IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 19871/2015

In the matter between:

OKULI SECURITY SERVICES CC **Applicant**

And

THE CITY OF CAPE TOWN **First Respondent**

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES **Second Respondent**

CASE NO: 19872/2015

In the matter between:

COMWEZI SECURITY SERVICES (PTY) LTD **Applicant**

And

CITY OF CAPE TOWN **First Respondent**

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES **Second Respondent**

CASE NO: 19873/2015

In the matter between:

COMMAND SECURITY SERVICES SA (PTY) LTD **Applicant**

And

THE CITY OF CAPE TOWN **First Respondent**

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES **Second Respondent**

Heard on: 2 August 2016

Coram: Donen AJ

Judgment delivered on: 7 September 2016

JUDGMENT

DONEN AJ

[1.] On 24 June 2016 I made an order in terms whereof certain tax clearance certificates ("TCCs") submitted by the applicants to first respondent ("the City") as part of their bid for a security services tender, and for the purpose of being registered on the City's vendor database were declared to have no status with SARS, and to be fraudulent and invalid *ab initio*. It was further declared that the City had lawfully cancelled its contracts with the applicants for the supply of protection services at various council sites. On the same day the applicants filed a notice of application for leave to appeal against this order in the main application.

[2.] On 15 July 2016, and before the application for leave to appeal had been heard, the City filed an application for an order, in terms of section 18 of the Superior Courts Act, directing that the operation and/or execution of the aforementioned order should not be suspended pending the determination of the applicants' application for leave to appeal and/or petition for leave to appeal, and/or any appeal pursuant to the aforegoing; directing that the City should be entitled to implement and act pursuant to the court orders; and in the event of the applicants failing or refusing to

comply with any of the said orders, authorising the Sheriff and members of the South African Police Services to do whatever may be necessary to enforce compliance with, and implementation of the orders, including to ensure that the applicants and their staff, contractors, equipment, vehicles and/or property, are removed from the sites at which the applicants have been deployed to render security services to the City. (For convenience this is referred to below as the "section 18 application" or "the application to implement".)

[3.] Section 18 of the Superior Courts Act provides as follows:

"***Suspension of decision pending appeal***

(1) Subject to sub-sections (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 an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to sub-section (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 sub-section (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 sub-section (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 sub-sections (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.[1]"

[4.] Prior to the commencement of this section the common law prevailed. This was encapsulated in Rule 49(11) which has been repealed. The Rule provided as follows:

"*Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of court has made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.*"

[5.] The applicants opposed the section 18 application. They also contended, *in limine*, that it would not be competent for me to hear the application because I am not currently an acting judge. I heard the main application by virtue of an acting appointment. The term of my appointment ended on 1 April 2016. I do not presently hold any judicial appointment.

[6.] On 2 August 2016 I heard both the application for leave to appeal and the section 18 application. On 26 August 2016 I dismissed the application for leave to appeal and ordered the applicants to pay costs. As a result the decision of this court in the main application ceased to be "*the subject of*

[1] See *Erasmus: Superior Court Practice 2nd Ed at A2-62.*

an application for leave to appeal or an appeal" as contemplated in section 18(1) of the Superior Courts Act. The jurisdictional requirement for operation of this section and suspension of the decision in the main application fell away. The relief claimed by the City became otiose.

[7.] The issues nevertheless remain as to whether I was competent to entertain the section 18 application, and to make any order in respect thereof, and whether it will be competent for me to adjudicate upon a renewed application should the applicants pursue an appeal by way of petition for leave to appeal to the Supreme Court of Appeal. The latter possibility is contemplated in the City's notice of motion.

