IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

JA77/2017,

JA78/2017 and

JA28/2018

In the matter between:

THE ROAD TRAFFIC MANAGEMENT CORPORATION	**First Appellant**
and	
TASIMA (PTY) LIMITED	**First Respondent**
DEPARTMENT OF TRANSPORT	**Second Respondent**
DIRECTOR GENERAL OF DEPARTMENT OF TRANSPORT	**Third Respondent**
MINISTER OF TRANSPORT	**Fourth Respondent**
ALL EMPLOYEES LISTED IN ANNEX "A" TO THE NOTICE OF MOTION	**Fifth Respondent**

And

JA134/2017

THE ROAD TRAFFIC MANAGEMENT CORPORATION — **First Appellant**

MAKHOSINI MSIBI — **Second Appellant**

and

TASIMA (PTY) LIMITED — **Respondent**

Heard: 08 November 2018

Delivered: 21 December 2018

Coram: Waglay JP, Davis JA and Murphy AJA

JUDGMENT

THE COURT

Introduction

[1] On 03 December 2001, Tasima (Pty) Ltd, the first respondent (respondent) and the Government of the Republic of South Africa, acting through the Department of Transport ('Department') entered into a Turnkey agreement (which was subsequently amended and extended) for the provision of the eNaTIS system. This system realised the requirements provided for in the National Road Traffic Act 43 of 1996 ('the Act'), namely to record, administer and maintain a vast range

of information required by the Act and the National Road Traffic Regulations as well as to perform key functions pertaining to road traffic in South Africa. To a large extent, it is a self-financing system. Given the eNaTIS transaction fees are paid by the public, the State receives in excess of R440 million per year from these transaction fees. It appears that the system administers over R14billion annually in road traffic revenue, it processes more than 500 million transactions per year at an average of 2million transactions per business day. It has more than 2400 sites nationwide, has up to 2700 live users logging transactions on the system with over 27 million entity records. It manages a vehicle population in excess of 11,3million vehicles and a driver population of approximately 9million.

[2] Following the conclusion of the Turnkey agreement, respondent was obligated to operate the eNaTIS system on behalf of the Department for a fee of R355 million over a period of five years. The agreement ultimately came into force on 01 June 2002 for a fixed period of five years terminating on 31 May 2007. It had been agreed that, upon the termination of this Turnkey agreement, respondent would transfer the operation of eNaTIS to the Department. Procedures were set out in the Turnkey agreement to effect the contemplated transfer. The first step was to be a written request from the Department for a transfer-management meeting between it and respondent. This request was to be made within 90 days from the date of termination at the agreement. At that meeting the parties would agree to a transfer-management plan which had to be completed within 30 days from the date of the request for the meeting.

[3] The arrangements between the contracting parties appear to have proceeded without any dispute until the agreement terminated on 31 May 2007. On the eve of the termination of the agreement, respondent addressed a letter to the Department requesting that the agreement be extended for another five years. When the initial agreement came to an end on 31 May 2007, the parties did not enter into an written agreement. They did agree, however, that respondent should continue to provide services that it had rendered under the expired contract on a month to month basis.

[4] It was at this point in the relationship between the parties that a litigation storm replaced the calm of the previous five years. Dozens of cases later, this court is now seized with the consequences of much of this litigation. To prevent the compilation of a narrative which could justifiably be entitled 'War and No Peace', suffice to say that in *Department of Transport v Tasima* 2017 (2) SA 622 (CC) at para 208, ('*Tasima 1*') the Constitutional Court ordered that, within 30 days of its order, respondent was to hand over 'the services and electronic National Traffic Information System to appellant'.

[5] Once this order had been made, respondent demanded that the staff employed by it in respect of the operation of the eNaTIS system be transferred to appellant, as employees of the latter in terms of s 197 of the Labour Relations Act 66 of 1995 ('LRA') (the appellant is the Road Traffic Management Corporation (RTMC) the successor in title to the Department in respect of the eNATIS system).

[6] As a consequence of this demand, respondent approached the Labour Court for an order which would declare that the contracts of employment of 5th to 84th respondents be transferred automatically from respondent to first applicant in accordance with the provisions of s 197 of the LRA.

