IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN
CASE NO:D 718/98

In the matter between:

CISCO PRINTING CC First Applicant
VICTOR FRANSICO Second Applicant

and

ANDREW SINCLAIR Respondent

JUDGEMENT

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[1] This is an urgent application in terms of Section 158(1)(a)(ii) of the Labour Relations Act, 66 of 1995 ("the Act".) brought by the applicants in terms of which they seek an interdict against the respondent. The interdict sought is to stay execution proceedings ins the respondent pursuant to an order of this court made by Landman J on 28 August 1998.

[2] Following the alleged unfair dismissal of the respondent by the applicants, the parties entered into a settlement agreement which

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was made an award of the Commission for Conciliation, Mediation and Arbitration. The applicants did not comply with the terms of the award

and the respondent made an application to this court for the award to be made an order of court in terms of section 158(1)(c) of the Act.

[3] On 29 August 1998 and after hearing the legal representatives of the parties, Landman J made the arbitration award referred to above an order of court.

[4] On 11 September 1998, the respondent filed an application for leave to appeal against the judgement of Landman J. On the same day (and it is impossible to tell which event occurred first) the sheriff, at the instance of respondent's attorneys, attached two machines and a motor vehicle belonging to the applicants. This attachment was pursuant to the order made by Landman J, which order had not yet been complied with.

[5] The sheriff advised the applicants' attorneys that he intended removing the goods which he had attached. This he intended to do on 14 September 1998. It is as a result of the sheriff's expressed intention that this application was launched to interdict the respondent from removing

or alienating the goods attached by the sheriff and from instituting any further execution proceedings or proceeding with any instituted execution proceedings.

[6] The application is opposed by the respondent.

[7] Before dealing with the merits of the application, it is necessary to deal with an issue which was not addressed by the parties in their papers nor in argument before me. The applicant has not cited nor joined the sheriff as a respondent in this matter. The relief sought, and in particular as contained in paragraph 1(a) of the Notice of Application, is clearly misdirected in so far as the relief is sought against the respondent. It is not the respondent who intends removing the attached goods, but the

sheriff, albeit at the instructions of the respondent's attorneys of record. The application was not served on the sheriff and he was not represented in these proceedings. In my view, the sheriff has a direct interest in these proceedings and ought to have been joined as a respondent in the application. The applicant's failure to do so is in my view, fatal in

respect of the relief sought in paragraph 1(a) of the Notice of Application. This, however, does not depose of the matter.

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[8] In paragraph 1(b) of their Notice of Application, the applicants also seek an interdict to restrain the respondent from instituting any further execution proceedings or proceedings with any instituted execution proceedings, pending the outcome of the application for leave to appeal against the judgement of Landman J.

[9] Neither the Act nor the rules of the court contain any provisions relating to the effect of the filing of an application for leave to appeal or the noting of an appeal on a judgement or order of court. Mr Bezuidenhout, who appeared on behalf of the applicants, urged me to have regard to the rules of the High Court and the common law. He referred me to the case of ***South Cape Corporation v Engineering Management Services*** 1977 (3) SA 534 (A) in which the common law position was formulated as follows (at 544H-545A):

> " Whatever the true position may have been in the Dutch Courts, and more particularly the Court of Holland(as to which see *Ruby's Cash Store(Pty) Ltd v Estate Marks and Another,* 1961(2) SA 118 (T) at pp 120-3) ***it is today the accepted common law rule of practice in our Courts that generally the execution of a judgement is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgement cannot be carried out and***

no effect can be given thereto, except with the leave of the Court which granted the Judgement....If the

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party in whose favour it [the ***judgement] has been given wishes it to be put into execution, he must make special application to do so..”***

[10] In the case of the High Court, the common law as set out above has been codified in rule 49(11) of the Rules of the High Court, with the further addition that the operation or execution of the judgement is also suspended where an application for leave to appeal has been made.

