

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: HCAA04/2020
COURT A QUO CASE NO: 542/2020

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

[3 JULY 2020]


.....
SIGNATURE

In the matter between:

MAKHADO LOCAL MUNICIPALITY
THE MUNICIPAL MANAGER

1ST APPELLANT
2ND APPELLANT

And

MAKHADO NANCY
ESTATE LATE MAKHADO

1ST RESPONDENT
2ND RESPONDENT

J U D G M E N T

MUDAU, J:

- [1] This is an appeal in terms of section 18 (4) of the Superior Courts Act 10 of 2013 (the Act). The application served before the Limpopo Local Division, Thohoyandou (per Makhafola, J). The parties are referred to as they were cited in the main application for convenience purposes. The first and second

respondents have come on appeal against the order by the court of first instance on 4 June 2020 in which it granted paragraphs 1.1-1.5 of the applicants' notice of motion pending the determination of an application for leave to appeal regarding the main application. The court *a quo* made the order that has been brought on appeal consequent upon an application by the applicants in terms of section 18(3) of the Act. After an agreement with counsel, this appeal was disposed of without further oral submissions in open court, pursuant to section 19 (a) of the Superior Courts Act.

- [2] The respondents are exercising their automatic right of appeal against that order conferred in terms of section 18 (4) (ii) of the Act. This Court, on appeal, is enjoined by section 18 (4) (iii) of the Act to deal with the appeal as "*a matter of extreme urgency*". Section 18 (4) (iv) of the Act provides that the order of the court *a quo* is automatically suspended pending the outcome of an appeal. Accordingly, a court on appeal is therefore able to substitute its finding for that of the court of first instance if it is convinced, for reasons founded in law or grounded on a different finding on the facts, that the application should have yielded a different outcome¹.
- [3] Under the common law, it is well established that once an appeal is lodged the order under appeal is automatically suspended. The judgment by Corbett JA (as he then was) in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*² has been the leading judicial authority for that proposition. A party could, however, apply for leave to execute the order notwithstanding the appeal. Rule 49(11) of the Uniform Rules of Court (which has since been repealed) restated the common-law position that an appeal suspended the execution of an order. Under the common law, a court had a wide discretion whether to allow or refuse execution of a court order. This common law rule of practice was adopted in Uniform Rule of Court 49(11), promulgated under the Supreme Court Act 59 of 1959. In relevant part

¹ *Knox D'Arcy Ltd and others v Jamieson and others* 1996 (4) SA 348 (A), [1996] 3 All SA 669 (A) at 360D–362F (SALR) and *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and another* 2015 (5) SA 245 (CC)

² 1977 (3) SA 534 (AD) [also reported at [1977] 4 All SA 53 (A)].

the rule read as follows: *"Where an appeal has been noted or an application for leave to appeal against . . . 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 appeal . . . , unless the court which gave such order, on the application of a party, otherwise directs."*

- [4] The Supreme Court Act 59 of 1959 has been repealed and replaced by the Act that came into operation on 23 August 2013. Subsequent thereto on 22 May 2015, rule 49(11) was also repealed.

- [5] Section 18 of the Act provides:

"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."*

- [6] The upshot of section 18(1)–(3) of the Superior Courts Act received thorough consideration by my brother, Sutherland J in *Incubeta Holdings (Pty) Ltd and another v Ellis and another*³. At the time, rule 49(11), provided:

"Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review 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 appeal or application, unless the court which gave such order, on the application of a party, otherwise directs."

- [7] Sutherland J's observation that the requirement, in terms of section 18(3), that a party making application in terms of that provision must prove "*the presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order; and the absence of irreparable harm to the respondent/loser, who seeks leave to appeal*" that introduces "*a new dimension*" has since been approved in several court decisions. As to what would constitute exceptional circumstances, Sutherland J, in *Incubeta*, looked for guidance to an earlier decision (on admiralty law), namely, *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas and another*⁴ where it was recognised that it was not possible to attempt to lay down precise rules as to what circumstances are to be regarded as exceptional and that each case has to be decided on its own facts. However, at 156H–157C, the court said the following:

"What does emerge from an examination of the authorities, however, seems to me to be the following:

- 1. What is ordinarily contemplated by the words 'exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; 'besonder', 'seldsaam', 'uitsonderlik', or 'in hoë mate ongewoon'.*
- 2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.*
- 3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.*
- 4. Depending on the context in which it is used, the word 'exceptional' has two shades of meaning: the primary meaning is unusual or*

³ 2014 (3) SA 189 (GJ)

⁴ 2002 (6) SA 150 (C)

different; the secondary meaning is markedly unusual or specially different.

