IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

10/11/2016

CASE NO:89657/2014
A464/16

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

12/11/2016 ..... SIGNATURE
DATE

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL FOR CO-OPERATIVE GOVERNANCE, HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS (COGHSTA)	**1ST APPELLANT**
THAPELO MATLALA	**2ND APPELLANT**
TLHALEFI ANDRIES MASHAMAITE	**3RD APPELLANT**
L.D LANGA	**4TH APPELLANT**
N.S MONTANE	**5TH APPELLANT**
M.A TSEBE	**6TH APPELLANT**
M.R LEBELO	**7TH APPELLANT**
VAALTYN KEKANA	**8TH APPELLANT**
SANNY TLHAKU	**9TH APPELLANT**
SAMUEL MATHEBULA	**10TH APPELLANT**
LESIBA JACOB MASHALA	**11TH APPELLANT**
LESIBA JACKSON MATHABATE	**12TH APPELLANT**
RAMASELA LINAH MAHLAELA	**13TH APPELLANT**
MOKGAETI FRANCINA MUTSHIMYA	**14TH APPELLANT**
RAMOKONE MINKY MOLEKOA	**15TH APPELLANT**
DAVID MAGONGOA	**16TH APPELLANT**

LESTJA CHARLES KGANYAGO	17TH APPELLANT
MONICCA SENOAMADI	18TH APPELLANT
ERNEST RAMTHUPA	19TH APPELLANT
NELSON NGWETJANA	20TH APPELLANT
NAKEDI MABULA	21ST APPELLANT
NELLY MONENE	22ND APPELLANT
LESIBA JAIRUS LEBELO	23RD APPELLANT
L.G LEGODI	24TH APPELLANT
EMILY MANGANYI	25TH APPELLANT
LEBOGANG BRENDA MOKGOTHO	26TH APPELLANT
MAPHUTI REHAD LEBELO	27TH APPELLANT
MAMMA MILOANE	28TH APPELLANT
ENOCK MANAMELA	29TH APPELLANT
LAWRENCE SOMO	30TH APPELLANT
RAISIBE ANDRINA MATSAMELA	31ST APPELLANT
ZUNAID SURTEE	32ND APPELLANT
MANKOPANE MICHAEL RAPATSA	33RD APPELLANT
MALESELA FRANS MOKWELE	34TH APPELLANT
LESETJA PHILLEMON ERIC GWANGWA	35TH APPELLANT
MAHLODI JOSEPHINE MADIBA	36TH APPELLANT
MADIBANA CATHY LENTSOANE	37TH APPELLANT
MAPULA SHIRLEY TEFU	38TH APPELLANT
MANKALE SOLOMON MOLABA	39TH APPELLANT
P.P SELEPE	40TH APPELLANT
MINISTER OF POLICE	41ST APPELLANT
NATIONAL COMMISSIONER OF SOUTH AFRICAN POLICE SERVICE	42ND APPELLANT
PROVINCIAL COMMISSIONER OF POLICE SERVICE, LIMPOPO PROVINCE	43RD APPELLANT
STATION COMMISSIONER, SOUTH AFRICAN POLICE SERVICE, MOKOPANE, COL. MOGWANENG	44TH APPELLANT
Vs	
MOGALAKWENA MUNICIPALITY	FIRST RESPONDENT
SHELLA WILLIAM KEKANA	SECOND RESPONDENT

JUDGMENT

RANCHOD J:

[1] In this matter the second respondent Mr Shella William Kekana (Mr Kekana) applied in the Court *a quo* for an order that he be reinstated as the Municipal Manager of the Mogalakwena Local Municipality (the first respondent). He alleged that he had been unlawfully ousted from the position by the appellants. The court *a quo* (per Hiemstra AJ) granted the order on 1 April 2016. (I shall refer to that application as the 'main application'). It is not necessary for the purposes of this judgment to deal with the facts in the main application in any detail as it is presently the subject of an appeal in the Supreme Court of Appeal – leave to appeal having been granted by the court *a quo*. There is some dispute about who the appellants are. But it is something to be determined, if necessary, in the appeal in the main application. I shall refer to the appellants who appeared before the court *a quo*.