[11] Mr Bezuidenhout submitted that given the *lacuna* in the rules of the Labour Court, I must either invoke the common law or import rule 49(11) and apply it to these proceedings. For the former proposition he relied on the rule of interpretation that there is a presumption against the deprivation of, or interference with, common law rights and in the case of an ambiguity, an interpretation which preserves those rights will be favoured, *cf* ***SA Breweries Ltd v Food & Allied Workers Union & Others*** (1989) 10 ILJ 844 (A) at 850H-I. The difference is that one in the present matter is one not dealing with an ambiguity but a complete *lacuna*.

[12] Advocate. Wild, on behalf of the respondent, submitted that in assessing applicants’ application, I must take into account the history of the matter

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and the applicants’ prospects of success on appeal. She further submitted that I should apply the principles set out in ***South Cape, supra,*** which a court must take into account in deciding whether or not to grant leave for

the execution of judgement, pending the outcome of the appeal. The factors listed in that judgement include irreparable harm to either party in such proceedings, the prospects of success on appeal and the balance of convenience.

[13] Advocate. Wild also submitted that I must have regard to the provisions of the repealed Labour Relations Act of 1956. I cannot find any provision which would be of any assistance in that legislation. In any event, even under the old legislation, successful parties could not execute judgements of the Industrial court whilst an appeal was pending. She also submitted that since section 184 of the Act imports specific provisions from the Supreme Court Act 59 of 1959 into the Act, and the imported provisions do not include the rules, and specifically, rule 49(11), this court should not readily rely on the High Court rule in resolving the matter.

[14] In my view, in the absence of a rule regulating the status of judgements **MASERUMULE AJ JUDGEMENT** pending an appeal, regard must be had first, to the specific powers granted to the court by the Act, secondly, the common law in so far as it may be applicable and as modified by the Constitution and thirdly, the rules of the High Court in so far as they deal with a matter similar to the one being considered by the Labour Court.

[15] Section 151 of the Act establishes the Labour Court as court of law and as:

> " 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 provincial division of the [High] Court has in relation to the matters under its jurisdiction."***

Section 163 of the Act further provides that an order of this court may be served and executed as if it were an order or judgement of the High Court.

[16] I do not agree with Advocate Wild's submission that because of the provisions of section 184, no regard should be had to comparable provisions in the High Court rules. It is clear from the sections referred to above that the standing of this court in relation to matters falling within its jurisdiction is the same as that of the High Court. In my view, the **MASERUMULE AJ JUDGEMENT** court's inherent powers include the power to consider comparable provisions in the rules of the High Court in dealing with matters where there is a hiatus in its rules. It is similarly entitled in the exercise of its powers, to have regard to the common law in so far as this may assist in carrying out the functions imposed on it by the Act.

[17] With regard to the present matter, both the common law and rule 49(11) of the High Court rules provide for the suspension of the operation of a judgement or order where an appeal has been noted and in the case of rule 49(11), also where an application for leave to appeal has been made. I take the view that, given the similar status of the High court and this court and the provisions of the common law, a judgement or order of the Labour Court is also suspended once an application for leave to appeal has been made or an appeal noted. It follows that the order made by Landman J on 29 August 1998 was suspended when an application

for leave to appeal was made on 11 September 1998. Following the

provisions of rule 49(11), the court may, on application by a party, direct

that the suspension be lifted. No such application has been made.

[18] I should mention that there is a sorry history to this matter which makes **MASERUMULE AJ JUDGEMENT**
respondent's decision to oppose the application understandable. I do not intend to set it out in this judgement, save to say that it is relevant to the reason for the costs order made below.

I therefore make the following order:

(a) The relief sought in paragraph 1(a) of the Notice of Application is refused;

(b) The respondent is interdicted and restrained from instituting any further execution proceedings or taking any further steps in furtherance of execution proceedings already instituted pursuant to the order of Landman J granted under case number D416/98, pending the outcome of the applicants' application for leave to appeal filed on 11 September 1998;

(c) There is no order as to costs.

Date of hearing : 16 September 1998

Date of judgement : 17 September 1998

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