[7] The Labour Court, (Steenkamp J) upheld this application and made the following order:

'63.1 It is declared that, with effect from 5 April 2017, the contracts of employment of the 5th to 84th respondents transferred automatically from the applicant (Tasima (Pty) Ltd) to the first respondent (the Road Traffic Management Corporation) in accordance with the provisions of s 197 of the Labour Relations Act (Act 66 of 1995).

63.2 The RTMC is directed to pay the 5th to 84 the respondents from 05 April 2017 to the date of the final determination of the order in subparagraph 1 above:

63.2.1 on monthly basis on or before the 25th of each month, the amounts set forth under the column headed "Monthly CTC excl 13th

cheque, annual bonus, overtime, standby allowance, birthday voucher and night shift allowance" as set out in Annexure "C" to Annexure "FM 11.6" to the founding affidavit of Fannie Lynen Mahlangu; and

63.2.2 on an annual basis, any additional amounts making up the column headed "Annual Total CTC" as set forth in that schedule.'

[8] With the leave of this court, the appellant appeals against the entire order.

Appeal against Paragraph 63.1 of the order of the court *a quo*

[9] To fully analyse the judgment of the court *a quo*, it is necessary to consider further relevant facts subsequent to the expiry of the Turnkey agreement on 31 May 2007. As indicated, the eNaTIS system and associated services were not immediately handed back to appellant. The parties had concluded an interim arrangement which ran on a month-to-month basis during which time respondent continued to operate the system and to provide associated services in relation thereto.

[10] With the appointment of Mr George Mahlalela as Director-General of the Department with effect from February 2010, respondent renewed its request for an extension of the expired agreement. Mr Mahlalela agreed to a further five year extension but failed to follow the procurement process as laid down in s 217 of the Republic of South Africa Constitution Act 108 of 1996 read together with Treasury Regulation 16.A6.4 and Treasury Instruction 8 of 2007/2008. As a result, the Auditor-General queried the extension of the contract to respondent and declared it to be irregular as the Department had failed to follow proper procurement requirements.

[11] In 2012, the Director-General initiated negotiations with respondent relating to the termination of the extension and the transfer of the eNaTIS to the

Department. It was at this point that he advised respondent that the Auditor-General had declared the extension of the agreement to the irregular.

[12] It appears that at some point in this process, respondent failed to attend the negotiations, following which the appellant addressed an email to respondent stating that, since the negotiations had broken down, respondent must hand over the eNaTIS to it. Respondent reacted by applying to the High Court for an order to enforce the purportedly extended contract which application proved to be successful. This triggered extensive litigation to which reference has previously been made. Much of this litigation is irrelevant to the present case in that the Constitutional Court in *Tasima 1* granted the order which has been referred to in this judgment, the effect of which remains central to the present dispute.

[13] A flurry of correspondence between the parties then ensued. On 25 November 2016 attorneys, acting on behalf of appellant, confirmed that appellant had agreed to the transfer of staff directly engaged in the system in terms of s 197 of the LRA. To this letter, attorneys for respondent wrote on 29 November 2016 attaching a draft Migration Scope Plan which provided that all of respondent's employees must be transferred to appellant and that the transfers would occur simultaneously with those parts of the business which were individually transferred in a staggered fashion. On 05 December 2016 appellant's attorneys rejected the staggered hand-over process but repeated appellant's commitment to take over respondent's employees expeditiously.

[14] Further correspondence was generated between 07 December 2016 and 02 April 2017. In particular, a dispute arose as to the meaning of the order of the Constitutional Court in *Tasima 1*. Unsurprisingly, this dispute also required resolution in the High Court. After hearing argument, Tuchten J ordered that respondent hand-over the services relating to the eNaTIS system by no later than 22 December 2016.

[15] Within hours of this order having been delivered, respondent was evicted from its premises by the Sheriff of the High Court. A further dispute broke out with regard

to the relevant employee contracts and their details, all of which were finally provided by respondent on 20 April 2017 although there remained a further allegation from appellant that the hard copies were incomplete. A day earlier, on 19 April 2017, respondent launched an urgent application in terms of s197 of the LRA, which was the application heard and decided by the court *a quo*.

[16] In upholding the application and making the order which it did, the court *a quo* found that the sole purpose of respondent's business was the provision of eNaTIS services. In the view of the learned judge, that business had been transferred to appellant in accordance with the order of the Constitutional Court; in *Tasima 1;* the appellant had taken control of the premises previously occupied by respondent; it employed its assets, information and property which had previously been used by respondent to render the same services; it liaised with the same service providers and made the same payments. In short, what had been transferred, pursuant to the order of the Constitutional Court in *Tasima 1*, was the business of respondent as a going concern.

