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

Case 3266/2017

In the matter between:

SCHOOL GOVERNING BODY OF UITZIG SECONDARY SCHOOL	First Applicant
UITZIG SENIOR SECONDARY SCHOOL	Second Applicant

and

MEC FOR EDUCATION, WESTERN CAPE	First Respondent
WESTERN CAPE EDUCATION DEPARTMENT	Second Respondent

In re:

The matter between:

SCHOOL GOVERNING BODY OF UITZIG

SECONDARY SCHOOL	First Applicant
UITZIG SENIOR SECONDARY SCHOOL	Second Applicant

and

MEC FOR EDUCATION, WESTERN CAPE	First Respondent
WESTERN CAPE EDUCATION DEPARTMENT	Second Respondent
WESTERN CAPE DEPARTMENT OF TRANSPORT AND PUBLIC WORKS	Third Respondent
WESTERN CAPE COMMUNITY SAFETY DEPARTMENT	Fourth Respondent
RAVENSMEAD SENIOR SECONDARY SCHOOL	Fifth Respondent
MINISTER OF EDUCATION	Sixth Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Seventh Respondent

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JUDGMENT DELIVERED ON 16 JANUARY 2019

MASUKU AJ

1. This application raises two procedural questions relating to the status of an administrative decision that is the subject of an application for leave to appeal to the Supreme Court of Appeal in terms of s 17(2)(b) of the Superior Courts Act 10 of 2013. The first is whether the implementation of an impugned administrative decision is automatically suspended pending the outcome of an application for leave to appeal to the Supreme Court of Appeal in terms of s 18(1) of the Superior Court Act. Section 18(1) of the Superior Court Act states the following

> "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. Section 18(1) refers to the execution or implementation of a judicial decision which is the subject of an application for leave to appeal. The crucial question in this matter is whether the First Respondent's administrative decision to close down the Second Applicant is suspended in terms of s 18(1) pending the decision of the Supreme Court of Appeal of the application for leave to appeal?

3. The second procedural question depends on the outcome of the first one. In the event that s 18(1) does not apply in that there is no decision to be suspended by the lodging of an application for leave to appeal to the Supreme Court of Appeal, what should a litigant who has lodged an application for leave to appeal to the Supreme Court of Appeal do to prevent the execution and implementation of an administrative decision pending that application for leave to appeal? The First Respondent contends that such a litigant must apply for an interdict to prevent the implementation and execution of an administrative decision and not rely on the provisions of s 18(1).

DOES S 18(1) OF THE SUPERIOR COURT ACT 10 OF 2013 APPLY

4. The Applicants contends that s 18(1) prevents the First Respondents from executing and implementing the administrative decision, because they have

lodged an application for leave to appeal the judgment and order of the court a quo dismissing the application to review and set aside the decision of the First Respondent to close down the Second Applicant. There can be no dispute that s 18(1) had the effect of suspending the execution and implementation of the administrative decision when the Applicants lodged an application for leave to appeal the order of the court a quo dismissing the application to review and set aside the decision to close down the Second Applicant. In other words, s 18(1) prevented the First Respondent from executing and implementing the administrative decision pending the outcome of the application for leave to appeal the order dismissing the application to review and set aside the administrative decision. The only procedural route open to the First Respondent to execute and implement its administrative decision pending the outcome of the application for leave to appeal was an application in terms of s 18(3). If the First Respondent wished to prevent the consequences of s 18(1) when the Applicants lodged their application for leave to appeal the judgment and order dismissing their application to review and set aside the administrative decision to close down the Second Applicant, she would be obliged to make a substantive application in terms of s 18(3). Section 18(3) states the following;

> "A court may only order otherwise as contemplated in subsection (1) and (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 do orders."

5. The position in s 18(1) may therefore only be altered by an order granted in an application brought in terms of s 18(3). Neither the Applicant nor the First Respondent have brought an application in terms of s 18(3). The

Applicants have brought this application to enforce the consequences of s 18(1) and therefore to prevent the First Respondent from executing and implementing the administrative decision to close down the Second Applicant pending the outcome of their application for leave to appeal to the Supreme Court of Appeal. The Applicants further contends that they will suffer irreparable harm should the First Respondent execute and implement the decision to close the school pending the outcome of their application for leave to appeal to the Supreme Court of Appeal. The application for leave to appeal to the Supreme Court of Appeal will be rendered moot if the First Respondent executes and implements the impugned administrative decision.

