IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: 2024-102582

In the matter between:

CHARLOTTE MANDISA NDLHOPI **Applicant**

and

ROAD ACCIDENT FUND **Respondent**

Heard: **16 October 2024**
Delivered: **21 October 2024**

This judgment was handed down electronically by emailing a copy to the parties. The 21st of October 2024 is deemed to be the date of delivery of this judgment.

JUDGMENT

ITZKIN, AJ

Introduction

[1] The applicant, Ms Ndlhopi, has approached the court on an urgent basis seeking *"leave to execute paragraphs 3, 4 and 5 of the order of Khumalo AJ pending the determination of the Respondent's intended appeal"*. She also seeks orders for payment of her salary and benefits from September 2024 onwards, as well as punitive costs.

[2] The application is founded on orders of this court, per Khumalo AJ, dated 27 September 2024. Those orders were made in the context of an application launched following the respondent (the RAF) informing Ms Ndlhopi, of its intention to dismiss her.

[3] The orders of Khumalo AJ declared that a letter and decisions communicated in the letters of 3 and 16 September 2024 from the respondent constituted an unfair labour practice (order 2); the RAF was interdicted from summarily terminating the applicant's employment (order 3); the RAF was interdicted from implementing a formal disciplinary process against the applicant (order 4); and the RAF was ordered to uplift the applicant's suspension and allow her to resume her duties subject to a reasonable reintegration plan (order 5).

[4] The founding affidavit records that the following occurred in the context of the orders of Khumalo AJ:

4.1 On 27 September 2024, Ms Ndlhopi's attorneys wrote to the RAF calling for a commitment to comply with the order, to pay Ndlhopi her salary and benefits for September 2024, and to confirm when she may resume her duties. Other than an acknowledgment of receipt by the RAF's attorneys, no response was received. Ms Ndlhopi's salary for September 2024 was short-paid.

4.2 On 1 October 2024, Ms Ndlhopi's attorneys wrote to the RAF calling for immediate payment of her full salary and benefits for September 2014 and written confirmation of the resumption of her duties. No response was received.

4.3 On 4 October 2024, Ms Ndlhopi presented herself at the respondent's offices to resume her duties. The Acting Senior Manager: Employment Relations, Ms Dludla, informed Ms Ndlhopi that she could not resume her duties as the RAF was appealing the order of Khumalo AJ. When Ms Ndlhopi inquired about the underpayment of her salary for September 2024, she was informed that the termination of her employment was effective from 16 October 2024.

[5] Although it is evident from the founding affidavit that when the application was launched, an application for leave to appeal against the orders of Khumalo AJ had not been delivered, the RAF's counsel confirmed that an application for leave to appeal had since been delivered. Ms Ms Ndlhopi's attorney confirmed having received that application.

[6] In its answering affidavit, the RAF has conceded that it *"does not oppose the execution of Khumalo AJ's order in so far as orders 3 and 5 are concerned pending the finalisation of the Respondent's appeal"*. However, it opposes order 4 of Khumalo AJ's order being rendered operative pending the finalisation of the application for leave to appeal, and any ensuing appeal, on the basis that this will immunise Ms Ndlhopi against all disciplinary action by the RAF.

[7] In relation to the orders for payment of the shortfall in Ms Ndlhopi's salary and benefits, the answering affidavit also contains a commitment to pay Ms Ndlhopi *"the balance of the short fall by no later than Friday, the 19th of October 2024"*.

Urgency

[8] Applications terms of section 18 of the Superior Courts Act[1] are, by their nature, urgent.

[9] In *Downer v Zuma and Another,*[2] the High Court expressed the position as follows:

> "[10] Section 18 applications are by their very nature urgent. This is borne out by the provisions of s 18(4) which provides that an appeal must be dealt with on an extremely urgent basis - see Trendy Greenies (Pty) Ltd tla Sorbet George v De Bruyn and Others. The First Respondent has submitted that the applications are not urgent and will not prevent the Applicants from appearing in court on the 4th August 2023. The underlying reason for this submission is that in the event this court finds in favour of the Applicants, the First Respondent will immediately invoke his right of automatic appeal in terms of s 18(4) of the Act. This is contemptuous as it is pre-empting the judgment and reasoning of the judgment. However, as the s18 applications are inherently urgent, we are of the view that there is no merit in the First Respondent's point in limine."

[10] The applicant has also not unduly delayed in pursuing the application and has not imposed unreasonable time periods for exchanges.

[11] Given the sequence of events and the considerations that arise in applications of this nature, I am satisfied that the matter should be entertained on the urgent roll.

Evaluation

[12] Section 18 of the Superior Courts Act provides as follows:

> "'(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision

[1] 10 of 2013.

[2] (12770/22P; 13062/22P) [2023] ZAKZPHC 75 (3 August 2023).

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…

(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."

