IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: C616/2019

In the matter between:

THE MINISTER FOR LOCAL GOVERNMENT,
ENVIROMENTAL AFFIARIS & DEVELOPMENT PLANNING
WESTERN CAPE PROVINCIAL GOVERNMENT **Applicant**

And

THE BITOU MUNICIPALITY **First Respondent**

LONWABO MINIAWA RONALD NGOQO **Second Respondent**

PLETTENBERG BAY RATEPAYERS AND
RESIDENTS ASSOCIATION **Amicus Curiae**

Date heard: 20 November 2019

Delivered: 26 November 2019

Summary: Application in terms of Section 18 of the Superior Courts Act 10 of 2013

JUDGMENT

RABKIN-NAICKER, J

[1] This is an application in terms of section 18 of the Superior Courts Act 10 of 2013 ('the Act') for execution and operation of the order of Nieuwouldt AJ under the above case number which was delivered on the 13 August 2019. The Order reads as follows:

> "1. The settlement agreement entered into between the first respondent and the fourth respondent on or about 21 February 2019 is reviewed and set aside.
>
> 2. The appointment of the fourth respondent[1] by the first respondent on or about 21 February 2019 is reviewed and set aside.
>
> 3. The further application to strike out by the first respondent is refused.
>
> 4. The first respondent is ordered to pay the applicant's costs, inclusive of costs of two counsel, save for the costs occasioned by the portions of the papers of the applicant that had been struck our and the response thereto."

[2] On the 9 October 2019, leave to appeal was granted. A key issue on appeal is set to be whether the decision of Judge Lallie on 24 October 2014 in C1019/12 is a decision *in rem*.

[3] Certain clauses of the settlement agreement are recorded hereunder for the reason that they provide background to the main application:

"1.1 The Third Respondent (hereinafter the 'Employee'), was employed by the Applicant (hereinafter 'the Employer'), as its Municipal Manager until his dismissal on 6 February 2012;

[1] Second Respondent in this application

1.2 The Employee referred his dismissal for arbitration to the South African Local Government Bargaining Council (the 'SALGBC'), under case number WCP031205 (the 'arbitration');

1.3 On 22 October 2012, the Second Respondent (the 'Commissioner'), handed down an arbitration award, setting aside the Employee's dismissal as procedurally and substantively unfair, and ordering reinstatement and compensation (the 'arbitration award');

1.4 On review in the Labour Court under the above case number ('the review application'), the Honourable Ms. Justice Lallie granted the Employer's application in a judgement dated 29 November 2014, setting aside the arbitration award and remitting the matter to the SALGBC;

1.5 The employee lodged an application for leave to appeal against the aforesaid judgment and order of Lallie J, which application is pending as at the date of signature of this agreement ('the application for leave to appeal');

1.6 Notwithstanding the order of Lallie J, the parties herewith agree to settle their dispute on the terms and conditions set forth below.

2. Abandonment of Lallie J's order

2.1 The Employer hereby abandons the whole of the judgment and order of Lallie J. The Employee's application for leave to appeal is thus redundant.

3. Arbitrator/s award

3.1 The parties accept that the Arbitrator's award made in paragraph 52 is correct. The Employee abandons the award set out in paragraph 53."

The Legal Principles

[4] Section 18 of the Act provides in relevant part 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 suspending pending the decision for leave to appeal 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 on 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 the 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 as is lodged with the registrar in terms of the rules.'

[5] The law to be applied in a section 18 application (and a comparison with the jurisprudence developed in relation to the now repealed Rule 49(11)) was considered in the matter of **Incubeta Holdings (Pty) Ltd v Ellis 2014 (3) SA 189 (GJ)**. In an analysis of the section, Sutherland J stated the following:

"[20] A given phrase in any statutory provision has a function specific to that provision and to that specific statute and the primary aim of the interpreter is to discover the function it performs in that specific context. It may perform a different function in another statute and one must avoid being seduced by beguiling similarities.

[21] The context relevant to s 18 of the SC Act is the set of considerations pertinent to a threshold test to deviate from a default position, i.e. the appeal stays the operation and execution of the order. The realm is that of procedural laws whose policy objectives are to prevent avoidable harm to litigants. The primary rationale for the default position is that finality must await the last court's decision in case the last court decides differently — the reasonable prospect of such an outcome being an essential ingredient of the decision to grant leave in the first place. Where the pending happening is the application for leave itself, the potential outcome in that proceeding, although conceptually distinct from the position after leave is granted, ought for policy reasons to rest on the same footing.

