

SOUTH AFRICA / JUDGMENT

Mphephu and Another v Mashau and Another (HCAA15/2019) [2019] ZALMPPHC 42 (23 August 2019)

[2019] ZALMPPHC 42

COURT

Limpopo High Court, Polokwane

BEFORE

Makgoba, Lamminga, Kganyago

CASE / FILE NUMBER

HCAA15/2019

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REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

DMSION, POLOKWANE)

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/

(3)

REVISED.

CASE NO: HCAA15/2019

23/8/2019

In

the matter between:

MPHEPHU
MATODZI ROBERT
FIRST APPELLANT
MALULEKE
NYUMANI NOBRIDE
SECOND APPELLANT
and
MASHAU
PFUNZO LAWRENCE
FIRST RESPONDENT
VHEMBE
FM
NPC
SECOND RESPONDENT

JUDGMENT

MAKGOBA JP

- [1] This is an appeal against the judgment and order of a single Judge of the Limpopo Local Division, Thohoyandou (Makhafola J) granting the Respondents an order in terms of section 18 of the Superior Courts Act 10 of 2013, putting into operation and execution a Court order pending the outcome of the Applicants / Appellants application for leave to appeal. The Appellants approached the Full Court after the Court a quo had refused their application for leave to appeal and have therefore exercised their automatic right of appeal in terms section 18(4)(ii) of the Superior Courts Act 10 of 2013.
- [2] On 26 June 2019 the First Respondent was dismissed from his employment as the station manager of the Second Respondent. Aggrieved by such dismissal the First Respondent launched an application for reinstatement which application was granted by the Court a quo on the 7 July 2019. The Appellants herein filed an application for leave to appeal against the aforesaid order on 8 July 2019. On the 18 July 2019 the Respondents filed an application in terms of section 18 of the Superior Courts Act, 2013. The Court a quo granted the Respondents' application on 23 July 2019 thus putting into operation and execution the order granted on 7 July 2019. Aggrieved by the aforesaid order the Appellants noted the present appeal in terms of section 18(4)(ii) of the Superior Courts Act, 2013.
- [3] Section 18 of the Superior Courts Act reads as follows:
- "Suspension of decision pending appeal
- (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) 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.
- (5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules."
- [4] Subsections 18(1) and (3) of the Act in essence provide for a twofold enquiry in that the following requirements must be met before an order appealed against can be put into operation pending the outcome of the appeal:
 - 1. First, whether or not exceptional circumstances exist and
 - 2. Second, proof on a balance of probabilities by the Applicant of
 - 2.1. The presence of irreparable harm to the applicants / victor, who wants to put into operation and execute the order; and
 - 2.2. The absence of irreparable harm to the respondent / loser, who seeks leave to appeal[1].
- [5] The test to be applied by a Court in deciding whether or not to suspend a Court order by virtue of the provisions of section 18(1) (and the observe situation arising from section 18(2)) has been the subject of a fair amount of judicial scrutiny. In particular, there have been conflicting decisions with regard to whether or not the Court ought to take into account the question of prospects of success on appeal. The latter question, and the test itself, has been settled by the Supreme Court of Appeal in the matter of *University of The Free State v Afriforum*[2]. In that matter the appeal Court found that the Legislature has proceeded from established premise of the common law that the granting of relief of this nature constitutes an extraordinary deviation from the norm that, pending an appeal, a judgment and its attendant orders are suspended. The exceptionality of such an order is also underscored by the requirements of section 18(4) which provides for, inter alia, an automatic right of appeal

on an urgent basis. The appeal Court also found that the requirements introduced by section 18(1) and (3) are more onerous than the common law requirements which existed previously and that section 18(3) has introduced

“a higher threshold, namely proof on a balance of probabilities that the Applicant will suffer irreparable harm if the order is not granted, and conversely that the Respondent will not if the order is granted”[3].

- [6] In *Afriforum*, supra, the Court found that prospects of success in the pending appeal ought to play a role in the consideration as to whether or not to grant such an order. In doing so, the appeal Court confirmed a dictum by Binns Ward J in the case of *Minister of Social Development Western Cape and Others v Justice Alliance of South Africa and Another*[4] as follows: "The less sanguine a Court seized of an application in terms of s 18(3) is about the prospects of the judgment at first instance being upheld on appeal, the less inclined it will be to grant the exceptional remedy of execution of that Judgment pending the appeal. The same quite obviously applies in respect of a Court dealing with an appeal against an order granted in terms of s 18(3)."
- [7] Whether or not exceptional circumstances for the purpose of section 18(1) are present, must necessarily depend on the peculiar facts of each case.

In *Incubeta Holdings (Pty) Ltd v Ellis*[5] at paragraph 22 Sutherland J put it as follows:

"Necessarily, in my view, exceptionality must be factspecific. The circumstances which are or may be 'exceptional' must be derived from the actual predicaments in which the given litigants find themselves".