5. *Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, 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."*

- [8] In *University of the Free State v Afriforum and Another*⁵ the Supreme Court of Appeal remarked at para [10] as follows:

"It is further apparent that the requirements introduced by sections 18(1) and (3) are more onerous than those of the common law. Apart from the requirement of "exceptional circumstances" in section 18(1), section 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".

- [9] In *Ntlemeza v Helen Suzman Foundation and another*⁶ the SCA observed: *"It must also be borne in mind that before the advent of section 18, the position at common law was that the court had a wide general discretion to grant or refuse an execution order on the basis of what was just and equitable whilst appreciating that the remedy was one beyond the norm".*

- [10] With the above background, it is appropriate that I now turn to the facts and circumstances of the present matter, before delving into the merits or otherwise of this appeal. The litigious background to the matter is largely common cause. On 8 December 2016, Bono Vision Design (the lessee), a company duly incorporated in accordance with the company laws of South

⁵ [2017] 1 All SA 79 (SCA)

⁶ [2017] 3 All SA 589 (SCA) at para [20]

Africa, duly represented by Moses Makhado (deceased) and the Makhado Local Municipality (the lessor and 1st respondent), represented by its Acting Municipal Manager (the 2nd respondent) entered into a lease agreement for the erection of a digital LED TV display billboard. The billboard was erected behind what is commonly known as Tshakhuma Market (named after its village), next to the main artery road leading to Thohoyandou. The main purpose of the lease agreement was for advertisement. The first applicant is the executrix of the estate of her late husband, the deceased. The second applicant is the estate of the deceased.

- [11] The applicants in the main application alleged that, the estate and thus the executrix of the estate were the successors in title to a lease agreement in respect of a billboard situated at the market. According to the first applicant during March 2020, she was advised to remove her billboard from the market due to a construction project underway at the market. On her version, the billboard was functional as at 11 March 2020 but was dysfunctional by 14 March 2020. Following a meeting, the second respondent advised the applicant's attorneys of record that the construction project will stop with immediate effect and in fact did so, on 27 March 2020 at the commencement of the Covid19 lockdown period.
- [12] By 6 May 2020 however, the construction work had recommenced. There were interactions between the applicant and certain municipal officials in the course of which it was said that unless the lease agreement otherwise provided, the removal of the billboard would be the first respondent's responsibility and that the applicants would be entitled to damages for past and future losses. The first applicant supports herself and her dependents through income received from advertisement revenue. On the respondents' version, the construction of the Tshakhuma market or the market upgrade project, is in two phases, to a total value of R15 million.

- [13] Before the commencement of the construction project, the market accommodated approximately 300 informal market stalls. However, the market lacked adequate public hygiene requirements in that there was *inter alia*, no fresh supply water, kitchen facilities, adequate parking and the necessary ablution facilities. The completed project will have 120 large stalls to accommodate a minimum of 300 'stallholders' with formal parking, kitchen facilities for selling prepared food to patrons, a borehole and a 20 000 L water storage dam. Once completed, the projects will bring much needed relief to the vendors and their customers in alleviating excessive congestion in the market and unhygienic conditions. From inception, the project was conceived as a six-month project to be completed by July 2020. However, due to attendant delays, the project commenced on 16 March 2020 and is likely to take more than the six-month initially envisaged given the Covid-19 pandemic and lockdown restrictions imposed by the Government of the Republic.
- [14] In the primary proceedings before the court of first instance, the applicants had sought certain prohibitory and mandatory relief premised on their contentions based on a lease agreement referred to above with the respondents. The main proceedings were launched as a matter of alleged extreme urgency on 13 May 2020. The respondents were required to notify the applicant's attorneys in writing of their intention to oppose the application on or before 13 May 2020 by 15h30, and to deliver their answering affidavit(s) by 11h30 on or before 14 May 2020, which they duly complied therewith on truncated basis in that, the respondents were given less than two court days to file their answering papers. The matter came to hearing on the Friday, 15 May 2020 and, as mentioned, the order granting the relief sought was given on Saturday, 16 May 2020. No reasons were furnished by the court of first instance on that occasion.
- [15] The court of first instance granted the applicants the following relief:
- "1. That the application is urgent.*
 - 2. Pending the calculation of the past loss of income and future loss of income suffered by the applicant(s) Andy which was caused by the 1st and/or 2nd respondents' conduct which income would have been generated by the billboard which belongs to the applicant(s) and with billboard is situated at*

and/or around and/or next to Tshakhuma market, Vuwani District, Venda, Limpopo Province, where the development and/or construction is taking place, such the development and/or constructions shall forthwith stop.