Appellant's case

[17] Mr Redding, who appeared together with Mr Hopkins on behalf of appellant, raised two essential criticisms against the judgment and thus in support of the appeal. In the first place, he contended that what have been transferred was a regulatory authority as opposed to a business which had been transferred as a going concern within the scope of s 197 of the LRA. Secondly, he contended that the Turnkey agreement was the only valid agreement which operated in the circumstances of this case and that this agreement expressly provided that s 197 of the LRA was inapplicable in respect of employees involved in the eNaTIS system.

The regulatory argument

[18] Mr Redding accepted that s197 (1) (a) of the LRA defined business to include 'the whole or a part of any business, trade, undertaking or service.' Appellant's case however, was that, if a system or service had been commissioned by a public authority because it required the system and service in order to perform a regulatory function, the entity transferred was not a business because it was not an economic entity. In short, it represented a regulatory facility as opposed to an economic entity. Because the eNaTIS system was thus a regulatory facility and not an economic entity, s197 of the LRA did not apply.

[19] In this connection Mr Redding referred to a judgment of the European Court of Justice in *Henke v Gemeinde Schierke ("Brocken")* [1996] IRLR 701 (ECJ), in support of his submission that the transfer of administrative services from a municipality to an administrative entity did not constitute the transfer of a business as a going concern. The facts of Henke need to be considered before any analogy can be drawn between it and the present dispute. It appears that Mrs Henke was appointed as secretary in the mayor's office of the Municipality of Schierke on 01 May 1992. On 01 July 1994 the Municipality of Schierke and other municipalities formed an administrative collective. Pursuant to provisions of the Local Government Law for the Land of Saxony-Anhalt, the municipality transferred certain administrative functions to the collective. As a result, the Municipality of Schierke terminated its contract of employment with Mrs Henke.

[20] Mrs Henke argued that Article 1 (1) of EU Directive 77/187/EEC applied to her case, because entities, such as a municipality, carry out, at least to some extent, activities of an economic character. Accordingly, what had been transferred in this case was a business which fell within the scope of the Directive.

[21] The court found, in the circumstances, that the transfer carried out between the municipality and the administrative collective related only to activities involving the exercise of a public authority, even if it assumed that these activities included aspects of an economic nature these could only be ancillary to its principal

activities. From this Mr Redding contended that a distinction could be drawn between the organisation of appellant's operations and the primary focus of earning of revenue. In this case he contended that the commercial or economic aspects were clearly ancillary to the main objects of the organisation which related to ensuring the efficient regulation of road traffic and its management.

Evaluation

[22] As was emphasised by the Constitutional Court in *Rural Maintenance (Pty) Ltd and another v Maluti-A-Phofung Local Municipality* (2017) 38 ILJ 295 (CC) at paras 22-27, English and European jurisprudence need to be treated with great care because of different wording and hence different tests which are applied to the transfer of a business or undertaking under these legal dispensations. Even if this Court was prepared to embrace the European jurisprudence with less care that the Constitutional Court has demanded, which manifestly it should not, the facts of Henke are different from those confronting this Court, where, as will be shown, there was a defined business in the hands of respondent which was then transferred to a public authority being appellant.[1]

[23] The judgment, in *Rural Maintenance* together with the earlier judgment of the Constitutional Court in *City Power (Pty) Ltd v Grinpal Energy Management Services (Pty) Ltd and others* (2015) 36 ILJ 1423 (CC) also confirmed that our jurisprudence draws no distinction between a business conducted by a public authority and one performed by a private enterprise. In dealing with the transfer of a business of a provision of electricity from a private enterprise to a municipality, the court in City Power, supra at para 39 said the following:

> 'On the present facts, there is no dispute that City Power took over the full business 'as is', with all of the complex network infrastructure, assets, know how,

[1] This cautionary approach to comparative law surely applies even more when dealing with an English VAT case of Institute of Chartered Accountants in England and *Wales v Customs and Excise Commissioners* [1997] STC 1155 (CA) which Mr Redding sought to apply to s 197 of the LRA

> and technology required to install and operate the prepaid electricity system with the clear intention of maintaining uninterrupted electricity services to Alexandra Township. The project continued after termination of the service level agreements and completion of the handover process. The business is identifiable and it is discrete. Ultimately a business of providing a system of prepaid electricity to residents of Alexandra continued, save that it was now conducted by a different entity.' (our emphasis)

[24] No matter whether a court is dealing with a public authority or a private organisation, the enquiry as to the applicability of s 197 of the LRA is critically dependent on the facts. As Froneman J said in the majority judgment in *Rural Maintenance, supra* at para 39: *'it is settled that the enquiry to determine whether the business is transferred as a going concern is a factual one. But the parameters of the factual enquiry are determined by the legal cause from which the transfer stems from (sic)'*.

