Reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case no: C 390/2020

In the matter between:

TRENDY GREENIES (PTY) LTD T/A SORBET GEORGE — **First Applicant**

and

HESTELLE DE BRUYN — **First Respondent**

Identity number: 94[…]

MICHELLE ANTHONY — **Second Respondent**

Identity number: 84[…]

YOU'RE WORTHY — **Third Respondent**

Date of Hearing: 14 May 2021

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 13h00 on 17 May 2021.

Summary: (Superior Courts Act 10 of 2013- s 18(3) – application to enforce judgment pending appeal – no valid notice of appeal filed – condonation for late filing of notice pending – s 18 of no application – judgment remains enforceable by ordinary means – *Obiter* – applications under s 18(3) might be inherently urgent – time of measuring of irreparable harm)

JUDGMENT ON APPLICATION UNDER S 18(3) OF THE SUPERIOR COURTS ACT 10 OF 2013

LAGRANGE J

Introduction

[1] The applicant has applied on an urgent basis for an order under section 18 [3] of the Superior Courts Act 10 of 2013 ['the Act'] to declare the judgment and order handed down on 21 October 2020 in its favour to be "executed and no longer suspended pending the determination of the appeal against the aforesaid judgment." No prayer for other or alternative relief was sought.

[2] The judgment upheld a restraint of trade agreement and interdicted the first and second respondents ('the individual respondents') from working for the third respondent for the remainder of the period of the restraint agreement.

[3] Section 18 of the Act provides that:

> **18 Suspension of decision pending appeal**
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> (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.
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> (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.

(emphasis added)

Events after 21 October 2020.

[4] The respondents had applied for leave to appeal and the application was ripe for consideration by 2 December 2020. Leave to appeal was granted on 5 March 2021, the pending application for leave to appeal only having been brought to my attention for the first time a few days earlier. Leave to appeal was granted because the case raised an issue of the correct interpretation of 'a radius' when used to measure the geographical scope of a restraint agreement, but the judgment did not confine the respondents' scope of appeal to this issue alone even though the court would not have granted leave to appeal based on prospects of success alone.

[5] The respondents noted their application for leave to appeal on 7 April 2021, eight days later than it should have been noted. They have applied for condonation for the late filing of the notice, but that application has not been determined. They did not request the appeal or condonation application to be dealt with on an expedited basis.

[6] This application was launched on 5 May 2021 and initially set down for hearing on an urgent basis on 11 May 2021, but was ultimately enrolled on

14 May 2021. The respondents filed their answering affidavit on 12 May 2021 and the applicant its replying affidavit by 13 May 2021.

Outline of the merits

[7] The respondents vehemently dispute the urgency of the application, owing to the fact that the applicant could have brought this application at any stage since judgment was handed down in October 2020, which is correct.[1] The applicant argues, on the other hand, that it obtained a judgment in its favour the value of which consists in preventing the first and second respondents from working for a competitor. The primary reason it did not bring an application under s 18(3) earlier is that, as a small business, it did not want to incur unnecessary costs, which it would have avoided if the court had dismissed the application for leave to appeal.

[8] It could have brought the application earlier, but I do not think it amounts to self-created urgency that they waited the outcome of the application for leave to appeal, which might have rendered the application unnecessary. However, it did not act promptly thereafter and it was only about a month after the appeal was noted that the application was launched. It appears that it might have felt compelled to act because a third former employee allegedly joined the third respondent's business. However, strictly speaking as a matter of law, that development is irrelevant to the enforcement of the original application.

[9] Significantly, section 18(4) of the Act provides that if the court grants an order to execute the judgment pending the outcome of the appeal under s 18, the appellant can immediately neutralise the effect of the enforcement order by lodging an automatic appeal against it, and the court considering that application is compelled to deal with it as a matter of great urgency. Accordingly, it appears that the Act treats the enforceability of a judgment pending appeal processes to be inherently urgent, and it might be argued that, in the same spirit, there is no reason to suppose an application to

[1] *Fidelity Security Services (Pty) Ltd V Mogale City Local Municipality and Others* 2017 (4) SA 207 (GJ) at 217-8 paras [23]-[25] and *Ntlemeza V Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) at 413, para [29].

uphold the judgment should not be considered in the same light. Ultimately, in this case it is not necessary to determine if the applicant had to demonstrate urgency in bringing the application on account of the reasons for the order made.

