REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

DATE 15/4/19 SIGNATURE:

Case No: HCAA04/2019

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **APPELLANT**

AND

MAANO MMBANGISENI MAGOGODELA **RESPONDENT**

JUDGMENT

MULLER J:

[1] This appeal emanates from a judgment by Makhafola J sitting in the Limpopo Local Division, Thohoyandou granting an urgent application by the respondent for the enforcement of a judgment pending the outcome of an application for leave to appeal. The appeal is before us by virtue of the provisions of section 18(4)(ii) of the Superior Courts Act[1]

[2] After having heard argument from counsel appearing on behalf of the appellant an order upholding the appeal with costs was issued due to the urgency of the matter.[2] The court intimated that reasons will follow. These are the reasons.

[3] The important background facts must be recited for a proper understanding of the issues involved.

On 24 August 2018 Makhafola J granted an order against the Appellant in an action which the respondent has instituted against the appellant for malicious prosecution. The order reads as follows:

> "THAT the defendant is to pay the Plaintiff the sum of R4000 000.00 (Four Million Rand)
>
> THAT the defendant is to pay interest on the above amount at the prescribed rate from a date (14) days after the date of judgement to date of payment.
>
> THAT the defendant is ordered to pay psychotherapy future expenses for 8 sessions in the amount of R78 800.00 (Seventy-Eight Hundred)
>
> THAT the defendant is to pay the costs of the trial of 23 August 2018."[3]

[4] The appellant duly served and filed a notice of application for leave to appeal against the judgment. The said notice for application for leave to appeal suspended the

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[1] Act10 of 2013.
[2] There was no appearance on behalf of the respondent despite proper notice.
[3] Hereinafter "the order".

enforcement of the order.[4] When the application was heard, it was struck from the roll as being premature. It is not at all clear why it was held to be premature since that notice of application for leave to appeal was not delivered before the judgment was pronounced, which would have caused the notice of application for leave to appeal to have been premature. It will be assumed for purposes of this judgment that the application was premature in the sense that the record of the proceedings and the judgment appealed against have not been transcribed at the time the application was heard. The upshot of the application for leave to appeal being struck from the roll was that the application for leave to appeal was still pending and the operation of the order still suspended.

[5] The respondent then launched an urgent application for the enforcement of the order which was suspended. In the founding affidavit the respondent boldly stated that he has a *prima facie* right by virtue of the order granted in his favour. He said that the balance of convenience was in his favour as he will suffer prejudice if the order is not executed or enforced, on the one hand, but that the appellant, on the other, will not suffer any prejudice if the application is granted because the order existed and that the appellant does not have any prospects of success on appeal. The respondent further stated that the appellant cannot dispute that it was ordered to pay the respondent and has shown an unwillingness to pay by abusing the process of court by lodging an appeal which caused a well-grounded apprehension of irreparable harm.

[6] The application was opposed by the appellant. The answering affidavit was deposed to by a state attorney who was in charge of the case and practiced at the Thohoyandou office of the state attorney. Several points *in limine* were raised by the deponent in the answering affidavit. Most importantly was the point that the respondent has not satisfied the requirements of section 18 of the Superior Courts Act by failing to

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[4] In terms of the common law rule of practice the execution of a judgement is generally suspended upon noting of an appeal. See *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) 544H-545A. See also s 18(1) of the Superior Courts Act.

demonstrate, in the founding affidavit, that there are exceptional circumstances present for the enforcement of the order.

[7] Section 18(1) and section 18(3) of the Superior Courts Act states:

> "(1) Subject to subsection (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)....
>
> (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."

[8] The purpose of section 18(1) is to bring about certainty pending an appeal. The subsection not only confirms the common law rule but it makes it more onerous. It requires an applicant, in addition, to prove, on a balance of probabilities, that he or she will suffer irreparable harm if the order to enforce the order is not made. In *UFS v Afriforum and Another*[5] the Supreme Court of Appeal explained:

> "It is further apparent that the requirements introduced by ss 18(1) and (3) are more onerous than those of the common law. Apart from the requirement of 'exceptional circumstances' in s 18(1), s 18(3) requires the applicant 'in addition' to prove on a balance of probabilities that he or she 'will' suffer irreparable harm if the order is not made, and that the other party 'will not' suffer irreparable harm if the order is not made. The application of rule 49(11) required a weighing-up of the potentiality irreparable harm or prejudice being sustained by the respective parties and where there was a potentiality of harm or prejudice to both of the parties, a weighing-up of the balance of hardship or convenience, as the case may be, was required. Section 18(3),

[5] [2016] ZASCA 165 (17 November 2016) par 10.

however, 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."

[9] The 'exceptional circumstances' which an applicant is required to prove will, of course, depend on the facts of each case, but must be fact specific and be truly exceptional. A relevant factor, which a court must also consider is the prospects of success on appeal. Put differently, an extraordinary deviation from the norm is required.[6]

[10] There is no doubt that the order issued by the learned Judge at the trial is a final order. It is trite law that an applicant must make out his case in the founding affidavit. The applicant has the burden to prove on a balance of probabilities that exceptional circumstances are present for the order to be enforced. The applicant has set about to prove the requirements for an interim interdict in his founding affidavit. Apart from setting out the common cause facts, no exceptional circumstances has been put forward in terms whereof the court could enforce the order. The applicant only made an averment that the appellant has no prospects of success without any elaboration. The high water mark of his application is the averment that the appellant abused the rules of court by delivering an application for leave to appeal because it is reluctant to pay the respondent the judgment debt. The simple truth is that once the judgment debt is paid and the judgment is later set aside on appeal, the horse would have bolted. The money would have been used. The respondent, as stated before, has not placed an iota of evidence before the court why the order should be enforced immediately.