[8.] The key provision for purposes of the above enquiry is section 48 of the Act. The section is headed "*Acting judges of Superior Courts*". It provides as follows:

"*Any person who has been appointed as an acting judge of a Superior Court must be regarded as having been appointed also for any period during which he or she is necessarily engaged in the disposal of any proceedings in which he or she has participated as such a judge, including an application for leave to appeal that has not yet been disposed of at the expiry of his or her period of appointment.*"

[9.] Section 48 extends the appointment of an acting judge statutorily until the disposal of any proceedings in which the acting judge is engaged, including an application for leave to appeal that was not yet disposed of at the expiry of the acting judge's initial period of appointment.[2] The section replaces the repealed section 10(6) of the Supreme Court Act, which employed very similar language. It provided as follows:

"*Any appointment made under this section shall be deemed to have been made also in respect of any period during which the person appointed is necessarily engaged in connection with the disposal of any proceedings in which he has taken part as a judge and which have not been disposed of at the termination of the period for which he was appointed or, having been disposed of before or after such termination, are reopened.*

[10.] The common feature of sections 48 and 10(6) is that they both extend the appointment of an acting judge during the period that he or she is engaged in the "*disposal of any proceedings*" in which he or she participated or took part during the period of appointment.

[11.] In dealing with section 10(6) and the former Rule 49(11), in *Airy v Cross-Border Road Transport Agency*,[3] Tuchten AJ held that an acting judge, whose appointment as such terminated after judgment had been given in the main proceedings, could competently consider an application in terms

[2] See *Erasmus Superior Court Practice 2nd Ed Van Loggerenberg at A2-190 Service 2, 2016*
[3] 2001 (1) SA 737 (TPD); paragraphs 13, 14 and 15 at 741 A – F.

of Rule 49(11) for relief directed at the implementation of an order in the main proceedings against which application for leave to appeal had been made.

[12.] The language, meaning and effect of the content of section 48 of the Superior Courts Act and section 10(6) of the Supreme Court Act are materially the same. Though the driving principles that now apply to applications for leave to appeal and implementation of a court's decision pending appeal, in terms of sections 17 and 18 respectively of the Superior Courts Act, are no longer identical to what they were prior to enactment of the Act this does not affect the present question for decision or application of the principles upon which Tuchten AJ reached his conclusion.

[13.] In my view the express inclusion in section 48 of the competence of an acting judge to hear an application for leave to appeal that has not been disposed of at the expiry of his or her period of appointment, and the failure to mention applications to execute, do not alter the overall conclusion reached by Tuchten AJ. Nor does the omission from section 48 of the words "*in connection with*" that were employed in section 10(6) of the Supreme Court Act.

[14.] The conclusion in the Airy case was reached by reference to *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*.[4]

[4] 1977 (3) SA 534 (AD) at 551 E – G

There Corbett JA stated that an order for leave to execute "*… relates to, and is incidental to, the very matter which is the subject of the main dispute in that it permits effect to be given to a judgment on the main dispute despite the fact that the dispute is to be canvassed before an appellate tribunal. It makes interim arrangements in regard to the subject of the main dispute pending the final determination of the matter on appeal. It is clearly interlocutory in the wide sense.*"

[15.] Arising from the content of the passage quoted above, Tuchten AJ concluded that a Rule 49(11) application was an aspect of, and had a connection with the main application, as did an application for leave to appeal.[5] That conclusion remains valid under the Superior Courts Act. Upon a proper interpretation of section 48, read with section 18, the application for the operation and execution of the decision in the main application remains an incidental part of the proceedings in the main application which I participated in. The section 18 application merely permits effect to be given to the judgment. It is not a separate proceeding.

[16.] The order for execution remains interlocutory. It does not have the effect of disposing of the issue or relief claimed in the main proceedings or any part of it. Nor is it definitive of the parties rights.