[10] The restraint which the judgment upheld expires at the end of September 2021, about four-and-a-half months' away. Consequently, the applicant argues if it is not granted relief under section 18 [3] then it will be effectively denied any of the relief it obtained, because by the time the application for leave to appeal is heard, it is likely the period of the restraint will have either expired or will be close to the expiry, rendering any success it obtains on appeal a pyrrhic victory. Accordingly, the respondents would have been able to conduct matters as if the order had never been granted, whereas the applicant would be denied the fruits of the judgment.

[11] If the respondents are now compelled to comply with the restraint for the remaining period, the prejudice to they will suffer is vastly less than the prejudice they would have suffered if the judgment had been effectively enforced at the outset. The applicant by contrast, if it succeeds in this application will only obtain a little more than a third of the benefit due to it under the judgment.

[12] Mr. *Van der Merwe*, for the respondents submitted that the relative irreparable harm suffered by the parties, which is to be weighed up under section 18 [3], is the harm which would be suffered by the parties at the time the application to enforce a judgment is considered. Undoubtedly, the applicant is suffering ongoing harm by the respondents' non-compliance with the court's order in the sense that it is unable to obtain any of the benefit of the order in its favour. However, the requirement of weighing the relative irreparable harm each party will suffer, set out in s 18(3) clearly means this would merely be one of the factors taken into account by the court performing that weighing exercise. It stands to reason the weight attached to the relative harm of non-enforcement in a case like this will be very different when the restraint is about to expire than when it still has a significant period to run.

[13] These are weighty considerations and in cases where the matter was urgent to begin with and the court order is time-limited and granted, *inter alia*, on the basis that suitable alternative relief is not available, such factors will often be enough to persuade a court that an applicant has met the requirements of section 18 [1] and [3] of the Act.[2] However, for the reasons which follow it is not necessary to consider the merits of the application, nor whether it is urgent.

The existence of a valid notice to appeal

[14] In *Panayiotou v Shoprite Checkers (Pty) Ltd and Others* 2016 (3) SA 110 (GJ), the High Court held that if an application for leave to appeal had not been served within the time prescribed in the rules of court, and if no condonation for the noncompliance has been granted then the judgment, against which leave to appeal is sought, is not suspended. In that case the court was considering whether an application to condone the late filing of a petition to the Supreme Court of Appeal suspended the judgment of the court *a quo*. Sutherland J held:

> '[11] The question arises as to what the minimum requirements are to satisfy s 18(5) read with s 17(2). Is it necessary that the petition itself be served, or is it sufficient that a condonation application be served in which it is sought that a petition be filed out of the prescribed time period?
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> [12] It has been argued that s 18(5) is prescriptive and that the text emphasises that the application for leave to appeal be lodged with the registrar 'in terms of the rules'. Accordingly, it is argued, until (and only if) condonation is granted can the petition be 'lodged'. All that is before the Supreme Court of Appeal at present is an application for condonation, whose fate is uncertain. In support of this proposition reference was made to several authorities.
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> [13] The failure to serve notices of appeal or court records within the prescribed periods is commonplace. The result of such failures is that the appeals lapse and require condonation to revive them. In *Schmidt v Theron and Another* 1991 (3) SA 126 (C) at 129H – 130G it was held:

[2] See, e.g., *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* 2014 (3) SA 189 (GJ) at 196-7 at paras [25] to [29] dealing with an application to enforce a judgment enforcing a restraint of trade agreement.

'Rhoodie denied that his application for condonation was activated by the present application. He added that he had acted in utmost good faith throughout, that it was never his intention to cause any delay in the pursuance of the appeal and that the first and second respondents were totally blameless and he personally and unequivocally accepted full responsibility for all that had taken place.

I think it is quite clear from a number of authorities that a failure to comply with the provisions of Rules 5 and 6 of the Appellate Division Rules causes an appeal to lapse. See *Vivier v Winter*; *Bowkett v Winter* 1942 AD 25 and 26, *Bezuidenhout v Dippenaar* 1943 AD 190, *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (2) SA 697 (D) at 699H, *Moraliswani v Mamili* 1989 (4) SA 1 (A) at 8B – C. Indeed Rule of Court 5(4) specifically provides — and I quote from Rule 5(4)bis(b):