[2] The effect of granting leave to appeal in the main application is that the order granted became suspended in terms of s18(1)[1] of the Superior Courts Act 10 of 2013 (the Act) which came into operation on 23 August, 2013.

[3] Mr Kekana therefore applied for an order in terms of s 18(1) that the order granted in the main application be executed pending the appeal. The court *a quo* granted the order on 8 July 2016.

[4] On the same day the 2nd to 38th appellants served a notice of appeal in terms of s 18(4) of the Act on the attorneys of the respondents indicating that they are appealing against the order to the Supreme Court of Appeal (the SCA). The effect was that the enforcement order

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[1] Section 18(1) provides:
'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.'

granted in terms of s18(1) became suspended in accordance with s18(4)(iv)[2].

[5] On 12 July 2016 the respondents' attorneys addressed a letter to the Registrar of the SCA submitting that the notice of appeal is fatally defective in that the "next highest court" referred to in s18(4)(ii)[3] of the Act refers (in this instance) to the full Court of the Gauteng Division of the High Court and not the SCA. It was further contended that the appellants deliberately filed the notice of appeal in the SCA in order to further delay the operation of the order granted on 1 April 2016 in the main application.

[6] In reaction to the letter, the attorneys of the 2nd to 38th appellants also wrote to the Registrar of the SCA in which they submitted that the SCA had a discretion and the jurisdiction to deal with the s18(4) appeal. Further, that it would be convenient for the latter appeal to be dealt with by the SCA as it will in any event be hearing the appeal in the main application.

[7] The Registrar of the SCA responded in a letter dated 20 June 2016 as follows:

'I acknowledge receipt of your letter of 14 July 2016 which was referred to the Acting President for his attention. He has asked me to respond thereto as follows:

1 In the Ntlemeza matter the court never had the opportunity to consider the meaning of the expression 'next highest court of appeal' contemplated in section 18 of the Superior Courts Act.

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[2] Section 18(4)(iv) provides

"such order will be automatically suspended, pending the outcome of such appeal."

[3] Section 18(4)(ii) provides-

"the aggrieved party has an automatic right of appeal to the next highest court."

2 As things stand now, it appears that the Gauteng Division of the High Court has dealt with at least two such urgent appeals in terms of section 18 ... . The practice in that Division therefore binds the parties until a contrary decision is made, in which event this court will be called upon to settle the issue.
3 In the circumstances, the Acting President directs that the appeal in terms of section 18 be referred to the Gauteng Division to be dealt with by the Full Court.'

[8] This court invited the parties to make submissions on the meaning of the expression 'next highest court of appeal'. The parties provided written heads of argument for which we are grateful. Counsel for first appellant and counsel for the second respondent were both of the view that the Full Court of a Division of the High Court was the 'next highest court' for the purpose of an appeal in terms of s18. Counsel for the rest of the appellants, Mr Mokhari SC, argued in the written heads that the next highest court would be the SCA. However, during the hearing of the appeal he aligned himself with the view of the other two counsel.

[9] The starting point in construing any piece of legislation or a section or phrase thereof is the text itself, read in the context of the statute and its subject. The so-called 'golden rule' of statutory construction was stated in *Venter v R*[4] to be the ascertaining of the intention of the legislature. This was to be done by taking-
'... the language of the instrument, or of the relevant portion of the instrument, as a whole; and, when the words are clear and unambiguous, to place upon them their grammatical construction and give them their ordinary effect.'

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[4] 1907 TS 910 at 913.

[10] Under certain circumstances it would, however be permissible to depart from the ordinary meaning of the words:[5]

'when to give the plain words of the statute their ordinary meaning would lead to absurdity so glaring that it could never have been contemplated by the legislature or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the Court is justified in taking into account. The Court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true intention of the legislature.'[6]

[11] The context of the phrase 'the next highest court" is to be found in sections 16(1)(a) and (b) as well as section 17(6)(a) which set out the relevant hierarchy of courts of appeal.