6. The First Respondent contends that the order dismissing the application to review and set aside her decision is not and cannot be suspended in terms of s 18(1). They contend that the purpose of s 18(1) and the common law rule that an application for leave to appeal suspends the operation of an order is to ensure that a judgment whereby relief is granted to a litigant is suspended pending the determination of an appeal. The First Respondent, relying on the judgments of the Supreme Court of Appeal, say that in cases where a claim or an application is dismissed, that order is not suspended pending an appeal, simply because there is nothing to appeal that can operate or upon which execution can be levied. **(MV Snow Delta: Serva Ship Ltd v Discount Tonnage Ltd 2000 (4) SA 746 (SCA) at para 6)** In the view of the First Respondent, a party wishing to enjoy the consequences of s 18 to have the implementation and execution of an administrative decision suspended must find his or her remedy in an interdict. A party who wishes to lodge an application for leave to appeal to the Supreme Court of Appeal in circumstances where such application has no s 18(1) effect must launch an application for an interdict preventing the

implementation and execution of an impugned administrative decision. The First Respondent says that s 18(1) does not apply where a party has not been granted an order because such an order is incapable of suspension in terms of s 18(1) or the common law.

7. The submissions by the First Respondent, relying on the authority of the Supreme Court of Appeal, if correct are binding on me and I may therefore not deviate. According to the submissions eloquently made by Ms Huyssteen, the Supreme Court of Appeal has decided that where an application is dismissed, the position in common law and now set out in s 18(1) does not apply in that there is no order to suspend when an application for leave to appeal is launched against that order. A litigant wishing to suspend the execution of an administrative decision must apply for an interdict. The device of an interdict would have the effect of s 18(1) if granted, in that it would suspend the execution and implementation of an impugned decision pending the outcome of an application for leave to appeal. According to Ms Huyssteen, such an application must comply with the requirements of an interdict. A crucial requirement for the granting of an interdict is irreparable prejudice if the suspension order is not granted. This is the exceptionality requirement in s 18(1).

8. I must therefore examine the authorities that are relied on for the position taken by the First Respondent. In the MV Snow Delta Serva Ship Ltd v Discount Tonnage Ltd, Harms J at para 6, deals with what he refers to *"a misunderstanding of the concept of suspension of execution"* in the context of a ratio of the decision of Corbett J in SAB Lines (Pty) Ltd v Cape Tex Engineering Works (Pty) Ltd 1968 (2) SA 535 (C) and the dissenting opinions that followed this judgment. (cited in para 6). Harms JA then says "*For instance, an order of absolution from the instance or dismissal of a claim or*

application is not suspended pending an appeal, simply because there is nothing that can operate or upon which execution can be levied. Where an interim order is not confirmed, irrespective of the wording used, the application is effectively dismissed and there likewise nothing that can be suspended. An interim order has no independent existence but is conditional upon confirmation by the same Court (albert not the Judge) in the same proceedings after having heard the other side (Chrome Circuit Audio-tronics (Pty) Ltd v Recoton Euopean Holdings Inc and Another 2000 (2) SA 188 (W) at 190B-C) Any other conclusion gives rise to an unacceptable anomaly: If an applicant applies for an interim order with notice and the application is dismissed, he has no order pending the appeal; on the other hand, the applicant who applies without notice and obtains an ex parte order coupled with a rule nisi and whose application is eventually dismissed, has an order pending the appeal."

9. Harms JA however does not deal with what a party must do to prevent the implementation and execution of an impugned administrative decision that is the subject matter of an application for leave to appeal to the Supreme Court of Appeal. His judgment does not deal with s 18(1). All he does is to state what is trite in common law– that an order dismissing an application is not suspended pending an appeal because there is nothing to appeal. Harms JA did not deal with a situation similar to the present – where the appellant has lodged an application for leave to appeal to the Supreme Court of Appeal and wishes to stop the implementation of an administrative decision until that application for leave to appeal is disposed of. The First Respondent then relies on the University of the Free State v Afriforum and Another 2018 (3) SA 428 (SCA) for the approach to interpreting s 18 of the Superior Court Act. In that matter, the University of the Free State ("UFS) had exercised its automatic right of appeal in terms of s 18(4)(ii) of the Superior Court Act against an order of the full court of the Free State Division of the High Court, Bloemfontein directing that its judgment and order delivered on 21 July 2016 not be suspended

pending the determination of an appeal by the UFS to the Constitutional Court, alternatively to the Supreme Court of Appeal.