[13] The critical question, for present purposes, is whether exceptional circumstances have been shown to exist, and whether Ms Ndlhopi has established, on a balance of probabilities, that she will suffer irreparable harm if the court does not order that orders 3, 4 and 5 are to be operative pending the application for leave to appeal and any ensuing appeal, and that the RAF will not suffer irreparable harm if the court so orders.

[14] With reference to what constitutes exceptional circumstances, our courts have eschewed attempts to lay down a general rule. The relevant inquiry is a factual one which evaluates whether the circumstances justify a departure from the ordinary position pertaining to the suspension of orders pending applications for leave to appeal and appeals.

[15] Given the events that transpired after the orders were made, I am satisfied that in relation to orders 3 and 5 (on which the immediate operation and execution is not opposed), exceptional circumstances have been established, and that it has been established that Ms Ndlhopi will suffer irreparable harm if the court does not order that they are operative, while the RAF will not suffer irreparable harm if the court so orders.

[16] With reference to order 4, during oral argument, the Ms Ndlhopi's representative contended that understood in context, it is not overbroad as it

pertains to (and only precludes) the disciplinary action that was instituted against Ms Ndlhopi, and not all disciplinary action that may generally be taken.

[17] Ms Ndlhopi's representative also expressed anxiety that if the operation of order 4 is not suspended, it is possible that the RAF may seek to resuscitate the same disciplinary steps that were pending against Ms Ndlhopi. In other words, there is a possibility that the same disciplinary action may be re-instituted.

[18] I am not satisfied that Ms Ndlhopi has established that she will suffer irreparable harm if order 4 is suspended, and that the RAF will not suffer irreparable harm if it is. In this regard, section 18(3) of the Superior Courts Act uses the word *"will"* - not *"may"* - in relation to the notion of irreparable harm. Ms Ndlhopi's fears appear, at this stage, to be speculative and do not meet the relevant threshold.

[19] Moreover, if Ms Ndlhopi's fears turn out to be well-founded based on steps that the RAF may yet take, there does not appear to be a reason why she could not seek to have that course of action interdicted, to the extent that there is a basis for doing so.

[20] Over and above this, it is of concern that order 4 is framed in broad terms. Its wording, read in isolation, suggests that no disciplinary action may be taken against Ms Ndlhopi, without qualifying this restriction. To the extent that this is the effect of order 4, an order for its continued operation would unduly trench upon the RAF's prerogative to maintain discipline, and there do not appear to be exceptional circumstances warranting an order of that nature remaining operative pending the application for leave to appeal and any ensuing appeal.

[21] Turning to the orders sought by Ms Ndlhopi for payment of her salary and benefits from September 2024 onwards, a commitment has been made under oath to remedy the short payments.

[22] In relation to the court's competence in these proceedings to make orders for payment, the orders of Khumalo AJ do not deal with a claim for such amounts (albeit that the orders may, in effect, have given rise to circumstances from which a contractual claim may have arisen).

[23] To the extent that Ms Ndlhopi has not been (and is not) paid amounts contractually due to her, a contractual claim for specific performance, based on a breach of her employment contract, would be available to her.[3]

[24] In these proceedings, Ms Ndlhopi has not claimed specific performance through a cause of action in contract. Although her founding affidavit attaches her salary statements from August 2024 and September 2024 to demonstrate a short payment in September 2024, the contractual foundation for a claim for specific performance has not been laid out in her founding papers.

[25] In these circumstances, with reference to the portion of the application pertaining to a claim to be paid amounts allegedly due to Ms Ndlhopi, the basis for the present application is misconceived and it would not be competent to make an order in this regard in these proceedings.

[26] Lastly, with reference to costs, both parties sought costs orders against one another; with the applicant seeking punitive costs orders, and orders that affidavits be filed by various of the RAF's officials indicating why personal costs orders should not be made against them.

[3] See, for instance, *Coca Cola Sabco (Pty) Limited v Van Wyk* [2015] 8 BLLR 774 (LAC).

[27] Both parties have been partially successful. However, the RAF's treatment of the applicant in the wake of the order of Khumalo AJ (which has necessitated this application), and its approach in only belatedly making concessions in its answering affidavit, warrants an order of costs in the applicant's favour. However, I am disinclined to make a costs order on a punitive scale, or to make a personal costs order against the RAF's officials.

[28] In the result, the following order is made:

Order

1. This matter is heard as one of urgency and the applicant's failure to comply with the normal time periods, forms and service is condoned.

2. Order 3 and order 5, in the order of Khumalo AJ dated 27 September 2024, are to remain operative and executable (and are not suspended) pending the determination of the respondent's application for leave to appeal and any ensuing appeal to the Labour Appeal Court.

3. The respondent is to pay the applicant's costs.

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R. Itzkin

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant	:	TA Mahlare
Of	:	Mahlare Attorneys Inc
For the Respondent	:	M Dlamini SC, with T Ngobane
Instructed by	:	Maponya Ledwaba Attorneys