[12] Section 16(1)(a) and (b) of the Act provide:

"Subject to section 15 (1)[7], the Constitution and any other law-

a) an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted-

i) if the court consisted of *a single judge, either to the Supreme Court of Appeal or to a full court of that Division, depending on the direction issued in terms of section 17 (6)*; or

ii) if the court consisted *of more than one judge, to the Supreme Court of Appeal*;

b) an appeal against any decision of a Division *on appeal to it, lies to the Supreme Court of Appeal upon special leave* having been granted by the Supreme Court of Appeal;" (My emphasis).

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[5] Venter v R at 914-915.

[6] See also Natal Joint Municipal Pension Fund v Endumeni Municipality 2012(4) SA 593 (SCA) at para [18] and [19] for a more recent exposition on the rules of interpretation.

[7] The provisions of section 15(1) are not applicable *in casu* as they refer to referral of an order of constitutional invalidity to the Constitutional Court.

[13] Section 17(6)(a) of the Act provides:

"If leave is granted under subsection (2) (a) or (b) to appeal against a decision of a Division as a court of first instance consisting of *a single judge*, the judge or judges granting leave *must direct that the appeal be heard by a full court of that Division*, *unless* they consider-

(i) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or

(ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision, in which case they must direct that the appeal be heard by the Supreme Court of Appeal." (My emphasis).

[14] The corresponding provisions of the Act's predecessor, the Supreme Court Act 59 of 1959 (the previous Act), form part of the circumstances attendant upon the coming into existence of the Act[8] and must also be taken into account. In *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd*[9] it is stated that section 20(2) of the previous Act[10] makes it clear that the primary court of appeal from a single judge of the High Court lies to the Full Court unless questions of law or fact or other considerations involved dictate that the matter should be decided by the SCA, allowing for a deviation from the norm. The provisions regarding the court to which leave to appeal must be granted from a single judge

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[8] Natal Joint Municipal Pension Fund v Endumeni Municipality *supra* para [18].

[9] 2007 (6) SA 620 (SCA) at para [24]

[10] "(2)(a) If leave is granted under subsection (4) (b) to appeal against a judgment or order, in any civil proceedings, of a court constituted before a single judge, the court against whose judgment or order the appeal is to be made or the appellate division, according to whether leave is granted by that court or the appellate division, shall direct that the appeal be heard by a full court, unless it is satisfied that the questions of law and of fact and the other considerations involved in the appeal are of such a nature that the appeal requires the attention of the appellate division, in which case it shall be directed that the appeal be heard by the appellate division."

are effectively the same in section 20(2) of the previous Act and section 17(6)(a) of the Act and as a result the principle stated in *MTN Service Provider* is in my view still applicable.

[15] As was the case in *MTN Service Provider* the inappropriate granting of leave to appeal to the SCA was deprecated in *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others*[11] as well as *Swart v Heine*[12]. It can safely be assumed that when formulating sections 17(6)(a) and 18(4)(ii) this approach formed part of the material known to the legislature as is clear from the use of the words "must" and "unless" in the introductory part of Section 17(6)(a). This is a further indication that the intention of the legislature is that in the event of an appeal against a decision of a single judge "the next highest court" is the Full Court regard being had to the default position which may be changed when the circumstances in sub-sections 17(6)(a)(i) and (ii) prevail.

[16] Both the Act and the previous Act are silent regarding instances where a party has an automatic right of appeal except as provided for in section 18(4)(ii). It is apparent that in the case of an automatic right of appeal, regard being had to the provisions, there is no mechanism to change the default position. There is therefore logically no reason for differentiating between the position regarding an automatic right to

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[11] 2003(5) SA 354 (SCA) at para [23].
"The inappropriate granting of leave to appeal to this Court increases the litigants' costs and results in cases involving greater difficulty and which are truly deserving of the attention of this Court having to compete for a place on the Court's roll with a case which is not."

