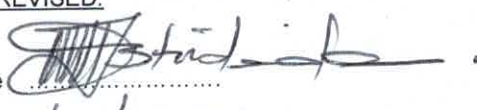


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/ NO
(2)	OF INTEREST TO THE JUDGES: YES/ NO
(3)	REVISED.
Signature 	
Date... <u>14/4/2020</u>	

CASE NO: 8200/2019

CALVIN ELECTRONICS T/A BATAVIA TRADING

1ST APPLICANT

MUDUMELA CALVIN THITOVHELWI

2ND APPLICANT

and

MULTICHOICE SUPPORT SERVICES (PTY) LTD

RESPONDENT

JUDGMENT

TSHIDADA, AJ

1. This is an urgent application brought by the Applicant in terms of Section 18 of the Superior Court Act, No. 10 of 2013, read with Rule 49(11) of the Uniform Rules of Court ("the Act"), for an order to allow the operation and execution of the order granted by MG Phatudi J on the 5th February 2020, (which order I note from the record is a subject of an appeal) to be read and

considered in conjunction, alternatively as part of a judgment delivered on the 26th November 2019 by Makgoba JP.

2 The well-established common law rule of practice in our courts has been that, generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that pending the appeal, the judgment appealed cannot be executed and no effect can be given thereto, except with the leave of the court which granted the judgment. See the matter of ***South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977(3) SA***.¹ The intended purpose of the rule was to prevent irreparable damage being done to the intending Appellant by the execution of the judgment pending appeal.

3 However, Section 18 of the Act introduces a test for leave to put into operation and execute an order pending the appeal process. Its enactment has overtaken the judicial authority that predates it.

4 *In casu*, the Applicant brings this urgent application in terms of Section 18 of the Act, seeking for an order in the following terms:

4.1 To the extent necessary, condoning the Applicant's non-compliance with the rules of this court relating to the forms and service, and for the hearing of this application on an urgent basis in terms of Rule 6(12)(a).

I pause to state that, after considering the papers and listening to both

¹ p. 543(A) at 544-545

counsel's submissions, I found that the matter was urgent and that this court should deal with it as such on an urgent basis.

4.2 That leave to be granted that the order granted by Phatudi J on the 5th February 2020 operates and be executed as part of a judgment delivered by Makgoba JP on the 26th November 2019, pending the outcome of the application for leave to appeal Phatudi J's order and the pending review application launched by the Applicants on the main application.

4.3 Costs of the application against the Respondent.

5 In an application in terms of Section 18 of the Act, the Applicant in such application bears the onus to establish three distinct propositions:

5.1 The Applicant must demonstrate that exceptional circumstances exists in his case based on the established facts of his case.

5.2 Applicant must prove on a balance of probabilities that he will suffer irreparable harm, if the order is not granted.

5.3 Lastly, it must be proven on a balance of probabilities that the Respondent will not suffer harm if the order is granted.

6 Keightly J, in her unreported judgment of **Mobile Telephone Networks (Pty) Ltd v Vodacom (Pty) Ltd and Another** stated the following:

"...The Court is required to make a determination on the probabilities of the alleged irreparable harm occurring. This is consistent with the purpose of Section 18, which is to prevent a party from suffering irreparable harm,

while appeal proceedings are pending. Its purpose is rooted in the realities and practicalities of the parties' situations. It follows that the determination of irreparable harm must also address these realities and practicalities. In other words, the court must determine whether, in reality, it is more probable than not that the Applicant (or the Respondent as the case may be) will suffer irreparable harm. As the court noted in *Incubeta*, this inevitably requires the court to make a qualitative assessment of the existence of irreparable harm: as to irreparable harm is a qualitative decision admitting some scope for reasonable people to disagree about the presence of the so-called "fact" of "irreparability".

7 Section 18 of the Act reads 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 of 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 on 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 an appeal, is not suspended pending the decision of the application or 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 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-section (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."*

- 8 The test to be applied by a court in deciding whether or not to suspend a court order by virtue of the provisions of Section 18(1) has been the subject of considerable judicial scrutiny, to the extent that conflicting decisions have been delivered with regards to whether or not the court ought to take into account the question of prospects of success on appeal. The above question was settled by the Supreme Court of Appeal in the matter of ***University of the Free State v Afriforum 2018 (3) SA 428 (SCA) para.9-15.***

In that matter, the appeal court found that the legislature has proceeded from established premise of the common law that the granting of relief of this nature constitutes an extra-ordinary deviation from the norm that, pending an appeal, a judgment and its attendant orders are suspended. The exceptionality of such an order is also underscored by the requirements of Section 18(4), which provides for *inter alia*, an automatic right of appeal on an urgent basis. The appeal court also found that the requirements introduced by Section 18(1) and (3) are more onerous than the common law requirements which existed previously and that which Section 18(3) has introduced.