[22] Necessarily, in my view, exceptionality must be fact-specific. The circumstances which are or may be 'exceptional' must be derived from the actual predicaments in which the given litigants find themselves. I am not of the view that one can be sure that any true novelty has been invented by s 18 by the use of the phrase. Although that phrase may not have been employed in the judgments, conceptually the practice as exemplified by the text of rule 49(11), makes the notion of the putting into operation an order in the face of an appeal process a matter which requires particular ad hoc sanction from a court. It is expressly recognised, therefore, as a deviation from the norm, i.e. an outcome warranted only 'exceptionally'……

[24] The second leg of the s 18 test, in my view, does introduce a novel dimension. On the South Cape test, No 4 (cited supra), an even-handed balance is aimed for, best expressed as a balance of convenience or of hardship. In blunt terms, it is asked: who will be worse off if the order is put into operation or is stayed. But s 18(3) seems to require a different approach. The proper meaning of that subsection is that if the loser, who seeks leave to appeal, will suffer irreparable harm, the order must remain stayed, even if the stay will cause the victor irreparable harm too. In addition, if the loser will not suffer irreparable harm, the victor must nevertheless show irreparable harm to itself. A hierarchy of entitlement has been created, absent from the South Cape test. Two distinct findings of fact must now be made, rather than a weighing-up to discern a 'preponderance of equities'. The discretion is indeed absent, in the

sense articulated in South Cape. What remains intriguing, however, is the extent to which even a finding of fact as to irreparable harm is a qualitative decision admitting of some scope for reasonable people to disagree about the presence of the so-called 'fact' of 'irreparability'.

[6] The interpretation set out in the paragraphs above was followed in the matter of **UFS v Afriforum & another [2016] ZASCA 165** in which the SCA considered an appeal in terms of section 18(4)(ii).

[7] In **Incubeta** the application for leave to appeal had yet to be set down. Sutherland J stated that he had made no reference to the 'merits' of the case which resulted in the interdict expressing the view that, "…they are not pertinent to this kind of enquiry. The considerations that are valuable pre-suppose a bona fide application for leave to appeal or an actual appeal. No second guessing about the judgment per se comes into reckoning." The SCA in **Stellenbosch University** stated the following**:**

> "[14] A question that arises in the context of an application under s 18, is whether the prospects of success in the pending appeal should play a role in this analysis. In *Incubeta Holdings* Sutherland J was of the view that the prospects of success in the appeal played no role at all. In *Liviero Wilge Joint Venture* Satchwell J, Moshidi J concurring, was of the same view. However, in *Justice Alliance* Binns-Ward J (Fortuin and Boqwana JJ concurring), was of a different view, namely that the prospects of success in the appeal remain a relevant factor and therefore '. . . 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)'.
>
> [15] I am in agreement with the approach of Binns-Ward J. In fact, *Justice Alliance* serves as a prime example why the prospects of success in the appeal are relevant in deciding whether or not to grant the exceptional relief. Binns-Ward J concluded that the prospects of

> success on appeal were so poor that they ought to have precluded a finding of a sufficient degree of exceptionality to justify an order in terms of s 18 of the Act. This conclusion was subsequently proven to be justified when this court upheld the main appeal in *Justice Alliance*. However, in the present appeal, the appeal record in the review application was not before us. The prospects of success shall therefore not feature in our consideration of whether or not the order of the Full Court should be upheld."

[8] I do not take the above paragraphs in a matter concerning a section 18 (4) (ii) appeal as authority for the proposition that the court of first instance (which this Court is) should take into consideration the prospects of success on appeal. This would mean a second guessing of its own judgment and order granting leave to appeal. In any event as the above paragraphs reflect the SCA did not make its decision in that matter based on a consideration of the prospects of success on appeal, given the absence of the appeal record. I do not therefore take submissions made by the parties on this question into account.

[9] In the founding affidavit, the applicant makes the case that the factual matrix of this matter is exceptional given the re-employment by a local authority of its own former municipal manager, previously dismissed for serious financial misconduct. It submits that what makes it even more exceptional is that such re-employment was combined with a settlement agreement containing novel terms. The applicant further underscores that such an appointment was prohibited by Regulation 18[2] in that the first respondent was forbidden in its terms from occupying such a position for ten years after having been dismissed for financial misconduct.

[10] It is further argued that given the position of Municipal Manager is one that has constitutional obligations to ensure service delivery, and efficient administration of the Municipality, this in itself constitutes exceptional circumstances. The retention of the second respondent in his current position would negate and severely undermine the relief sought in the main application, given that the

[2] Regulations on Appointment and Conditions of Employment of Senior Managers GN21 in GG 37245 (17 January 2014)

purpose of the main application was to ensure that the first respondent complies with the principle of legality. The order of Niewoudt J would be of little value if the appeal was dismissed but the second respondent was permitted to effectively serve the remainder of his contract.