10. The facts relevant to this case are simple. The Full Court delivered the judgment reviewing and setting aside the decision of the Council to 'adopt and approve' the new language policy for the UFS. The UFS sought leave to appeal to the Constitutional Court, alternatively leave to appeal to the Supreme Court of Appeal, against the order of the Full Court. That application for leave to the Constitutional Court alternatively the Supreme Court of Appeal had the effect of suspending the order of the Full Court reviewing and setting aside the implementation and execution of the language policy in terms of s 18(1) of the Superior Court Act. Leave to appeal was granted by the Full Court to the Supreme Court of Appeal. The appeal process initiated by the UFS had the effect of suspending the order of the Full Court – which meant that the University was not prevented from implementing and executing its decision on the language policy. Afriforum appreciated this position and launched an application before the Full Court in terms of s 18(3) for an order implementing the order of the Full Court pending the appeal. The s 18(3) Afriforum application was designed to give effect to the orders of the Full Court pending the appeal because they understood that the appeal of the UFS had suspended that order. There was no legal instrument preventing the UFS from executing the language policy, unless prevented specifically by a s 18(3) order. The UFS submissions made in the context of the Afriforum's 18(3) application helped the Court to evaluate whether exceptional circumstances existed to prevent the consequences of s 18(1) from operating. It was in that context that the Court held that Afriforum had not meet the exceptionality test that its application was dismissed and the consequences of s 18(1) continued to

operate in favour of the UFS. But how does this matter apply to the facts of this case.

11. The Applicants contend that s 18(1) applies and seek to enforce the suspension of the order giving the First Respondent the power to implement its decision to close down the school. The Applicants further contend that an order dismissing the review application must be given its context. The context is the following. The order dismissing the application to review and set aside the decision to close down the Second Applicant was suspended by the application for leave to appeal lodged immediately after that judgment was granted. The First Respondent could not, save under s 18(3), implement or execute the administrative decision while leave to appeal was pending. The First Respondent appears to accept that. However, prior to that order being granted, an order had been granted by Saldanha J, essentially suspending the implementation of the administrative order of the First Respondent closing down the school. In terms of that order, pending the finalisation of the application, the decision to close the school would not be implemented and executed by the First Respondent. The matter was finalised when the judgment of Hack AJ dismissing the application was handed down. That ended the Saldanha J order. When the application for leave to appeal was lodged by the Applicants against the judgment and order of Hack AJ, s 18(1) kicked in and that order was suspended. In my view, during that period, the order of Saldanha J was revived.

12. The First Respondent's contention, based on her understanding of the Harms JA's remarks in MV Snow, that an order dismissing an application cannot be suspended in terms of the common law, does not, in my view apply under s 18(1) with the equal force that it applied under common law.

While the common law creates a distinction between the orders that may be suspended pending an appeal, s 18(1) does not do so. Section 18(1) applies to all decisions or orders. It does not apply, as the First Respondent contends, only to orders or decisions that are granted. I cannot think of any reason why an interpretation of s 18(1) in terms of which the suspension doctrine applies only to granted orders and not those that are not granted is possible under s 18(1). Harms JA did not purport to give an interpretation of s 18(1) and its scope of application. But even if I am wrong on this – on the basis of Harms JA in MV Snow, it is clear to me that the purpose of the suspension requirement in applications for leave to appeal would be frustrated if it were to operate in a discriminatory manner to granted orders only.