[5] At p. 741 A – C

[17.] The respective enactments of section 17 and section 18 of the Act have had the effect of raising the bar for granting leave to appeal,[6] while at the same time giving stricter protection to appellants by limiting the wide general discretion previously vested in a court to grant leave to execute, and permitting execution only under exceptional circumstances, and if the applicant can prove on a balance of probabilities that it will suffer irreparable harm if the court does not order execution and that the other party will not suffer irreparable harm if the court does not make an order.[7] Furthermore section 18(4) provides for automatic suspension and an urgent appeal in the event of a court ordering implementation.[8] However, the principles enunciated by Corbett JA above and reiterated by Tuchten JA have not changed under the new regime.

[18.] Tuchten AJ noted that the judge who presides in a court which considers a Rule 49(11) application, in order to do substantial justice, must take into account all the relevant circumstances surrounding the case, and should therefore be fully acquainted with the proceedings which led to the order giving rise to the Rule 49(11) application. He went on to observe that the judge who made the order under attack would more often than not have done a substantial part of the work required for the proper adjudication of a

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[6] *See Acting National Director of Public Prosecutions & Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions & Others (19577/09) [2016] ZAGPPHC 489 (24 June 2016) para 25, referring with approval to the Mont Chevaux Trust (2012/28) v Tina Goosen & 18 Others (unreported judgment of the Land Claims Court, LCC 14R/2014.) See too Investec Bank Limited v Karel & Another (2013/34683) [2016] ZAGPJHC 171 (15 June 2016), para 14; and the Daantjie Community & Two Others v Crocodile Valley Citrus Company (Pty) Ltd (75/2008) LCC (28 July 2015) para 3.*

[7] *See Incubeta Holdings v Ellis 2014 (3) SA 189*

[8] But for the enactment of S18(4) the appealability of an implantation order might have been in doubt. See *South African Druggists Ltd v Beecham Group plc 1987 (4) SA 876 (TPD) where it was held that an implementation order was interlocutory and not appealable.*

Rule 49(11) application[9]. Another judge hearing such an application would have to repeat the work. The legislature could not have been unaware of these circumstances when it enacted section 10(6) in order to facilitate the administration of justice. The same applies to section 48.

[19.] The narrow interpretation presently urged upon me by the applicants would not advance the efficient administration of justice. Decisions appealed against may be the product of lengthy and complex litigation. What the applicants are now suggesting is that an acting judge whose period of appointment has expired may competently adjudicate upon an application for leave to appeal against that decision if it has not yet been disposed of at the expiry of his/her period of appointment; but anterior thereto the interlocutory decision, concerning whether or not to allow the operation or execution of the decision pending the application for leave to appeal, would have to be considered afresh by another judge. The intention of the legislature could never have been to fetter the administration of justice in this way.

[20.] Applicants also rely for their argument on the fact that implementation applications are not included at the end of section 48 together with reference to the power to consider applications for leave to appeal. In the light of what is said above in relation to the language employed in section 48, and the principles referred to by Tuchten AJ, this is not decisive in

[9] *See Airys case supra paragraph 9 at 740B-D*

interpreting the section. For the same reason there is no merit in applicants' contention that another relevant consideration is the fact that an application to implement an order in terms of section 18 need not, as with an application for leave to appeal, be brought within a relatively short or determinable time after the judgment has been delivered.

[21.] In all the circumstances I hold that the City's application in terms of section 18 of the Superior Courts Act is part of the disposal of proceedings in the main application. It is competent for me to consider the application, and to make an order accordingly.

[22.] Because the order I intend to make will be incidental to the main application, and interlocutory in nature, it may be altered[10] if and when the applicants institute further proceedings and before a court of appeal has finally determined the parties rights in the main application.

[23.] I therefore make the following order:

[23.1] The application, made by the City of Cape Town in terms of section 18 of the Superior Courts Act, to put into operation and execute the order in the main application handed down on 24 June 2016 is refused;

[10] See the *South Cape Corp case – supra – at 550 H to 551 A*

[23.2] In the event of the applicants petitioning the Supreme Court of Appeal for leave to appeal against the aforementioned order the City is granted leave to renew the said application duly supplemented;

[23.3] There will be no order as to costs.

DONEN AJ