[11] The possible risk to contracting third parties with the first respondent, (for example, to successful tenderers whose contracts with the Municipality may be impugned), based on the unlawful appointment of the second respondent is another issue highlighted by the applicant. It also emphasizes that the appeal process may outlive the second respondent's terms in office.[3]

[12] The applicant further submits that the first respondent will not suffer irreparable harm if the order is immediately implemented. It could appoint another municipal manager, pending the outcome of the appeal. Any possible financial prejudice to the second respondent by his employment being suspended pending the outcome of the appeal can be addressed by appropriate financial compensation in the future. It argues, that on the other hand, if the appeal fails the chances of the ratepayers recovering any salary paid to the second respondent, pending the finalization of the appeal are negligible. Those funds would in all likelihood have been dissipated.

[13] The first respondent submits in answer that the applicant has conflated the alleged factual bases for "exceptional circumstances" and of "irreparable harm". Further, that there is no legal or factual basis for the claim that the court a quo's judgment will give rise to public distrust which in turn would warrant execution of the order pending appeal. It is submitted that there is nothing novel about the settlement agreement.

[14] It is denied that the appointment of a new Municipal Manager would avoid prejudice to the First Respondent given that this would require significant expenditure of human and capital resources in order to screen and select a new candidate. In the event that the appeal is successful the expenditure would

[3] I should note however that there is nothing precluding the applicant requesting the LAC to hear the appeal on an urgent basis in order that the Court a quo's judgment may be confirmed, given that the matter in all its process has been treated urgently by the Labour Court on the applicant's instance.

have been incurred for no good reason. In addition, the first respondent would have to compensate the second respondent in the intervening period. There are a number of averments in the answering affidavit as to the positive role the second respondent is playing since he returned to his role as Municipal Manager in March this year and to the disruption his removal would cause, particularly during the height of the tourist season.

[15] The amicus curiae, the Plettenberg Bay Rate Payers and Residents Association, which represents some 400 rate payers who reside in or who have houses in the Municipality, was given leave to intervene by Gush J on 20 October 2019. Mr. Brassey made submissions on their behalf. These were principally directed at grounds supporting the applicant's prospects of success in the forthcoming appeal hearing. The amicus will be seeking leave to intervene in that hearing.

Evaluation

[16] In the application before me, the essence of the exceptionality and the irreparable harm requirements relied on by the applicant, is one founded on the protection of the principle of legality in the public interest. Specific evidence of alleged irreparable harm is sparse in the founding affidavit. The challenges in obtaining recovery of monies paid in terms of the settlement agreement and monies spent on the salary of the second respondent, appear to be the high water mark of these allegations. Although the harm to ratepayers in this regard is alleged in general terms, there is no specific evidence provided on their behalf in the founding papers.

[17] The applicant's submissions that the Municipality will not suffer irreparable harm if the section 18 application is granted are substantively dealt with in some detail in the answering papers. I find that, on balance of probabilities on the evidence in the papers before me, the applicant has not met its onus in proving exceptional circumstances *and* irreparable harm. In the **Afriforum SCA** judgment (supra), the first section 18 (4) (ii) appeal heard by the SCA, the Court made the following observations:

> "[21] I fail to see how, even if there had been an infringement of rights as contended for, this would constitute exceptional circumstances as

envisaged in s 18(1) of the Act. The mere reliance on the foregoing of the right by the students to exercise a choice does not in itself (ie without proof of any adverse consequences) constitute exceptional circumstances. As submitted on behalf of the UFS, the submission on behalf of Afriforum is conceptually confused because it conflates the deprivation of a right with the adverse consequences flowing therefrom in circumstances where there is no proof at all of such adverse consequences. As recorded earlier, there is simply no evidence of a single individual student intending to exercise this right in the affected faculties or of any adverse consequences which may befall any student until final judgment on appeal. It accordingly follows, in my view ,that Afriforum failed to show the existence of exceptional circumstances justifying relief implementing the order of the Full Court of 21 July 2016 pending the determination of the appeal.

[22] This brings me to the additional requirements for an order of this nature as set out in s 18(3). Firstly, Afriforum was required to prove on a balance of probabilities that the students whose interests it represented would suffer irreparable harm if an order in terms of s 18 was not made. As recorded earlier, Afriforum did not suggest that any actual harm would befall this small number of potential 2017 first-year Afrikaans students. In fact, Afriforum based its argument on the same premise as before, namely that the foregoing of an opportunity or right to be taught in a language of choice per se constitutes irreparable harm. This line of reasoning is, as I have said, conceptually flawed. Infringement of the right per se does not constitute proof of irreparable harm……" (emphasis mine.)

[18] In view of all of the above, the application must fail. Given the content of my judgment above, and based on the submissions of the parties, I consider this a matter in which costs should follow the result.

[19] I make the following order:

Order

1. The application is dismissed with costs, including costs of two counsel.

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: Kahanovitz C (SC) with Williams J instructed by the State Attorney

First Respondent: A. de Vos SC with L. Fereiria instructed by HDRS Attorneys c/o Erasmus Attorneys