

IN THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

DATE: 01/02/2022

Signature

CASE NO: 60975/2020

In the matter between:

THE PAN AFRICANIST CONGRESS OF AZANI

1ST APPLICANT

THE NATIONAL EXECUTIVE COMMITTEE
THE NATIONAL EXECUTIVE COMMITTEE OF THE
PAN AFRICANIST CONGRESS OF AZANIA
ELECTED AT BLOEMFONTEIN

2ND APPLICANT

MZWANELE NYHONTSO

3RD APPLICANT

NTSIRI APPA POOE

4TH APPLICANT

And

NARIUS MOLOTO

1ST RESPONDENT

THE NATIONAL EXECUTIVE COMMITTEE OF

2ND RESPONDENT

THE PAN AFRICAN CONGRESS OF
AZANIA ELECTED AT TOMPI SELEKA

THE INDEPENDENT ELECTORAL
COMMISSION OF SOUTH AFRICA

3RD RESPONDENT

JUDGMENT

MAHLANGU AJ

INTRODUCTION

[1] This matter relates to Section 18(1) of the Superior Courts Act No.10 of 2013, (hereinafter referred to as the “Act”), I omitted to deal with in my judgment which was handed down by this court on the 21st September 2021. This Section (18.1 of the Act) was one of the two applications which were before this court on the 17th September 2021. These were-

- 1.1 Application for leave to appeal against the judgment and order granted by this court on the 23rd August 2021 (“**leave to appeal application**”). The application for leave to appeal was dismissed on the 21st September 2021.
- 1.2 Application in terms of section 18(1) of the Superior Courts Act declaring that the judgment shall notwithstanding any application for leave to appeal remain enforced, i.e. (“**the enforcement application**”).
- 1.3 For ease of reference and convenience, the First to Fourth Applicants will (hereinafter be referred to as “the Applicants” and the First and Second Respondents will (hereinafter be referred as “Respondents”)
- 1.4 In terms of the chronological aspect of the discussion at hand, it is noteworthy and important to mention that the application for leave to appeal was dismissed by this court on the 21st of September 2021.
- 1.5 The primary objective of the present matter is to deal with the application

in terms of section 18(1) of the Superior Courts Act. In order to give context to this application i.e. (section 18(1) of the Superior Courts Act, it will be significant to give a brief background to this matter, which will be done here in below.

FACTUAL BACKGROUND

- [2] Briefly, the historical background to this matter is the fact that the Respondent in his application for leave has contended in his application for leave to appeal that this court erred in its decision of the 23rd August 2021, and accordingly came to the conclusion that an appeal would have a reasonable prospect of success as envisaged in section 17(1)(a)(i) of the Superior Courts Act, 2013.
- [3] In his application for leave to appeal, the Respondent contested the court`s finding and came to the conclusion in six respects which could be classified into two categories, namely-
- 3.1 The court`s finding on the status and effect of the appeal in the Supreme Court of Appeal.
- 3.2 The court`s findings on the status and the effect of the purported section 18(4), an appeal against Millar AJ`s order of the 23rd August 2019(“the enforcement order”).
- [4] It is important to note that the Respondents did not challenge the court`s findings on the following aspects:

- 4.1 The Interpretation of section 18(5) of the Superior Court Act;
- 4.2 The finding that the purported notice of appeal in terms of section 18(4) was not served and no attempt was made to serve same at the Applicants attorney s address;
- 4.3 The finding that the attempted service of the purported notice of appeal in terms of section 18(4) on the Applicants legal representatives at the court, could not be regarded as proper service; and
- 4.4 That the notice of appeal was not served on the Registrar.

[5] It was therefore submitted that in the absence of a challenge to those findings the conclusion arrived at was that the purported appeal in terms of section 18(4) was not properly lodged and thus Millar AJ`s order of the 23rd of August could not have been a subject matter of the appeal and thus remained operative and not suspended.

[6] The court found that there was no merit in the Respondents` contentions and therefore the court`s findings could not be faulted.

[7] The Applicants contended that in order to avoid further obstruction to the PAC`s eligibility to participate in the local government elections of the electorate`s right to free and fair elections, which includes the right to elect a party of its own choice and certainty within parliament and the IEC, the Applicants sought the following relief by way of the enforcement application-

- 7.1 An order declaring that pending the finalization of the application for leave to appeal to the full court and/or the Supreme Court and/or the Constitutional Court and/or any appeal to the Full Court and/or Supreme Court and/or Constitutional Court against the order and judgment issued

by this court on the 23rd of August 2021, the orders and judgment shall remain operative;

[8] The Applicants contended further that the relief sought was to bring certainty to the Parliament and IEC as well as to the members of the PAC and its electorate regarding the PAC's leadership and eligibility to nominate the PAC's parliamentary representative and its eligibility to participate in the last local government election, or any other by-election.

[9] The Applicants contended that two important questions should have been answered in the determination of these two applications, namely-

9.1 Whether the Respondents have demonstrated that the intended appeal would have some prospects of success and/or there are compelling reasons why the intended appeal should be granted;

9.2 Whether there exist exceptional circumstances, warranting the grant of an enforcement order, pending the application for leave to appeal and/or any appeal against the impugned judgment.