[12] Unreported, SCA case no 192/15 dated 14 March 2016 at para [13].
"[13] There is a further disconcerting aspect to this appeal. The issues in this appeal are simple and straightforward and do not involve complicated or complex issues of law. This is a case where leave to appeal should not have been granted at all. Why the court a quo thought this appeal deserves the attention of this court is not explained. This court has repeatedly bemoaned the fact that unworthy appeals are referred to it, with the result that more deserving and meritorious appeals are either delayed or lose their places in the roll. (See Shoprite Checkers Pty Ltd v Bumper 2003 (5) SA 534 (SCA); S v Monyane & others 2008 (1) SACR 543 (SCA).) Leave to appeal should not be granted where there is no reasonable prospect of success on appeal, or no compelling reason why an appeal should be heard — s 17(1)(a) of the Superior Courts Act 10 of 2013."

appeal and where leave to appeal is required. The context of section 18(4) dictates that the appeal must follow the default route, i.e. from a single judge to a Full Court of the same Division as required by section 17(6)(a), being the next highest court.

[17] In both *Coetzer v Actom (Pty) Ltd* (Unreported judgment of this Division, case no A269/2015) and *Liviero Wilge Joint Venture v Eskom Holdings SoC Ltd* (Unreported judgment of the Gauteng Local Division, case no 17321/2014) the question whether the Full Court of the Division was the correct court of appeal was not raised. In my view in both cases it was correctly accepted that the Full Court was the correct forum.

[18] It seems to me it would logically follow that in the event of an order in terms of s18(1) to put into operation the decision of a court constituted of more than one Judge an automatic right to appeal lies to the SCA - being the next highest court.

[19] Finally on this issue, in terms of s18(4), where a court has decided in favour of interim enforcement pending an appeal, an aggrieved party has a further and final opportunity by way of appeal (as is the case before us) to challenge interim enforcement of the order and retain the default position of suspension of the order pending an appeal.

[20] There is one aspect that deserves comment before I turn to the merits of this appeal. The terms 'Full Bench' and 'Full Court' are often used by parties interchangeably. Section 1 of the Act provides-

" 'full court' in relation to any Division, means a Court consisting of three judges; "

and

" 'Division' means any Division of the High Court".

[21] It follows that a court of a Division consisting of two judges is a 'full bench' and a Court consisting of three judges is a Full Court.

[22] I turn then to the merits of the appeal before us.

[23] The crisp issue to be determined is whether the court *a quo* was correct in granting an order in terms of s18(1) of the Act which has had the effect of re-instating the order it granted in the main application after it was automatically suspended when the appellants applied for leave to appeal the order in terms of s18(4) of the Act. Now that the present appeal has been launched against the order granted in terms of s18(1) of the Act the order in the main application has once again become suspended.

[24] Sub-sections 18(1) (footnote 1 *supra*) and (3)[13] of the Act in essence provide for a two-fold 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. Firstly, exceptional circumstances must exist;
2. Secondly, proof, on a balance of probabilities, by the applicant;
    - 2.1 that the applicant will suffer irreparable harm if the order is not put into operation; and
    - 2.2 that the other party will not suffer irreparable harm if the order is put into operation.

[25] Mr Kekana contended that exceptional circumstances existed in that his contract as municipal manager expires on 3 August, 2017 and it

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[13] Sub-section 18(3) provides:

> '(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.'

is highly improbable that the appeal in the main application would be finalised in the SCA before that date. The court *a quo* said:

> '7 Whether the circumstances of the foreseen duration of the appeal process constitutes an exceptional circumstance, was answered in *Incubeta Holdings (Pty) Ltd v Ellis [2014(3) SA 189 (GJ)]* where Sutherland J said in paragraph 27:
>
> 'Do these circumstances give rise to 'exceptionality' as contemplated? In my view the predicament of being left with no relief, regardless of the outcome of an appeal, constitutes exceptional circumstances which warrant a consideration of putting the order into operation. The forfeiture of substantive relief because of procedural delays, even if not protracted in bad faith by a litigant, ought to be sufficient to cross the threshold of 'exceptional circumstances'.
>
> 8 I therefore find that exceptional circumstances exist, which may justify the implementation of the order.'

