

REPUBLIC OF SOUTH AFRICA



GAUTENG HIGH COURT, JOHANNESBURG LOCAL DIVISION

CASE NO: 21815/2014

- (1) Reportable: Yes
(2) Of interest to other judges: Yes
(3) Revised.

12 November 2014
DATE

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SIGNATURE

In the matter between:

**Mohau Williams Mokgatla
NomfezoMdingi
Dion Makhura
PhumlileShange
SelloSelepe
Jacob Modimoeng
Lance Veotte
Andre Adams
ZakheleKhumalo
WycliffMabusela
Kennedy Nkosi
KgosiMakwati
ThabisileMangele
NtokozoNzura
MampetiMalete
NomceboGumede**

**First Applicant
Second Applicant
Third Applicant
Fourth Applicant
Fifth Applicant
Sixth Applicant
Seventh Applicant
Eighth Applicant
Ninth Applicant
Tenth Applicant
Eleventh Applicant
Twelfth Applicant
Thirteenth Applicant
Fourteenth Applicant
Fifteenth Applicant
Sixteenth Applicant**

and

**South African Municipal Workers Union
Samuel Molohe
John Dlamini
Lorraine Baitsiwe
Walter Theledi
Moses Miya**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent**

JUDGMENT (Section 18 and Rule 49(11))

Vally J:

1. The applicants apply in terms of s 18 of the Superior Court Act 10 of 2013 (the SCRT) read with Rule 49(11) of the Uniform Rules of Court for an order that allows for the operation and execution of an order made by the Court as part of a judgment delivered on 29 September 2014 (the main judgment). There has also been an application for leave to appeal to the Supreme Court of Appeal (the SCA) against the main judgment, brought by the respondents. A judgment in that application has been delivered at the same time as this judgment, and for reasons of convenience the two judgments, though related, have not been combined.
2. Prior to the enactment of s 18 of the SCRT an application of this nature was governed by the provisions of Rule 49(11). Rule 49(11) is simply stated. It provides:

“When an appeal has been noted or an application for leave to appeal against or to rescind, correct or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such an appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.”
3. An extensive body of common law was developed as a result of its application. A comprehensive account of this common law can be found in the admirably reasoned judgment of Corbett JA (as he then was) in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*.¹

¹1977 (3) SA 534 (A). See at 544H-549*in fin*.

4. Section 18 of the SCRT has radically altered this common law. It provides:

“18. 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 suspended pending the decision of the application 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 or 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 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 is lodged with the registrar in terms of the rules.”

5. Previously courts were empowered with a wide discretion, based on their inherent jurisdiction, when determining whether to grant an order allowing execution pending the outcome of an appeal or not. That discretion has been curtailed by the enactment of sub-sections (2) and (3). Sub-sections (4) and (5),

too, are innovative. They now make it imperative for the court hearing the matter to immediately record its reasons if it decides to grant the application to execute, and they bestow upon the losing party a right to an automatic appeal which has to be treated “as a *matter of extreme urgency*” by the appellate court. This particular innovation is radical. Previously, an order made in terms of Rule 49(11) was purely interlocutory and, therefore, not appealable.² The court granting the order always had the power to vary it on application, should it be appraised of changed circumstances.³ This can no longer occur as the losing party is now afforded an appeal, and once the appellate court upholds the order it becomes an order of that court. It is no longer an order of the court *a quo* that initially granted it. The court *a quo* cannot vary a judgment or order of an appeal court. The logic underlying these innovations is not clear, and it is yet to be seen if they will be of any benefit to the public at large, or if they are to have any positive effect on the administration of justice.

6. In terms of sub-sections (2) and (3) the applicants are required to show that:⁴

6.1. there exists “*exceptional circumstances*” warranting the operation and execution of the judgment pending the outcome of the appeal; and,

²*Id*, at 551G-552H. See also *Minister of Health and Others v Treatment Actions Campaign (No 1)* 2002 (5) SA 703 (CC) at [5] and [11]

³*Steytler N. O. v Fitzgerald* 1911 AD 295 at 304; *Blaauwbosch Diamonds Ltd v Union Government (Minister of Finance)* 1915 AD 599 at 601 *Minister of Health and Others v Treatment Actions Campaign (No 1)* 2002 (5) SA 703 (CC) at [11]

⁴See *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* 2014 (3) SA 189 (GJ)

6.2. on a balance of probabilities:

6.2.1. they suffer irreparable harm should the order not be made operational; and,

6.2.2. there is no irreparable harm to the respondents, who may, if they prosecute an appeal, succeed in overturning the judgment and order granted in the main case.