[25] In the present case it does not appear to be contested that respondent was the entity responsible for rendering eNaTIS services to end users. It used its premises solely to operate the system. When any faults were logged, it was required to respond thereto. It was required to develop, test and implement any new functionalities required of the system, and to manage third party service providers, securing necessary services and equipment from such parties and paying them.

[26] All of respondent's employees were employed for the sole purpose of providing these services. They worked from eNaTIS premises with assets which were those of eNaTIS, accessing the eNaTIS system, code and infrastructure. The premises were suitably furnished and equipped to provide for the necessary infrastructure to conduct the system. It is said that at least 80 persons were employed exclusively to perform these necessary functions. All assets were purchased and used solely to perform these functions. Respondent negotiated and entered into contracts solely to perform these functions.

[27] Examining these facts holistically, it is clear that what was conducted by respondent was a business, falling within the scope of s197 of the LRA. The legal cause for the transfer of this business, as defined, to appellant is to be found in the order of the Constitutional Court in *Tasima 1* at para 208. What was transferred, pursuant to this order, was a business which until that point had been conducted by respondent. The fact that it was transferred to a statutory authority cannot, on its own, convert that which was a business as defined in s197 of the LRA to an enterprise that fell outside of the scope of s197 of the LRA, simply because the system supported a regulatory function. In short, the facts of this case are distinguishable from the European authorities, cited by Mr Redding in support of the appeal. The outcome of the mandated factual enquiry is that a business operated by respondent was transferred to appellant in terms of an order of the Constitutional Court which it handed down in *Tasima 1*.

The Turnkey contract argument

[28] Clause 9.1 of the Turnkey contract provided that respondent was obliged to employ 'suitably qualified experienced and trained staff to provide the eNaTIS system to the State'. In terms of clause 9.2, an undertaking was given by respondent that, after the contract came to an end, it would allow the State to access its skilled and qualified personnel for a period of 36 months to enable the State to seamlessly take over the operation of the system once it had been delivered by respondent. No provision was made for the transfer of staff from respondent to appellant.

[29] In terms of the Turnkey contract, respondent had been contracted to develop and implement the eNaTis system. When the agreement came to an end, respondent 'shall use all reasonable efforts to affect the orderly and uninterrupted migration of all the affected Existing Service and Existing System (Clause 7.1 read with schedule 18 to the Turnkey Agreement).

[30] The Turnkey Agreement terminated in 2007 and the five years extension to the agreement was invalid and had no legal force and effect (*Tasima 1*, at para s41 and 200). The Constitutional Court held that from 23 June 2015 any extension to the agreement no longer had any legal effect.

[31] On this basis Mr Redding submitted that the intention of the Constitutional Court was that the Turnkey agreement continued to govern the transfer of the eNaTIS system. It was for this reason that reference was made in paragraph 4 of the Constitutional Court order at para 208 of *Tasima 1* that, in the event that an alternative transfer management plan was not agreed to by the parties within ten days of this order 'the handover was to be conducted in terms of the migration plan set out in schedule 18 of the Turnkey agreement'. On the basis of this part of the Court's order, Mr Redding submitted that the only contract which could possibly govern the transfer of eNaTIS system remained the Turnkey agreement. As the Turnkey agreement eschewed the operation of s197 of the LRA, the appellant was justified in its contention that no transfer of a business had taken place pursuant to s197 of the LRA.

Evaluation

[32] This argument unfortunately is based on a misreading of the order of the Constitutional Court. This order clearly provided that respondent was under an obligation, within 30 days of the grating of the order, to hand over the eNaTIS system to appellant. It provided for the possibility of an alternative transfer management plan to be agreed between the parties within ten days of the granting of the order. In the event that such an agreement could not be reached, provision was made for a default position namely that the mechanism for transfer would be the migration plan as set out in Schedule 18 to the Turnkey agreement. This alternative hardly constituted a resurrection of the Turnkey agreement simply because the Court provided that, absent an agreement to the contrary, a

mechanism as had been set out in the Turnkey agreement was available to ensure that the court order could be properly implemented.

