

SOUTH AFRICA / JUDGMENT

Luxor Paints (Pty) Ltd v Lloyd (J1265/16)
[2016] ZALCJHB 505; (2017) 38 ILJ 1149 (LC);
[2017] 7 BLLR 700 (LC) (9 December 2016)
[2016] ZALCJHB 505

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

J1265/16

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 1265/16

In the matter between: LUXOR PAINTS (PTY) LTD and NATASHA LLOYD VICAN
MANUFACTURING CC Applicant First Respondent Second Respondent

Heard: 1 December 2016

Judgment:

9 December 2016

VAN NIEKERK J

- [1] This is an application to commit the first respondent for contempt of court on account of her failure to comply with an order granted by Gush J on 8 September 2016. That order upholds a restraint of trade in favour of the applicant and interdicts the first respondent from being employed by the second respondent.
- [2] The principles applicable to civil contempt are well-established. The purpose of contempt proceedings is to compel compliance with orders of court and to vindicate the court's dignity and authority consequent on the disregard of its orders. The principles relevant to contempt were set out by Cameron J in *Fakie NO v CCI Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA). It is a crime unlawfully and intentionally to disobey a court order, the essence of which lies in violating the dignity,

repute or authority of the court. The order in question must be one *ad factum praestandum*, the order must have been served on the respondent or the respondent must have been advised of the order in circumstances where there are no reasonable grounds for disbelieving the information, and respondent must have failed to comply with the order. The failure to comply must be both *mala fide* and wilful (see *Fakie NO (supra)*, *Uncedo Taxi Service Association v Maninjwa & others* [1998] BCLR 683 (E)).

- [3] It is not disputed that the order was served personally on the first respondent; she is accordingly aware of the order and its contents. The first respondent opposes these proceedings on the basis that her failure to comply with the 8 September 2016 order is not *mala fide*, and that the order was in any event suspended by virtue of the provisions of s 18(4) of the Superior Courts Act.
- [4] The material facts are not in dispute. On 27 September 2016, the respondents' attorneys advised the applicant's attorneys that they had been instructed to apply for leave to appeal against the order. The application for leave to appeal was served on 29 September 2016.
- [5] On 4 October 2016, the applicant filed an application for a directive that the order granted on 8 September 2016 not be suspended pending the outcome of the application for leave to appeal.
- [6] On 18 October 2016, both the application for leave to appeal and the application for the directive were argued before Gush J. On 1 November 2016, Gush J dismissed the application for leave to appeal and further ordered that:

The operation and execution of the order dated 8 September 2016...shall not be suspended pending the outcome of any application for leave to appeal in terms of Rule 4 of the Rules for the Conduct of Proceedings in the Labour Appeal Court unless the Labour Appeal Court directs otherwise.

- [7] Rule 4 of the Rules of the Labour Appeal Court provides, amongst other things, that an appellant may petition for leave to appeal

within ten court days of the date on which leave to appeal is refused. On 3 November 2016, the respondents' attorneys advised

the applicant's attorneys that they had instructions to petition for leave to appeal against the order of 8 September 2016,

and to appeal against the order granting the applicant leave to execute.

- [8] On 9 November 2016, the first respondent, acting in terms of s 18(4) of the Superior Courts Act, delivered a notice of appeal against the order granting leave to execute. On 15 November 2016, the first respondent delivered a petition for leave to appeal against the order dismissing the application for leave to appeal against the order granted on 8 September 2016.

[9] As at the date of the present hearing, the Labour Appeal Court had not yet made a ruling in respect of the petition for leave to appeal, nor had it made any ruling in respect of the application for leave to appeal filed in terms of s 18(4).

[10] The first issue to be determined is the application of s 18 of the Superior Courts Act to this Court. Section 18 regulates the suspension of decisions pending appeal. In general terms, the operation and execution of a decision (other than a decision not having the effect of a final judgment) is suspended pending the outcome of an application for leave to appeal or appeal (see s 18(1)). The court may order otherwise (see s 18(3)) if it is established on a balance of probabilities that the applicant 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. (See *Incubeta Holdings (Pty) Ltd & another v Ellis & another* 2014 (3) SA 189 (GJ).) If the court orders that the operation or execution of an order is not suspended, the court must record its

reasons

for doing so. The aggrieved party has an automatic right of appeal to the next highest court, which must deal with the matter 'as

a matter of extreme urgency' (s 18 (4) (iii)).

[11] Of particular importance in the present matter is s 18 (4) (iv), which provides that pending the outcome of the urgent appeal, the order to execute is automatically suspended, pending the outcome of the appeal. It follows that if s 18(4) is applicable, the order granting the applicant leave to execute was automatically suspended on 9 November 2016, when the notice of appeal was filed.

[12] The applicant contends that the provisions of s 18(4) of the Superior Courts Act do not apply to this court and in doing so, relies on the judgment by Snyman AJ in *L'Oreal South Africa (Pty) Ltd v Kilpatrick and another* (2015) 36 ILJ 256 (LC)). In that judgment, the court held that the provisions of the Superior Courts Act do not apply to this court, at least not in relation to s 18 of that Act. Having said that, Snyman AJ accepted that 'selected provisions' from the Superior Courts Act may from time to time be imported into or adopted by this court where these are complementary with this Court's rules, provisions and processes (at para 21).