7. The applicants point out that this Court found that they were unlawfully treated. They have, without cause, been denied the benefits of their membership of the first respondent. They have suffered harm as a result thereof, but as time proceeds the harm increases and is in danger of becoming irreparable. In this case they point to the fact that two of them, applicants 6 and 7, have already suffered irreparable harm notwithstanding the fact that they were successful in this Court. The harm they refer to concerns their right to stand for elections to official posts within the structures of the first respondent. These structures are identified in the main judgment. Elections for the posts for which applicants 6 and 7 should have been eligible to stand have already been held. They were not allowed to stand for these posts as applicant 6 was suspended and applicant 7 was expelled.⁵ The finding of this Court that the suspension of applicant 6 and the expulsion of applicant 7 was unlawful has not benefitted them. The applicants contend that should the same fate befall the rest of the applicants then the order

⁵See paras 9.1 and 9.4 of the main judgment.

of this Court would be rendered nugatory. By not being allowed to stand for election, both they and the members who wish to vote for them are prejudiced. This, in my view, constitutes exceptional circumstances warranting the intervention of this court. It also demonstrates that the applicants suffer irreparable harm should they await the completion of the appeal process.

8. The respondents do not deny that the first respondent has commenced with elections and do not deny that the applicants will suffer the harm referred to by the applicants. What they say in response is that the first respondent will suffer as much, if not greater, harm than the applicants should the order be made operational pending the appeal. The harm they claim the first respondent is at risk of suffering arises from:

- 8.1. A decision of the greater Johannesburg Region of the first respondent, to which four of the applicants belong (the four are not identified), to call on the City of Johannesburg, one of the employers of the first respondent's members, to no longer pay the subscriptions of the members of that Region to the first respondent but to instead pay it to another party, called Qlink.

- 8.2. The conduct of the applicants' "*faction*" which consists of the formation of a new trade union, called the Azanian Municipal Workers Union (AMWU) and the recruitment of the first respondent's members for AMWU. In

support of this allegation the respondents attach a blank membership form of AMWU.

9. On the first allegation it is important to note the following. Firstly, the respondents only claim that the Region (Johannesburg Region) to which four of the applicants belong has taken such a decision. They do not show that any of the applicants are responsible for the decision. Secondly they do not present any evidence of a causal connection between the decision of the Johannesburg Region and the actions of any of the applicants. Thirdly, they do not claim or show that the decision has resulted in the first respondent suffering any harm. On the contrary, they claim that they have been able to prevent the City of Johannesburg and Qlink from acting upon the request of the Johannesburg Region. Thus, the first respondent has suffered no harm at all by this decision.
10. On the second allegation, the applicants deny its veracity. The respondents claim that the denial is bare and therefore valueless. This, however, is not entirely correct. The allegation itself is vague, general and refers to the applicants' "*faction*" not to any applicant. There are no details given of this "*faction*" and no allegation as to which particular applicant is party to this "*faction*". Under these circumstances, the denial of the applicants is not unrealistic. Moreover, the respondents merely present a blank application form for membership of a rival Union. They present no evidence to show that such a Union exists, where it operates, or which of the first respondents' members have joined it because they

have been diverted away from the first respondent by any of the applicants. Lastly, there is an illogicality inherent to the allegation, which the respondents were not able to explain despite being invited to do so at the hearing. The illogicality is this: it makes no sense for the applicants to fight so hard to retain their membership of the first respondent and by so doing agree to pay subscriptions to the first respondent, to potentially hold office in the first respondent, and carry the responsibility of that office, while at the same time engage in activities to set up, or build, a rival Union.

11. Finally, if the respondents have evidence of the destructive activities (referred to in paragraph 8 above) they claim the applicants are engaged in, they have remedies in terms of the constitution of the first respondent. In other words, if any applicant is found to be responsible for unlawfully trying to divert the funds of the first respondent to Qlink, or if s/he is found to be responsible for recruiting members for a rival Union then the first respondent can take punitive action against him/her in terms of its constitution. What is important, though, is that it must comply with those terms. The form of action, and the manner in which this action is to be taken, is dealt with in the main judgment in greater detail.
12. In conclusion, the first respondent does not, in my view, suffer irreparable harm should the order be made operational. Whatever harm it suffers, or is in danger of suffering, can be remedied, or prevented.

13. On a more general note, I hold that if a victorious party suffers irreparable harm because of a pending appeal, as has happened in this case with applicants 6 and 7, then the very foundation of our social contract, the rule of law, will be seriously compromised. It bears the risk of people losing faith in the law and in the courts. Such a consequence is not to be treated lightly.

14. As the judgment and order in the leave to appeal application is delivered at the same time as this judgment, the following order is made:

- 1 The order of this Court dated 29 September 2014 shall operate pending the outcome of the appeal process.
- 2 The costs of this application shall be the costs in the appeal.

Vally J
Judge of the Gauteng High Court
12 November 2014

Appearances:

For the Applicants	:	Adv M Petlane with Mr Thagwana
Instructed by	:	Mathopo Attorneys
For the First Respondent	:	Adv R J Raath SC with Adv R Venter
Instructed by	:	Maenetja Attorneys
Date of hearing	:	10 November 2014
Date of judgment	:	12 November 2014