[33] It follows that the legal *causa* for the transfer was the order of the Constitutional Court in *Tasima 1*. However, in a further judgment of the Constitutional Court in *Department of Transport and others v Tasima (Pty) Ltd and others* [2018] ZACC 21 (*Tasima 2*) the Court was required to deal with further applications which were launched pursuant to its earlier order. In *Tasima 2* the Constitutional Court made it clear that, although the declaration of invalidity of the extension to the Turnkey agreement which had been made by the High Court on 23 June 2015 was only confirmed by the Constitutional Court in *Tasima 1* on 09 November 2016, this confirmation had retrospective effect that is from 23 June 2015. See para 59 of *Tasima 2*. It follows therefore that, as at 23 June 2015, respondent had a clear obligation to transfer the entire business constituting the eNaTIS system to appellant in terms of s197 of the LRA.

[34] To the extent that the court *a quo* declared the contracts of employment of 5th to 84th respondents to be transferred automatically from respondent to appellant in accordance with s 197 of the LRA this is correct however; it will be necessary to amend this order to the proper date of the legal cause of the transfer, which must be 23 June 2015. In the circumstances, the appeal under case number JA77/2017 in relation to paragraph 63.1 is upheld save that the date is amended from 05 April 2017 to 23 June 2017.

Appeal against Paragraph 63.2 of the order of the Court *a quo*

[35] In addition to seeking an order declaring that the contracts of employment of the employees transferred automatically to the appellant, the respondent sought an order in paragraph 3 of its notice of motion directing the appellant to pay the employees their remuneration for the period from 5 April 2017 to the date of "the final determination of the relief" on appeal before this court. The only averment

made in support of such relief is in paragraph 138 of the founding affidavit. The relevant part reads:

> "[The employees] are required to be paid, and depend on being paid, on a monthly basis. Tasima thus also prays for the Tasima employees to be paid by the RTMC with effect from 5 April 2017 pending any final determination, including appeals, in relation to the section 197 dispute. This is obviously relief that needs to be granted as a matter of urgency. I point out that the eNatis system is completely self-financing and, for years, the Tasima employees were paid with funds which the RTMC and DoT [Department of Transport] received from eNatis transactions. The transaction fees more than amply cover the costs of the running of the eNatis system, including payment to employees. The RTMC is still the recipient of all these transaction fees, but is now refusing to apply these fees to payment of the salaries of the Tasima employees."

[36] The appellant in its answering affidavit did not deal with the prayer for interim relief, or respond directly to the supporting averment in paragraph 138 of the founding affidavit.

[37] The court *a quo* did not discuss prayer 3 of the notice of motion or paragraph 138 of the founding affidavit in its judgment. Nonetheless, after making the order in paragraph 63.1 of his judgment ("paragraph 63.1") declaring that the contracts of employment of the employees transferred automatically to the appellant in terms of s197 of the LRA, the judge granted the relief sought in prayer 3 of the notice of motion by making the order in paragraph 63.2 of his judgment ("paragraph 63.2") which reads:

> "63.2 The RTMC [The appellant] is directed to pay the 5th to 84th respondents from 5 April 2017 to the date of the final determination of the order in subparagraph 1 above:
>
> 63.2.1 on a monthly basis on or before that the contracts of employment of the employees transferred automatically to RTMC the 25th of each month, the amounts set forth under the column headed "Monthly CTC excl 13th cheque, annual bonus, overtime, standby allowance, birthday voucher and night shift

allowance" as set out in Annexure "C" to Annexure "FM 11.6" to the founding affidavit of Fannie Lynen Mahlangu; and

63.2.2 on an annual basis, any additional amounts making up the column headed "Annual Total CTC" as set forth in the that schedule"

[38] The following day, 26 May 2017, the appellant delivered a notice of application for leave to appeal against the entire judgment and order. In relation to paragraph 63.2 it contended that the order in paragraph 63.1 declaring that the contracts of employment had transferred automatically is final in effect and that the ancillary order in paragraph 63.2 is inconsistent with the order in paragraph 63.1 which is final. It accordingly contended that the order in paragraph 63.2 is "either meaningless or granted in error".