13. The interpretation of s 18(1) has extensively been covered in the judgment of the Supreme Court of Appeal in UFS v Afriforum more particularly in para 5 to 15. I am bound by that interpretation. However, the Supreme Court of Appeal did not deal with the purpose of the suspension requirement. The purpose of suspension concept in common law applies with equal force to s 18(1) save that the interpretation of s 18 must be coloured by the applicable constitutional concepts. The purpose of s 18(1) is therefore to provide protection to a litigant pending a full investigation of the matter by the Court on appeal. An approach contended for by the First Respondent in terms of which the suspension concept would only apply to orders that are granted would strip a litigant in the position of the Applicants with that protection. In other words, if the application for leave to appeal to the Supreme Court of Appeal suspends an order that is granted but not to an order that is not granted, it would introduce a discriminatory criterion between litigants. In terms of this approach, only litigants against whom orders are granted have the right to the protection of s 18(1) and not

those whose applications are dismissed. This approach would fundamentally offend s 9(1) of the Constitution, which provides that everyone is equal before the law and has the right to equal protection and benefit of the law. The purpose of the suspension rule is intended to protect the integrity of our courts and to afford courts of appeal the opportunity to engage with real disputes on appeal. In any event, if an application for leave to appeal suspends the operation of the judgment and orders of the court a quo, on what logic can the rule not operate where the appeal is with a higher court, for example, the Full Court, the Supreme Court or the Constitutional Court. The suspension principle must apply with equal force in circumstances where an appeal is pending before a higher court as it applies to the court a quo. The importance of the suspension rule is also reflected in the requirement of exceptional circumstances in under s 18(1). In other words, the requirement that only exceptional circumstances justify a deviation from the suspension rule demonstrates its potency. The exceptionality requirement is dealt with sufficiently in UFS v Afriforum at paras 10 and 12. A party wishing to avoid the consequences of s 18(1) must show exceptional circumstances in an application under s 18(3).

14. The approach I take in this application requires that I deal with the argument of the First Respondent that s 18(1) does not apply to an order dismissing an application. As stated above, I do not agree with this position. The approach that must be adopted is one which must interpret the order appealed in context. Furthermore, s 18(1) applies regardless of the order granted by the court a quo except in interim interdicts. This therefore means that a party wishing to enforce an order that is under appeal must seek to do so by way of a substantive application under s

18(3). The First Respondent accepts this position, contending that such an application must be in the form an interdict. That appears true if regard is had to the judgment in UFS v Afriforum. The difference though is in who the First Respondent says bears the obligation to show exceptional circumstances in order to avoid the consequences of s 18(1). In my view, it is the party wishing to benefit from the order that is the subject of the application for leave to appeal. An order dismissing the application frees the successful party to execute and implement the decision that is the subject of a legal challenge in the appeal. This means, as was contended by the Applicants, that an order dismissing their application allows the First Respondent to implement and enforce the administrative decision, despite such decision remaining under a legal challenge.

15. In context, the order dismissing the application has the legal effect of permitting the First Respondent to implement the decision to close down the Second Applicant. In my view, the First Respondent's decision to close down the Second Applicant may only be executed and implemented under the exceptional circumstances required in an application in terms of s 18(3). There is no such application, although the First Respondent's defence to the Applicant's application appears to raise factors that could be considered in an application under s 18(3). Given that there is no s 18(3) application by the First Respondent, I deem it unnecessary to go into its defence to the Applicants' case. In my view, I am only permitted to determine whether the exceptionality test has been met in a substantive application by a party wishing to avoid the consequences of a suspension under s 18(1).

16. This then means I do not have to determine whether the Applicants have met the requirements of exceptionality because in truth, their rights are

fully protected by s 18(1) which suspends the execution and implementation of the order of the court a quo.

17. In the circumstances, I grant the following order;

1. Pending the outcome of the Applicant's application for leave to appeal to the Supreme Court of Appeal, the First Respondent's decision to close down the Second Applicant is suspended in accordance with s 18(1) of the Superior Court Act 10 of 2013;

2. The First Respondent is directed to comply with the order of Saldanha J attached herewith as "X" pending the finalisation;

3. The First Respondent is directed to pay the costs of the application including the costs of two Counsel.

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T MASUKU

ACTING JUDGE OF THE HIGH COURT

Counsel
Appellant: Advocate Norman Arendse
Respondent: Advocate Elsa van Huisteen

Instructing Attorneys
Appellant:
Respondent:
JUDGMENT READ AND DAY(S) IN COURT: 16 January 2019
Court 28