Therefore, argued Mr *Moretlwe*, the order of Rabkin-Naicker J is suspended; and therefore, the disciplinary hearing scheduled for today must be interdicted and Liberty must continue with the September part-heard hearing.

[19] What does it mean to say that 'the operation and execution' of the decision must be suspended? Does it mean that, because the previous order of tis Court is the subject of an application for leave to appeal, the hearing cannot proceed?

[20] I think not. The order that is the subject of the application for leave to appeal must be capable of execution. The effect of this Court's earlier order is that the applicant's application is dismissed. That application was one for interdictory and mandatory relief. What does it mean to suspend that order? It must mean that the status quo is restored. What is the status quo? It is the position before the first application, i.e. that Liberty had abandoned the earlier hearing and had summoned the employee to a new hearing. That hearing was due to commence today after it had been postponed at the applicant's request.

[21] To argue the converse would lead to absurd consequences, as I debated with Mr *Moretlwe*. It would mean, on his argument, that the company would be forced to continue with the part-heard hearing. But that hearing had been abandoned. This Court had denied the earlier application for an interdict; had it granted the *mandamus*, and had Liberty applied for leave to appeal, the mandamus would have been suspended; but it cannot be that, having denied the mandamus, the effect of a pending application for

[2] In this regard I agree with the dicta of Van Niekerk J in *Luxor Paints (Pty) Ltd v Lloyd* (J 1265/16, 9 December 2016) and Lagrange J in *Wenum v Maquassi Hills Local Municipality* (J 1684/15, 22 July 2016) and disagree with Snyman AJ in *L'Oreal South Africa (Pty) Ltd v Kilpatrick* (2015) 36 *ILJ* 256 (LC).

leave to appeal is that the relief that had been denied, must now be granted.

[22] Under the previous dispensation governed by High Court rule 49(11) and the common law, this was the position:

> 'The noting of an appeal suspends the operation of an interdict but the court is entitled to grant leave to execute forthwith pending the outcome of the appeal. On the other hand, the noting of an appeal against an order dismissing an application for a final interdict does not revive the interim interdict which was an adjunct to those proceedings, nor is the court entitled to grant an interim interdict pending the appeal.' [3]

[23] In *Constantinides*, the Court dismissed an application for an interim interdict but granted leave to appeal. The applicant applied for an order suspending execution of the judgment pending appeal. The High Court held that, as the applicant had failed in the main application, then in equal measure he must be held to have failed to show a clear right or a *prima facie* right in the application in that Court. As Herbstein J said:[4]

> '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 of the appeal.'

[24] It seems to me that similar considerations apply in this case. The applicant has applied for an interdict in exactly the same terms as the one that served before Rabkin-Naicker J and that she had dismissed; and he argues that he is entitled to it merely because he has applied for leave to appeal against that judgment. That would lead to absurd results and would entitle applicants to obtain, by the mere fact of lodging an application for leave to appeal (however meritless), that which they could not obtain in the first place.

[25] Has that position been changed by the enactment of s 18 of the Superior Courts Act? Again, I think not; but I need first to refer to another decision

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[3] Harms in LAWSA vol 11 par 428, citing *Constantinides v Jockey Club of South Africa* 1954 (3) SA 35 (C) (my underlining).

[4] At 53 H.

preceding that Act and cited by Mr *Buirski*, viz *Serva Ship Ltd v Discount Tonnage Ltd.*[5] In that case, Harms JA said:[6]

> 'Once [the] interim order is discharged, it cannot be revived by the noting of an appeal. This approach was and still is generally accepted as correct. Dissenting views were, however, expressed in *Du Randt v Du Randt* 1992 (3) SA 281 (E) and *Interkaap Ferreira Busdiens (Pty) Ltd v Chairman, National Transport Commission* 1997 (4) SA 687 (T). The essence of these judgments was that Corbett J had failed to have regard to the common law rule as received by our courts that an appeal suspends the execution - or, in the words of Rule 49 (11), the operation and execution - of an order (cf *Reid and Another v Godart and Another* 1938 AD 511). Unfortunately, the criticism was based upon a misunderstanding of the concept of suspension of execution. For instance, an order of absolution from the instance or dismissal of a claim or application is not suspended pending an appeal, simply because there is nothing that can operate or upon which execution can be levied.'

[26] Does s 18 of the Superior Courts Act change this state of affairs? Mr *Moretlwe* argued that it does.

[27] The starting point must be the wording of the section. It uses the same wording as rule 49(11), referring to 'the operation and execution' of the order. It seems to me that, once the application for an interdict had failed, there is nothing to execute and nothing that comes into operation. The converse would apply had the applicant been successful and had the respondent appealed against the order; then the operation and execution of the order – i.e. that the December hearing could not proceed and that the September hearing had to proceed – would be suspended.

[28] Generally, as Mr *Moretlwe* argued, 'judicial authority that predates the section has been overtaken by its enactment.'[7] In *Incubeta Holdings (Pty) Ltd v Ellis*[8] Sutherland J pointed out that 'the discretion hitherto exercised by the court is history'.

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[5] [2000] 4 All SA 400 (A).

[6] At para 6 (my underlining).

[77] Erasmus *Superior Courts Practice* Vol 1 (Service 1, 2016) A2-63.

[8] 2014 (3) SA 189 (GJ) at 194 B-D.

[29] But I do not take this to mean that, where the applicant has been unsuccessful in an application for interim relief such as this one, it would then mean that he could then obtain the same relief merely by dint of launching an application for leave to appeal. There is no 'operation and execution' of a decision that can be suspended, as the order was to dismiss the application – there is nothing to enforce, execute or bring into operation.

Conclusion

[30] I conclude that, despite the enactment of s 18 of the Superior Courts Act, the applicant is not entitled to the interdictory relief he seeks. He was unsuccessful in seeking the same relief before Rabkin-Naicker J. The fact that he has applied for leave to appeal against that judgment does not axiomatically mean that he is entitled to the same relief now, pending a decision on the leave to appeal or an appeal.

Costs

[31] Both parties have asked for costs to follow the result. I see no reason in law or fairness to disagree.

Order

The application is dismissed with costs.

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Steenkamp J

APPEARANCES

APPLICANT:	T Moretlwe
Instructed by	Motlatsi Seleke attorneys.
RESPONDENT:	P Buirski
Instructed by	SDV attorneys.