- 9 In ***Incubeta Holdings (Pty) Ltd v Ellis supra*** at paragraph 22, Sutherland J held:

“Necessity, in my view, exceptionality must be fact-specific. The circumstances which are or may be “exceptional” must be derived from the actual predicament in which the given litigants find themselves.”

- 10 I proceed to scrutinize the facts *in casu* in order to determine the predicaments of the parties herein so as to determine whether exceptional circumstances do exist and to what extent each party stands to suffer irreparable harm in the event of the application being granted or dismissed. The Applicants avers in their founding papers that exceptional circumstances exist in their case that enjoins the court to grant the relief sought in its application in terms of Section 18 of the Act as set out in the Applicant's notice of motion.
- 11 It is common cause between the parties that, during April 2016, the Applicants concluded a written Accredited Installer's Agreement with the Respondent. On or about the 30th September 2019, the Respondent terminated the agreement on a 30 days notice. The Applicants disputed such a termination on the basis that the Respondent was not entitled to effect termination of their agreement in the manner it did.
- 12 On the 21st November 2019, the Applicants launched a review application to review the Respondent's decision to terminate their agreement, which application is still pending. Shortly thereafter, the Applicants brought an urgent application before this court to interdict the Respondent from implementing the termination pending the review. Makgoba JP granted the interim interdict pending the said review in favour of the Applicants and

further ordered the Respondent to restore and reinstate the Applicants onto the Respondent's system known as CLARITY and SAP.

- 13 During November 2019, the Respondent complied with the Makgoba JP's order by restoring and re-instating the Applicants' access into their system. On or about January 2020, the Respondent revoked the Applicants' access to their system again, this time on allegations of fraud allegedly perpetrated by some of the Applicant's employees on the Respondent's system. This court is however not going to delve much on the said allegations, reason being that civil proceedings were instituted by the Respondent in this regard, and no finding or rather a ruling was made on the matter by the court, instead the court which was ceased with the application decided to postpone the hearing *sine die* pending the appeal launched by the Respondent against Phatudi J's order.
- 14 To put facts in clear perspective and sequence of events that led to this application, the following unfolded. After the Respondent revoked the Applicant's access to the system in January 2020, on the 4th February 2020, the Applicants instituted civil proceedings before this court for contempt of court order by the Respondent on an urgent basis challenging the revocation of their access into the system against the court order for restoration and reinstatement granted by Makgoba JP.
- 15 After the hearing of the said urgent application, Phatudi J found on the day that the Respondent was indeed in contempt of Makgoba JP's interim order. Consequent thereto, the Respondent sought reasons in terms of Rule

49(1)(c) for his order. The above notice was accompanied by a notice to apply for leave to appeal the same order.

16 On the 11th February 2020, or hardly a week after the urgent application before Phatudi J, the Rule 49(1)(c) notice and the application for leave to appeal his order, the parties appeared before Campbell AJ at the South Gauteng High Court in Pretoria, wherein the Respondent sought a declaratory order to confirm cancellation or termination of the parties agreement, largely on allegations of fraud perpetrated by some of the Applicants employees, which allegations by the Respondent's own uncanned admission which is almost impossible to understand was neither reported as a criminal offence to the South African Police Service. However, at the end of the said hearing, the court postponed the application *sine die* pending the determination of the appeal launched by the Respondent against Phatudi J's order.

17 The Applicants then launched the current application on urgent basis. The Applicants premised this application on Section 18 of the Act on the following grounds:

17.1 That this matter was certified urgent on two previous occasions on the same issue which remains unresolved i.e. that the Respondent continues to deny the Applicants access into the system contrary to the parties agreement, as a result the Applicants are put in the same position that was prayed for in the previous hearings.

17.2 That in the main, due to the revocation of access, the Applicants and their employees are suffering severe business financial loss, in that since the closure of the business, the Applicants are incurring escalating rental costs from the leased business premises. There is also no earnings or income generated for their living.