We agree and wish to add that in evaluating the circumstances relied upon by an, Applicant, a Court should bear in mind that what is sought is an extraordinary deviation from the norm, which, in turn, requires the existence of truly exceptional circumstances to justify the deviation.

Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion, their existence or otherwise is a matter of fact which the Court must decide accordingly.

- [8] It is now trite that the prospects of success in the pending appeal plays a role in the consideration as to whether or not to grant an order in terms of section 18 of the Superior Courts Act, 2013. The Court hearing an application in terms of section 18 or an appeal arising from such order is enjoined to peruse and consider the judgment sought to be appeal against. In the present appeal it will be the judgment of the Court a quo delivered on the 7 July 2019.
- [9] It is common cause that the Appellants in the present appeal failed and / or neglected to file of record the judgment of the Court a quo sought to be appealed against. It is against this backdrop that Mr Mokotedi, Counsel for the Respondents argued and submitted that the appeal record is incomplete without the judgment of the Court a quo which is sought to be appealed against. Mr Mokotedi submitted further that the present appeal was lodged

prematurely and with an incomplete record. He prayed that the appeal be struck from the roll with costs. We agree.

- [10] As matters stand, this Court is not in a position to consider or assess the prospects of success in the section 18 appeal without having regard to the judgment of the Court a quo delivered on the 7 July 2019. The Court record before us is incomplete for appeal purpose.
- [11] With this defect in the appeal record, it is not necessary to go into the merits of the appeal with regard to the existence of exceptional circumstances and irreparable harm on the part of any of the parties to this appeal.
- [12] Before concluding this matter, it is appropriate to deal with one aspect which is rather worrisome to say the least. This is a point in limine raised by the Respondents in their heads of argument. The Respondents raised a point that the Limpopo Division, Polokwane has no jurisdiction to hear appeals from the Limpopo Local Division, Thohoyandou. At the start of the proceedings during the hearing of this matter the provisions of section 6(4) of the Superior Courts Act, 2013 were read to the parties by the presiding Judge. Thankfully, Mr Mokotedi, for the Respondents did not pursue the point in limine raised in the heads of argument filed by the Respondents' attorney. It needs to be put on record that the heads of argument were not drawn up by Mr Mokotedi.
- [13] For what it may be worth, we hereby state the provisions of section 6(4) of the Superior Courts Act, 2013 which read as follows:
- "(4) If a Division has one or more seats
- (a) the main seat of that Division has concurrent appeal jurisdiction over the area of jurisdiction of any local seat of that Division, and the Judge President of the Division may direct that an appeal against a decision of a single Judge or a Magistrates' Court within that area of jurisdiction may be heard at the main seat of the Division;
 - (b) the Judge President of that Division must compile a single Court roll for that Division; and
 - (c) the Judge President of that Division may assign all the Judges of that Division within the Division as he or she deems fit."
- [14] The provisions of section 6(4) of the Superior Courts Act are crystal clear. In any event our Local Division at Thohoyandou has only three Judges. Once an appeal is lodged against the judgment of any of them, the remaining two Judges will not be able to constitute a Full Court for purposes of an appeal. We trust that this issue is clarified once and for all even to those who are still with stereotyped minds of the old order.
- [15] The following order is made:
1. The appeal is struck from the roll.

2. The Appellants are to pay the costs of the appeal jointly and severally, the one paying the other to be absolved.

E M MAKGOBA

JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE

I agree

A LAMMINGA

ACTING JUDGE OF THE HIGH
COURT, LIMPOPO DIVISION,
POLOKWANE
KGANYAGO J

I have had the benefit of reading the judgment of the majority prepared by Makgoba JP. I agree with the reasoning of the judgment and order. However, I do not agree with the last statement in paragraph 14 of the judgment which read as follows:

“We trust that this issue is clarified once and for all even to those who are still with stereotyped minds of the old order.”

In my view, this statement is unnecessary and was also not an issue before us. Except for what I have stated, I will concur with the judgment and order of the majority.

MF HGANYANGO

JUDGE OF THE HIGH COURT,
DIVISION POLOKWANE

APPEARANCES

Heard on

: 16 August 2019

Judgment

delivered on

: 23 August 2019

For the Appellants

: Adv. N T Themeli

Instructed by

: Tshitangano Attorneys

c/o M M Maiwashe Attorneys

For the Respondents

: Adv.KM Mokotedi

Instructed by

: V M Netshipale Attorneys

c/o D S Sello Attorneys

[1] Incubeta Holdings (Pty) Ltd v Ellis 2014 (3) SA 189 (GJ) para 16 and Ntlemeza v Helen Suzman Foundation and Another [2017] 3 ALLSA 589 (SCA) at para 35; 2017 (5) SA 40 2 (SCA) at para 3536.

[2] 2018 (3) SA 428 (SCA) paragraphs 9 15

[3] UFS v Afriforum (supra) paragraphs 9 10

[4]

[2016] ZAWCHC 34

[5] 2014 (3) SA 189 (GJ) at paragraph 22

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