[39] On 5 June 2017, the court *a quo* granted the appellant leave to appeal against its order in paragraph 63.1 that s197 of the LRA was applicable and that the contracts of employment had transferred automatically, but refused leave to appeal against paragraph 63.2. In its judgment on the application for leave to appeal, the court noted that Tasima had not brought an application in terms of section 18(3) of the Superior Courts Act[2] ("the SC Act") but suggested that such was not necessary because the order in paragraph 63.2 "is interim in nature" and in terms of section 18(2) of the SC Act 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, is not suspended pending the decision of the application or appeal.

[40] In terms of its headnote, section 18 of the SC Act governs the suspension of decisions pending appeal. The relevant part of it reads:

"(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] Act 10 of 2013

(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."

[41] On 15 June 2017, the appellant petitioned this court for leave to appeal against the order in paragraph 63.2, which petition was allowed and leave to appeal was granted on 16 August 2017. The appeal has been noted under case number JA 78/2017.

[42] The appellant correctly maintains that the order in paragraph 63.2 is an interim execution order aimed at reversing the suspension of the final relief granted in paragraph 63.1. It quite explicitly puts into operation the final relief granted in paragraph 63.1 for the duration of the period in which an appeal may be pending. There can be no doubt that the order in paragraph 63.1 is final in that it disposes of the issue in the main application in a final and definitive manner. The order in effect substitutes the appellant as the new employer in the place of the respondent in respect of all the contracts of employment in existence immediately before the date of transfer and delegates the obligations under the contracts to the appellant. The purpose of the ancillary order in paragraph 63.2 is to permit the operation and execution of the final order in paragraph 63.1 pending the determination of the appeal against it (being the appeal filed under case number JA77/2108).

[43] Prior to the enactment of section 18(3) of the SC Act there was no statutory provision regulating interim execution orders. In terms of the common law, the noting of an appeal automatically suspends execution of the judgment appealed

against. Where the successful party wishes to execute upon the judgment, it is required to make an application for leave to do so and bears the onus to show why the judgment should be executed pending the appeal, subject, in appropriate cases to the furnishing of security *de restituendo*.[3] The court had a wide discretion to grant or refuse leave to execute and was required to determine what was just and equitable in all the circumstances having regard to the potentiality of irreparable harm or prejudice to the parties, the balance of convenience and the prospects of success on appeal.[4] At common law, an interim execution order is itself an interlocutory order and was generally not appealable on the grounds that such an order may be varied by the court granting it in the light of changed circumstances.[5]

[44] Section 18 of the SC Act has significantly altered the common law in more than one respect. The court no longer has a wide discretion to do what is just and equitable or to rely exclusively on the balance of convenience or the appeal's prospects of success. Now, before a court may order interim execution, the applicant for that relief must prove three things on a balance of probabilities. Firstly, the applicant must show that exceptional circumstances exist (perhaps including the balance of convenience and prospects of success) justifying the reversal of the ordinary principle of suspension pending appeal. Secondly, it must prove on the probabilities that it will suffer irreparable harm if interim execution is not ordered. Thirdly, it must prove that the other party will not suffer irreparable harm if an order of interim execution is granted. Should the applicant fail to discharge its onus in relation to any one of these requirements, the court may not grant an interim execution order. Additionally, in terms of section 18(4) of the SC Act, where an interim execution order is granted, the aggrieved party has an automatic right of appeal against that order to the next highest court and the order will be automatically suspended, pending the outcome of such appeal.

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[3] *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A)
[4] The common law was reflected in Uniform Rule 49(11)
[5] *Minister of Health v Treatment Action Campaign (No 1)* 2002 (5) SA 703 (CC); and *N v Government of Republic of South Africa (No 3)* 2006 (6) SA 575 (N)

[45] In our view, the court *a quo* clearly erred in granting the order in paragraph 63.2 for two reasons. Firstly, the order was granted in a manner impermissibly circumventing the jurisdictional requirements of section 18 of the SA Act. The order reversed the principle of suspension on appeal before an appeal was in fact noted and pre-empted the appellant's right to address the issues of suspension and interim execution in an appropriate application.