17.3 Lastly, that given the situation, the Applicants are and continue to suffer serious prejudice and irreparable harm far much more-greater than the Respondents.

18 In argument, the Applicants further submitted that, the operation of the order in any event means that, the more the Applicants attends to the calls logged by all Respondent's customers in their designated areas, be it installation of new DSTV units, attendance of network connections or any other related complaints, the Applicants or its employees whilst on site generates revenue which in turn gets paid to the Respondents to make profits from their service.

19 Incontrovertible, the Respondent's opposition is based on allegations of alleged fraud perpetuated by certain Applicants' employees. Before me, counsel for the Respondents conceded that the Respondent did not take any further steps to meet with the Applicant's to see how best both parties could deal and address the alleged discovery by the Respondent, save for one of its officials writing emails to the Applicants who in turn undertook to conduct parallel investigations on the allegations.

- 20 I have already expressed my views on the allegations herein. I find it startling why such a serious matter as it were according to the Respondent, was not reported to the SAPS as the alleged conduct clearly amounted to a criminal offence pending resolution of the problem at the civil proceedings. No persuasive reason was advanced to the court for such a glaring omission, not unless in the contrary, the aim, attitude and insistence is simply to terminate the agreement without the parties engaging each other and attempting to find an amicable solution to the problem. That I find unsustainable.
- 21 I am of the view that, if the Respondents intention was to attend and deal with the problems discovered in conjunction with the Applicants, with all the systems in place and the advance technology at the Respondent's disposal, for all intense and purposes any of its contracted agents, not necessarily the Applicants herein, must/should accordingly be notified of any illegal and/or unlawful activities being perpetrated by any of its employees, and if detected such an employee/s access to the system must be terminated with immediate effect without necessarily terminating or revoking the entire agreement, because in certain instances, it can be assumed that the Agent might not even be aware of what some of its employees are doing on the client system rightly or wrongly, my emphasis.
- 22 I am convinced that flowing from the above, the Respondent is and would be in a position if looked at closely to deal with the issue raised to address and ameliorate any further potential harm on its side pending the appeal to be

heard before Phatudi J. For that matter, it could address any harm by any of its agents or by the agents' employees.

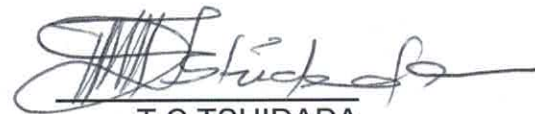
- 23 The circumstances outlined in paragraph 17.1 to 17.3 above constitutes, in my view, exceptional circumstances calling for the intervention of this court by way of implementing the provisions of Section 18 of the Act. The conduct of the Respondent is prejudicial to the Applicants and continues to cause irreparable financial loss of earning to the Applicants.
- 24 Given the prolonged completion process of appeal, and if the noted appeal herein is to proceed in the superior court of this division, that will entail forfeiture of substantial relief and loss of income to survive by the Applicants. This in my view qualifies as "exceptional circumstances".
- 25 The Applicants were successful in the two previous applications pending the review application in the main, therefore should not be deprived the benefit of the said orders by the unfortunate unpredictable appeal court process. It was undisputed that the Applicants are since the refusal of access to the system by the Respondent been unable to meet their business financial obligations let alone their personal and employees financial life expenses.
- 26 In the circumstances, the Applicants have made out a case, demonstrated and proved on a balance of probabilities that they will suffer irreparable harm if the two orders granted in their favour are not implemented pending the outcome of the application for leave to appeal.

27 I am therefore satisfied with the relief sought by the Applicants in this matter in terms of Section 18 of the Superior Court Act, 10 of 2013 and, I accordingly grant the following order:

27.1 The Order granted by this court on the 5th February 2020 as part of the judgment delivered on the 26th November 2019 shall operate and be executed in full, pending the outcome of the application for leave to appeal to be heard before this Court.

27.2 The Applicants are exempted from furnishing security in terms of Rule 49(12) of the Uniform Rules of Court.

27.3 The Respondent is ordered to pay the costs of this application.



T C TSHIDADA
ACTING JUDGE
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

1. For the Applicants	: Adv. Ndlovane
Instructed by	: Mvundlela & Associates Attorneys

- 2. For the Respondent : Adv. M Sello
Instructed by : Cliffe Dekker Hofmeyr Inc.
- 3. Date of hearing : 28 February 2020
- 4. Date to be delivered : 14 April 2020