ISSUES TO BE DETERMINED

[10] Issues to be determined is whether in terms of the enforcement application, has the Applicant demonstrated the existence of exceptional circumstances warranting the court to grant an order declaring the impugned judgment notwithstanding any leaves to appeal and/or appeal, to remain operative.

APPLICATION FOR LEAVE TO EXECUTE IN TERMS OF SECTION 18(1)

[11] It is trite that the operation and execution of a decision that is subject to an application for leave to appeal or an appeal is suspended pending the decision of an application for leave to appeal or the appeal.

11.1 This principle is set out in Section 18(1) of the Superior Court Act which provides that:

“18. Suspension of decision pending appeal:

(1) Subject to subsections 1 and 2 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.

11.2 The proper interpretation of section 18 were undertaken in the matter of **UFS v Afriforum (2016) ZASCA 165** as follows:

11.3 The proper interpretation of section 18 was set out in the matter of **UFS v Afriforum** which provided as follows:

“In embarking upon an analysis of the requirements of s 18, it is firstly necessary to consider whether, and, if so, to what extent, the legislature has interfered with the common law principles articulated in South Cape Corporation, and the now-repealed Uniform rule 49(11). What is immediately discernible upon perusing ss 18(1) and (3), is that the legislature has proceeded from the well-established premise of the common law that the granting of relief of this nature constitutes an extraordinary deviation from the norm that, pending an appeal, a judgment and its attendant orders are suspended. Section 18(1) thus states that an order implementing a judgment pending appeal shall only be granted ‘under exceptional

circumstances. The exceptionality of an order to this effect is underscored by s 18(4), which provides that a court granting the order must immediately record its reasons; that the aggrieved party has an automatic right of appeal; that the appeal must be dealt with as a matter of extreme urgency and that pending the outcome of the appeal the order is automatically suspended.”

11.4 The principle that the operation and execution of an order are suspended pending the decision of an application for leave to appeal or an appeal, is not an absolute one. The provision empowers this court to under exceptional circumstances order otherwise.

11.5 The jurisdictional requirements for the court’s exercise of this power are set out in section 18(3). Section 18(3) provides that:

“the court may only order otherwise as contemplated in subsection (1) or (2) of a 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 does so.”

11.6 Counsel for the applicant contends that the nature and content of this requirement was analyzed by the SCA as follows:

“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 made. The application of rule 49(11) required a weighing-up of the

potentiality of 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), 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.”

11.7 In **Incubeta Holdings (Pty) Ltd and Another v Ellis and Another (20233/14) (2014) ZASCA 132(23 September 2014)** Sutherland J held that section 18 has introduced a new perspective to the test of the granting of relief under rule 49(11). The test is twofold:

- (a) Firstly, whether or not “exceptional circumstances exist” and
- (b) Secondly, proof on a balance of probabilities by the Applicant of:
 - i. The presence of irreparable harm to the Applicant was to put into operation and execute the order; and
 - ii. The absence of irreparable harm to the Respondent was its leave to appeal.

11.8 The Applicant contends that the exceptional circumstances were considered by Mpati P(as he was then referred to) in **Avnit v First Rand Bank Ltd(20233/14)(2014)ZASCA 132(23 September 2014).**

“The term ‘exceptional circumstances’ is one that has been used in various different statutory provisions in varying contexts over many years. It was first considered by this Court in the context of its power in exceptional circumstances to direct that a hearing be held other than in Bloemfontein. The question arose in **Norwich Union Life Insurance Societyv Dobbs 1912 AD 395**, where Innes ACJ said at 399:

‘The question that arises, what are “exceptional circumstances”? Now it is undesirable to attempt to lay down any general rule. Each case must be considered upon its own facts. But the language of the clause shows that the exceptional circumstances must arise out of, or be incidental to, the particular action; there was no intention to exempt whole classes of cases from the operation of the general rule. Moreover, when a statute directs that a fixed rule shall only be departed from under exceptional circumstances, the Court, one would think, will best give effect to the intention of the Legislature by taking a strict rather than a liberal view of applications for exemption, and by carefully examining any special circumstances relied upon.’

11.9 The court said the following:

- a. “Later cases have likewise declined an invitation to define ‘exceptional circumstances’ for the sound reason that the enquiry is a factual one.²² A helpful summary of the approach to the question in any given case was provided by) **Thring J in MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and another 2002 (6) SA 150 (C)** where he said:

- a) *What is ordinarily contemplated by the words ‘exceptional circumstances’ is something out of the ordinary and an unusual nature; something which is excepted in the sense that the general the rule does not apply to it; something uncommon, rare or different: ‘besonder’, ‘seldsaam’, ‘uitsonderlik’, or ‘in hoë mate ongewoon’.*

- b) *To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.*
- c) *Whether or not exceptional circumstances exist is not a decision that depends upon the exercise of judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.*
- d) *Depending on the context in which it is used, the word 'exceptional' has two shades of meaning: the primary meaning is unusual or different: the secondary meaning is markedly unusual or especially different.*
 - i. *Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, the effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.'*

11.10 It is contended by the Applicant that relation the first requirement, exceptionality must be facts specific. He contends that the circumstances which are or may be "exceptional" must be derived from the actual predicaments in which the litigants find themselves. This leg we submit does not alter the common law position.