[46] The purpose of the statutory scheme enacted by section 18 of the SC Act is to provide generally for the suspension of final orders pending appeal, but to allow exceptionally for interim execution on the fulfilment of the strict criteria laid down by the section. The terms of section 18 of the SC Act intimate that the principle of suspension pending appeal may only be reversed where a specific application addressing the evidentiary questions of exceptional circumstances and the potentiality of irreparable harm is brought as part of the appeal process. It will be prejudicial to make such an order simultaneously with the final order, prior to an application for leave to appeal being made, because it would require the party opposing interim execution to address a hypothetical in the main application and will deny it the opportunity to adduce evidence regarding the circumstances and potential harm prevailing at the time of the application for leave to appeal. In any event, it is clear from the wording and context of section 18 of the SC Act (as well as established practice) that such applications are to be heard as part of the appeal process.

[47] The court *a quo* thus lacked the jurisdiction to make the interim execution order and erred in making it. The appeal under case JA 78/2017 accordingly must succeed and the order in paragraph 63.2 must be set aside.

[48] But even were it permissible to regard prayer 3 of the notice of motion as an application for interim execution in terms of section 18(3) of the SC Act, and to determine such before the aggrieved party has noted an appeal against the final relief, the court *a quo* erred in granting the interim relief because the respondent failed to discharge its *onus* to prove the requirements of section 18 of the SC Act.

The averment in paragraph 138 of the founding affidavit, being the only evidence adduced in support of the interim execution order, is wholly insufficient to establish that there were exceptional circumstances justifying the reversal of the suspension of the final relief on noting an appeal. The averments in paragraph 138 say only that the employees need their salaries and that the transaction fees would cover that expense. There is no compelling or substantiated explanation for why the respondent could not continue to pay salaries until the determination of the appeal, nor any assessment of the potentiality of harm to either party. .

[49] Turning to the court *a quo*'s categorisation of an interim execution order as an interlocutory order:[6] What it overlooked is that, in terms of section 18(4) of the SC Act, orders made under section 18 (1) of the SC Act (unlike other interlocutory orders[7]) are automatically appealable and suspended pending the outcome of any appeal against such an order. Thus, if we were to accept that paragraph 63.2 was an interim execution order in terms of section 18(1) of the SC Act, albeit premature, then the noting of an appeal by the appellant on 26 May 2017 suspended its operation and execution pending the outcome of the appeal by this court. Such a finding would have implications for the further litigation brought by the respondent in its attempt to enforce paragraph 63.2, to which we now turn.

Enforcement of Paragraph 63.2 of the order of the Court *a quo*

[50] Four days after the appellant petitioned this court to grant leave to appeal against the order in paragraph 63.2, on 19 June 2017, the respondent brought an urgent application for an order that the appellant reimburse it the salaries it had paid to the employees for the month of April 2017 in the amount of R3 208 307 which it

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[6] See *Minister of Health v Treatment Action Campaign (No 1)* 2002 (5) SA 703 (CC); and *N v Government of Republic of South Africa (No 3)* 2008 (6) SA 575 (N)

[7] Section 18(2) of the SC Act provides that interlocutory orders are not suspended pending the appeal process unless the court under exceptional circumstances orders otherwise in terms of an application under section 18(3) of the SC Act.

claimed was owing in terms of paragraph 63.2 on the understanding that it had not been suspended (and incidentally seeking an order of contempt).[8] the appellant responded to this application with a counter-application seeking an order that the operation and execution of paragraph 63.2 be suspended until the determination of its petition and the subsequent appeal if any. The court *a quo* then (Rabkin-Naicker J) handed down judgment on 13 July 2017. It ordered the appellant to make payment of the salaries for April 2017 to the respondent within five days. Despite not discussing the counter-application in its judgment, or making any order in relation to it, the court ordered the appellant to pay the costs of the counter-application and made no order as to the alleged contempt or costs in the application. The appellant has appealed against this decision under case number JA 134/2017.

[51] The order directing the appellant to pay the respondent the amount of R3 208 307 is an appealable order if only because it is an order seeking to enforce an erroneously granted interim execution order. But the appeal should succeed on a more fundamental ground. The application was incompetent in that orders *ad pecuniam solvendam* must be enforced by writ of execution. Applications to obtain a court order to enforce an earlier court order sounding in money are not competent in our law. Contempt proceedings are appropriate only in respect of orders *ad factum praestandum*.[9] Accordingly, even if the order of the court *a quo* were considered to be an interlocutory order, as the respondent submits, it would be appealable in the interests of justice. The constitutional prescripts of legality and the rule of law demand that nobody, not even a court of law, exercises powers they do not have, and thus improperly obtained interlocutory orders are appealable.[10] In the premises, the appeal under case number JA 134/2017 must be upheld.