"If an appellant has failed to lodge the record within the period prescribed and has not within that period applied to the respondent or his attorney for consent to an extension thereof, and given notice to the Registrar that he has so applied, he shall be deemed to have withdrawn his appeal. The appeal having so lapsed, an application for condonation in terms of Appellate Division Rule 13 is required if an appellant who has failed to comply with the Rules wishes to revive or reinstate it. As stated by Kumleben J in the *United Plant Hire* case supra at 699H, in reference to the two cases to which I have also referred, viz *Vivier v Winter and Bezuidenhout v Dippenaar*: Thus, in these two cases it was held:

(a) that, although not expressly so stated in the former Rules, an appeal lapses on failure to comply with the requirements of either the former Rules relating to the lodging of copies of the record or security for the costs of an appeal;

(b) that an appellant may nevertheless apply for condonation in terms of the former Rule 12 even after an appeal has lapsed (strictly speaking in such a case it may be more accurate for an appellant to apply for condonation of non-compliance with a particular Rule and for enrolment or reinstatement of the appeal).

'I emphasise the word reinstatement. And in the *Moraliswani v Mamili* case supra Grosskopf JA, referring to the cases that I have cited above, and adding to them also the cases of *Waikiwi Shipping Co Ltd v Thomas Barlow & Sons (Natal) Ltd* 1981 (1) SA 1040 (A) at 1049B – C and S v Adonis 1982 (4) SA 901 (A) at 907F – G which both deal with the related subject of an appellant's failure to file the record in time, said:

"Indeed there is strong authority for the proposition that failure to comply with Rule 6 causes an appeal to lapse and that condonation by this Court is needed to revive it.

'I emphasise again the words needed to revive it.

The position therefore is that in the present case the appeal has lapsed. No condonation in terms of the Appellate Division Rule 13 has been granted and accordingly the order made by this Court on 22 October 1990 is no longer suspended in terms of Supreme Court Rule 49(11). (See *Herf v Germani* 1978 (1) SA 440 (T) at 449G.) Appellant is therefore entitled to the order sought in prayer 1(a) and (b) of the notice of motion. It is the type of order envisaged by the Appellate Division in *Vivier v Winter* (supra at 26).'

[14] Prior to the enactment of the Superior Courts Act and, in particular, ss 16 – 18, rule 49(11) of the Uniform Rules of Court regulated this matter. Rule 49(11) was deleted from the rules on 17 April 2015 (GN 317 in GG 38694 of 17 April 2015). Addressing the provisions of that rule, it was held in *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) (2004 (8) BCLR 821; [2004] 3 All SA 169) para 46:

> 'The [argument] was based on Uniform Rule 49(11), which provides that, where an appeal has been noted or an application for leave to appeal made, the operation and execution of the order is suspended. In this case, as will appear soon in more detail, the Modder East Squatters lodged their application for leave to appeal together with an application for condonation some 18 months after the order had issued. The right to apply for leave to appeal, by then, had lapsed. Rule 49(11) presupposes a valid application for leave to appeal to effect the suspension of an order. In this case, there was none.'

[15] The inherent logic of the position is unassailable. It can be tested by asking what would happen if many months or years were to pass before an application for condonation is lodged. It is untenable that upon the service of a condonation application the judgment would then be suspended. Accordingly the application fails for want of even a *prima facie* right that the judgment of Legodi J be suspended.'[3]

[15] In this instance, the court is also faced with a situation in which an appeal has not been noted within 15 days of leave to appeal being granted as required by Labour Appeal Court Rule 5 [1]. In light of the judgment in *Incubeta* and since s18(5) determines that it is a prerequisite for an order being made under s18(1) read with s18(3) that a notice of appeal must have been lodged with the registrar in terms of the rules, the basis for bringing an application under 18(3), does not exist, irrespective of whether it was necessary for the applicant to demonstrate urgency.

[16] Consequently, as things currently stand, until and unless the condonation application before the LAC has been determined in the respondents' favour, there is no decision which is subject to an application for leave to appeal. Paradoxically therefore, even though s 18(3) is not applicable and no relief can be granted in terms of that section, the judgment of this

[3] At 113-115.

court on 21 October 2020 still remains in force and compliance therewith can be enforced through contempt proceedings.

Order

[1] The application is dismissed with costs.

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Lagrange J
Judge of the Labour Court of South Africa

Representatives -

For the Applicant:	**R Nyman instructed by R Titus Attorneys**
For the Respondents:	**D Van der Merwe instructed by O'Neill and Visser Attorneys**