[13] What this conclusion ignores is the definition of 'Superior Court' in s 1 of the Superior Courts Act. The definition

extends to the 'Constitutional Court, the Supreme Court of Appeal, the High Court and any other court of a status similar to the High Court.' Section 151 of the Labour Relations Act establishes this court as a court of law and equity, and as a superior court that has the authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that of a division of the High Court. There can be no question therefore that this court falls within the definition of a

‘Superior Court’ for the purposes of the Superior Courts Act. The fact that this court is established in terms of the Labour Relations Act and not the Superior Courts Act, a state of affairs to which Snyman AJ appeared to attach some significance, is neither here nor there.

[14] But it does not necessarily follow that the Superior Courts Act always prevails. Section 2(3) of the Superior Courts Act reads as follows:

The provisions of this Act relating to Superior Courts other than the Constitutional Court, the Supreme Court of Appeal or the High Court of South Africa, are complementary to any specific legislation pertaining to such Courts, but in the event of a conflict between this Act and such legislation, such legislation must prevail.

[15] What this subsection recognises is the existence of superior courts (such as this court) that are established by other, specific

legislation, and the potential for conflict between that legislation and the Superior Courts Act. But the scope of the exception that s 2(3) represents is limited by the existence and extent of any conflict between the Superior Courts Act and the specific legislation to which the section refers. If there is no conflict, it follows that the default position is that established by the Superior Courts Act.

[16] As Snyman AJ observed, there is no specific provision in the Labour Relations Act, (or the Rules of this Court or the Labour Appeal Court) regulating the status of orders that are subject to an appeal or application for leave to appeal. There is therefore no conflict between the Labour Relations Act and the Superior Courts Act in relation to this matter. I share the concerns expressed by Lagrange J in *Wenum v Maquassi Hills Local Municipality* (J 1684/15, 22 July 2016) where he said, at paragraph 9 of the judgment:

Having regard to section 174 of the LRA and sections 2 (3) and 18 (1) and

(2) of the Superior Courts Act, I do not believe that section 2 (3) of the Superior Courts Act renders section 18 of that Act inapplicable to the effect of leave to appeal been granted by this court, as there is no obvious conflict between s 174 of the LRA and s 18 of the Superior Courts Act. Insofar as the judgment in *L’Oreal* suggests that the Superior Courts Act does not apply to the Labour Courts unless provisions are imported in the exercise of the courts’ management of their processes and procedures, I believe that proposition is stated too widely.

[17] In my view, (and contrary to what Snyman AJ held) the fact that this court has over the years ‘borrowed’ from other statutes to address lacunae in its own Rules and in the Labour Relations Act, does not justify the conclusions either that the Superior Courts Act does not apply to this court, or that this court is at liberty to import or adopt provisions of the Superior Courts Act on a selective and ad hoc basis.

[18] The interpretation adopted in *L’Oreal* flies in the face of what is clearly a limited exception established by s 2(3) of the Superior Courts Act to the effect that other

specific legislation trumps only in the event of a conflict with that Act. It is an interpretation that fails to resonate with the plain meaning of the words used in s 2(3) and, to use the analysis by Wallis JA in *Natal Joint Municipal Pension Fund v Edumeni Municipality* 2012

- (4) SA 593 (SCA) (at para 18), it is an interpretation that is likely to lead to insensible or unbusiness-like results and which undermines the express purpose of the Superior Courts Act. That Act gives effect to the constitutional imperative of rationalising the structure, composition and functioning of the courts and the creation of a uniform framework for judicial management. That purpose would be frustrated, if not undermined, should the Superior Courts Act be held to be inapplicable to this court. Insensible and unbusiness-like results would be inevitable should this court be empowered selectively to decide, on an ad hoc basis, which of the provisions of the Superior Courts Act it wishes to adopt and apply and which it prefers to ignore. The constitutional

imperative and statutory purpose to which I have referred have as their touchstone considerations of certainty.

- [19] While I appreciate that one should not lightly depart from a prior judgment that is in point, in my view, the approach adopted in *L’Oreal* is incorrect and I decline to follow it.
- [20] That being so, in terms of s 18(4) of the Superior Courts Act, the first respondent had an automatic right of appeal against the leave to execute order, pending the outcome of any petition filed in terms of Rule 4 of the Labour Appeal Court’s Rules. She has exercised that right. In the circumstances, the first respondent’s notice of appeal filed on 9 November 2016, together with her petition for leave to appeal against the order granted on 8 September 2016, both read with s 18 of the Superior Courts Act, suspended the operation of the order. It follows that as at the date of the hearing of the present application, the first respondent could not be in contempt of the order.
- [21] Finally, in relation to costs, the court has a broad discretion to make an order for costs according to the requirements of the law and fairness. In my view, those interests are best served by each party bearing its own costs.

I make the following order:

1. The application is dismissed.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCES:

For the Applicant: Adv. I Miltz SC instructed by Webber Wentzel

For the Respondent: Mr C Bollo, BBM Attorneys

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