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[8] RTMC has complied with paragraph 63.2 since June 2017 subsequent to a further order by Saloojee AJ handed down on 2 June 2017 directing it to do so.
[9] *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd & others* 2006 (5) SA 333 (W) at 344-345.
[10] *Tshwane City v Afriforum and Another* 2016 (6) SA 279 (CC) para 41

Leave to adduce additional and new evidence

[52] On 9 March 2018, the appellant petitioned for leave to adduce additional and new evidence concerning the order to pay bonuses. The appellant seeks an order setting aside paragraph 63.2.2 and replacing it with an order requiring payment on an annual basis of the specified additional amounts, but excluding the annual bonus as set forth in the schedule. The basis of the application is that the evidence will establish that the bonuses were *ex gratia* payments which were discretionary and that the employees were not entitled to such payments at all or on an interim basis pending this appeal. Considering our finding that the order in paragraph 63.2 was erroneous in its entirety the application has become moot and of no practical effect. The application under case number JA 28/2018 should therefore be dismissed.

Costs

[53] Finally, with regard to the issue of costs, notwithstanding the fact that this Court has dismissed the appeal in respect of s197 transfer, the arguments presented by the appellant were novel and deserving of consideration. In the circumstances, it is only appropriate that no order as to costs be made in case number JA77/2017.

[54] With regard to case numbers JA78/2017, the respondent's insistence that monies be paid by the appellant in respect of wages and salaries knowing that the basis of that order was subject to appeal with the Court which granted the order itself expressing the view that another court may well find differently and the fact that if payment is made by the appellant which was in excess of R3million a month and the appeal is successful there was no guarantee that the appellant would recover the monies paid, there is no basis why costs here should not follow the result.

[55] With regard to enforcement there was simply no bases to launch the application under case number 134/17 as the respondent could and should have simply issued a writ of execution. In the circumstances costs in this matter must follow the result.

[56] In case number JA28/2018, the appellant sought leave to lead further evidence, this issue did not require a decision to be made by this Court because the issue is moot, but again this was a matter which but for the upholding of the appeal in JA78/2017 might have been of same merit. The fact that the respondent seeks to oppose the application on spurious grounds and decided to file its answer in thematic style rather than answering the allegations *in seriatim* as is required does not justify an order of costs in its favour, we believe that they should be no order as to costs in this matter.

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

1 Case number: JA77/2017

The appeal in respect to paragraph 63.1 of the order of the Labour Court is dismissed with no order as to costs, save that the effective date of the transfer of the employee's contracts is amended from 05 April 2017 to 23 June 2015.

2 Case number: JA78/2017

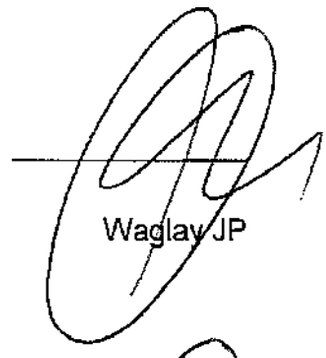
The appeal in respect of paragraph 63.2 of the order of the Labour Court is upheld with costs.

3 Case number: JA134/2017

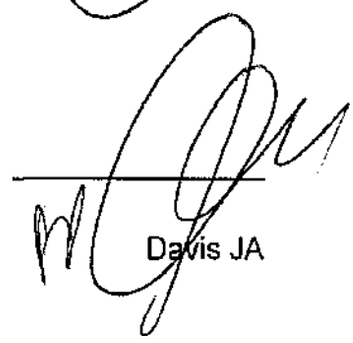
The appeal is upheld with costs.

4 Case number: JA28/2018

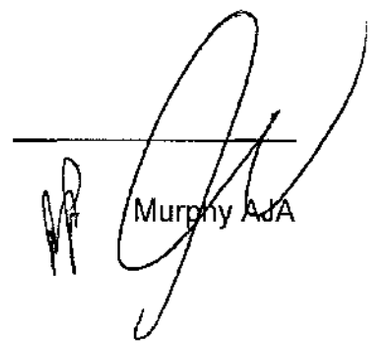
Application to lead further evidence is dismissed with no order as to costs.



Waglay JP



Davis JA



Murphy AJA

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