11.11 It is further contended by the applicant that the second requirement introduced a more onerous requirement than the common law. He contends that the section introduces a requirement of proof on a balance of probabilities that the Applicant will suffer irreparable harm if the order is not granted and inversely he contends that the Respondent will not if the order is granted. He contends that where there is potential irreparable harm or prejudice to both appellant and respondent the court can no longer balance the two interests but must refuse the application.

11.12 He contends that if a court appeal is likely to uphold the appeal, the lower court will be less inclined to grant the exceptional remedy of execution if that

judgment is pending appeal.

EXCEPTIONAL CIRCUMSTANCES

12.1 He contends that there are exceptional circumstances in the present case which warrants the court to grant the extraordinary order of enforcement pending appeal. These are:

- (a) The effect of the leadership vacuum
- (b) The impact of the suspension of the impugned order, in the PAC legibility, to participate in the local government elections which took place on the 1st November 2021.
- (c) The impact of the PAC ineligibility to part in the last local government elections on its electorate.

THE LEADERSHIP VACUUM- THE EFFECT OF IT

12.2 The Counsel for the Applicants contends that leadership squabbles cannot be disputed as they known facts. He contends that amongst others, these have resulted in many court applications which brought uncertainty in Parliament and the IEC as to which of the two factions should be recognized as the leadership of the PAC to liaise with a party by the Parliament, the IEC and the Public at large.

12.3 He contends further if is not granted PAC would find itself in this position.

12.4 He contends that the impugned judgment has brought about a certain measure of certainty in relation to various institutions with which the PAC must interact.

12.5 He contends that if allowed to be suspended the PAC would find itself in the position it was before these proceedings. He contends that this cannot be allowed.

THE EFFECT OF THE PAC'S ELIGIBILITY TO PARTICIPATE IN THE LAST LOCAL GOVERNMENT ELECTIONS

- 12.6 The applicant contends that is not in dispute that due to the leadership squabbles within the PAC, the IEC had taken a decision not to recognize any of the faction purporting to be both in the Parliament and the IEC withholding PACs allowances which have resulted in the PAC not being able to administer and run its affairs.
- 12.7 He contends that in addition to the above-mentioned circumstances, the Parliament and IEC took a firm position not to recognize any of the two factions as the leadership, according to the applicant has further impacted on the PACs ability to participate fully in matters which concern political parties both at parliamentary level as well as the electoral space.
- 12.8 In addition to what has been mentioned above by the Counsel for the Applicant, he contends that as a result of the leadership uncertainty, the IEC took the decision not to allow the PAC to participate in any elections. He contends that the PAC`s right in terms of section 19(3) being the right to stand for election in the public office.
- 12.9 He contends that the case of **UDM v President of the Republic of South Africa 2003(1)SA 495** the importance of a political party partaking in the elections was explained by the court.

EFFECT ON THE FREE ELECTIONS

- 12.10 Counsel for the Applicant contends that Section 19(2) of the Constitution enshrines a requirement that the elections must be free and fair. He contends that it does so by providing that every citizen has a right to free, fair and regular elections for any legislative body established in terms of the Constitution. He contended that the term “free and Fair” was described in *Kham and Others v Electoral Commission and Another* at par. 86.

HARMS TO THE APPLICANTS & RESPONDENTS

- 12.11 The Applicant contends that in the event of PAC not being allowed to register its candidates by the cut-off date, this will result in it not being able to participate and be voted in municipalities, it would be without a representative for the next five years.
- 12.12 The Applicant contends that the harm which will befall the PAC, will be irreparable, not only to its good name but also to masses wishing to vote for and stand elections as the candidates on behalf of the PAC in the municipalities, and it is going to be without a representative for the next five years.
- 12.13 With respect to the irreparable to the Respondent, the Applicant contends that there will be no harm to the Respondents because if the appeal could have succeeded the effect would be that the First and Second Respondents will be reinstated at the helm of the PAC and will continue where their current leadership left off.

CONCLUSION

- [13] For the reasons set out herein, I am of the view that the applicants have demonstrated the existence of exceptional circumstances which warrants this court to grant an order declaring that its judgment and/or order will not be suspended pending an application for leave to appeal and/or appeal. This application has not been challenged by the Respondent's Counsel, nor have the intervening parties convinced this court to grant them leave to intervene.

Accordingly, **IT IS ORDERED THAT:**

The order prayed for by the applicant in the notice of motion in terms of Section 18(1) be granted



MAHLANGU AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing:

**JUDGEMENT ELECTRONICALLY TRANSMITTED TO THE PARTIES OF THE
01ST OF FEBRUARY 2022**

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