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[6] *UFS v Afriforum and Another supra* para 13.

[11] This court is unable to comment on the prospects of success as it was neither favoured with the record of the proceedings of the trial nor with an explanation by the applicant what the prospects are. The appellant considered that the award was substantial and should be taken on appeal on the facts and the amount awarded.

[12] The learned Judge on 23 October 2018 granted the application with costs and dismissed all the points *in limine* with costs as being highly technical.[7]

The learned Judge erred and regrettably paid lip service to provisions of section 18(1) and (3). The respondent has failed to adduce any evidence whatsoever to prove, on a balance of probabilities, that there were exceptional circumstances in existence which warranted the enforcement of the order. The court held that the respondent was in need of psychotherapy and that the suspension of the order is prejudicial to him to the extent that it will lead to irreparable harm. The respondent did not rely on that fact for the relief claimed. Nowhere in the affidavit of the respondent is there any suggestion that he was in urgent need of therapy or that he will suffer psychological harm if the therapy is suspended.

[13] The learned Judge also held that the deponent to the answering affidavit has no personal knowledge of the facts and that his affidavit is therefore defective. I do not agree. The deponent is the attorney of record. As such he has personal knowledge of the facts and was able to depose to the affidavit. Even if I am wrong, that the deponent was able to make the affidavit, the fact remained that the respondent has failed to cross the threshold requirement set by section

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[7] It is unnecessary to deal with any of the grounds for urgency or all the points *in limine*.

18(1) and (3) to prove exceptional circumstances. The application ought, for that reason, to have been dismissed with costs.

[14] Subsequent to the application being granted the appellant delivered a notice of appeal to appeal the order to enforce the execution of the judgment in the action in terms of section 18 (4)(ii) which affords the appellant an automatic right of appeal to this court. The appellant also launched an urgent application on 4 December 2018 in terms of rule 45A to suspend the execution of the judgments. The application came before Kgomo J who granted orders suspending the operation and execution of the judgments granted by Makhafola J pending the outcome of the leaves to appeal and subsequent appeals in the High Courts. The court also granted an interdict against the sheriff to stop him from removing the goods attached by him pursuant to the judgment in the action.

[15] This contents of the order granted by Kgomo J is not an impediment to pursue the appeal in this court. The appeal to this court remained unaffected. The appeal is directed at the effect of an order which is subject to an application for leave to appeal or an appeal. The rule 45A application dealt with the suspension of the execution of an order which is not subject to an application for leave to appeal or an appeal.

[16] In the premises I am of the view that the appeal should be upheld.

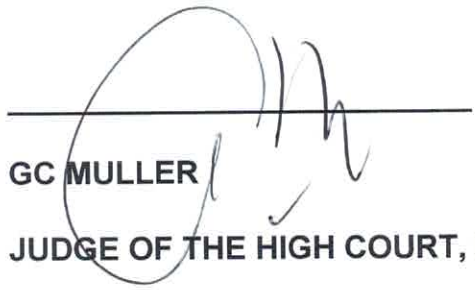
ORDER

1. **The appeal is upheld with costs inclusive of the costs of two counsel.**

2. **(a) The order dated 23 October 2018 directing that the order is**

enforceable pending the outcome of an application for leave to appeal is set aside and replaced with the following order:

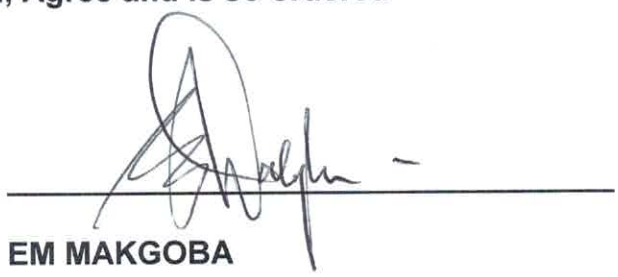
(b) "The application is dismissed with costs."



GC MULLER

JUDGE OF THE HIGH COURT, LIMPOPO DIVISION, POLOKWANE

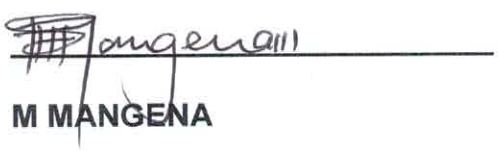
I, Agree and is so ordered



EM MAKGOBA

JUDGE PRESIDENT OF HIGH COURT, LIMPOPO DIVISION, POLOKWANE

I, Agree



M MANGENA

ACTING JUDGE OF THE HIGH COURT, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

APPEARANCES

FOR APPELLANT	:	ADV T.F MATHIBEDI SC
		ADV MADHAVHA
FOR RESPONDENT	:	NO APPEARANCES
DATE OF HEARING	:	29 MARCH 2019
DATE OF JUDGMENT	:	15 APRIL 2019