[26] I respectfully agree with the court *a quo's* finding that exceptional circumstances do exist. However, that is not the end of the enquiry, which the court *a quo* also recognised. It dealt firstly at some length with the issue of irreparable harm to the Municipality. I do not think I need concern myself with that aspect as the issue whether Mr Kekana had the requisite authority to act on behalf of the Municipality is also an issue to be determined in the appeal in the main application.

[27] Insofar as irreparable harm to Mr Kekana is concerned, the court *a quo* said it had 'dealt with the harm that Mr Kekana would suffer if the orders are not put into operation under the heading "Exceptional Circumstances". He was victorious in the application and should not be deprived of the benefits of the order by the slow grinding of the judicial mill.'

[28] It seems that the court *a quo* conflated the requirements for exceptional circumstances with that of irreparable harm to Mr Kekana. It stated under 'exceptional circumstances' what Mr Kekana averred was the irreparable harm to him without expressly finding that his averments were correct. Insofar as it may be inferred that the court *a quo* impliedly made such a finding it seems to be based on Mr Kekana's submission that should he succeed in defeating the appeal in the main application an order for his re-instatement as municipal manager will be academic as his contract would have expired by then.

[29] Mr Kekana submitted that he is suffering financial loss as a result of the suspension of his re-instatement as municipal manager. He is unable to service the mortgage bond on his residential property as a result of which he risks losing it; he is unable to continue paying for his child or children's education fees, etc. While one has empathy for his predicament, that is an almost inevitable consequence of instances of alleged unlawful termination of employment until the dispute is resolved.

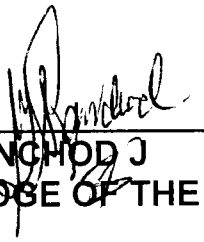
[30] The appellants contend that Mr Kekana will not suffer irreparable harm as he has a claim for damages against the Municipality for any loss he may suffer, if he defeats the appeal in the main application. There is merit in this submission.

[31] It appears that the court *a quo* did not pertinently deal with the issue of irreparable harm to the appellants. The wording of sub-section (3) stipulates that not only must the court find exceptional circumstances but 'in addition' make a finding (on a balance of probabilities) whether the party who applied for the enforcement of the order pending the appeal will suffer irreparable harm 'and' whether the other party will not suffer irreparable harm.

[32] Mr Kekana has not demonstrated that the appellants will not suffer irreparable harm. If the appellants were to ultimately succeed in the appeal in the main application the probabilities are that his employer will not be able to recover any monies paid to him from the time of his re-instatement as Municipal Manager.

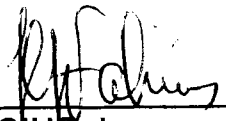
[33] In the result I propose the following order:

1. The appeal succeeds with costs.
2. The order of the court *a quo* is set aside and replaced with the following order:
   'The application is dismissed with costs.'



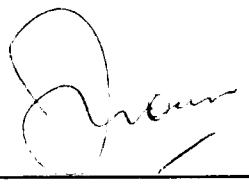
RANCHOD J
JUDGE OF THE HIGH COURT

I AGREE



FABRICIUS J
JUDGE OF THE HIGH COURT

I AGREE



J.W LOUW
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of First Appellant	: Adv T. Ngcukaitobi
Instructed by	: State Attorney
Counsel on behalf of 2nd – 37th Appellant:	Adv W.R. Mokhari (SC)
	Adv K.T. Mokhatla
Instructed by	: Hogan Lovells (SA) Inc
Counsel on behalf of 2nd Respondent	: Adv J.H Dreyer (SC)
	Adv J.A.L. Pretorius
Instructed by	: Mohale Inc.
Date heard	: 23 September 2016
Date delivered	: 10 November 2016