3. Pending the undertaking by the 1st and/or 2nd Respondent to remove and place the billboard at the place chosen by the 1st applicant and also that such undertaking shall also include that the 1st and/or 2nd Respondents shall bear all the costs of the removal and the placing of the billboard at the place chosen by the 1st applicant, the development and/or construction which is taking place at and/or next and/or around Tshakhuma market shall forthwith stop..

4. Pending the fulfillment of paragraph 2 and 3 above, all the machines, including the scavator, TLB, lorries, truck (s) or Roller and/or any machine shall forthwith be removed from the sight by the 2nd respondent where the development and/or construction is taking place which development is at and/or next and/or around Tshakhuma market.

5. Ordering the 2nd Respondent to pay costs of this application on attorney and own client scale."

[16] The reason for the timing of the application in terms of section 18(3) on 3 June 2020 given in the supporting affidavit was the discovery that the respondents filed a notice to appeal albeit in the absence of reasons for the order by the court of first instance. On 4 June 2020, the court of first instance granted the applicants' interim leave to execute the above-mentioned Court Order save on the issue of costs. Section 18(4)(i) of the Act prescribes that a court which makes an exceptional order pursuant to an application in terms of section 18(3) "must immediately record its reasons for doing so".

[17] A person must have the requisite legal capacity to be a party to a lawsuit. That is a well-established principle of our law. The attack against the order is based on more than one ground. It is unnecessary to traverse all of them for reasons that will become obvious in this judgment. First, the application in terms of section 18 (3) of the Act was launched and served on the respondents at 13H00 hrs on Saturday 30 May 2020, outside normal court hours and set down for 11h30 on Wednesday, 3 June 2020 again on truncated basis, before the court of first instance could give its reasons for the main order granted on 16 May 2020. The respondents contended that they were prejudiced as the application, which is the subject matter of this appeal, was launched prematurely whereas they were only obliged to file a notice of application for

leave to appeal within 15 days after the reasons for judgment had been handed down in terms of the applicable Rule.

- [18] Counsel for the respondents', Mr Watt-Pringle SC contended in his written heads of argument that, save for the alleged lease agreement, no other right in respect of the leased property, being the billboard, was alleged by the respondents (applicants) in their founding affidavit in the main application. To the extent that the applicant relied upon a written lease agreement between a juristic entity, Bono Vision Design, to lease from the first appellant (the first respondent), it is apparent that neither the applicants nor the deceased has or had any lease agreement in respect of the billboard. It was a point taken *in limine*, which in my respectful view, is valid. This point alone is dispositive of this appeal.
- [19] It is trite that, company is a juristic person with its own property and have legal rights and liabilities and that it can sue and be sued in its own name⁷. The separate personality of a company and its entity is distinct from its shareholders. Therefore, a company itself is capable of owing property, being a party to a contract, and being a claimant or defendant in legal proceedings. A shareholder is a natural and legal person who invested capital in the company. The shareholder generally own right to vote and they can participate in the affairs of the company through the general meetings. In this regard, the applicants assert, without more, in their founding affidavit in support of the section 18 (3) application that: "*[I]t is trite law that the executrix or executor of an estate acquires all the rights and obligations which are attached to the deceased at the time of his or her death*". However, the Companies Act, 71 of 2008 and attendant Regulations, regulate the appointment, role and responsibilities of directors in a company. Clearly, the position of a director cannot be inherited and accordingly, cannot form part of the deceased's estate.

⁷ See generally *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* [2018] ZACC 17 Case CCT 249/17 at para [64]. *Dadoo Ltd and Others v Krugerdorp Municipality Council* 1920 AD 530; *Ngcwase v Terblanche* 1977 (3) SA 796 (A) and *Universiteit van Pretoria v Tommie Meyer Films* 1979 (1) SA 441 (A).

- [20] It is trite that for purposes of section 18 (3) of the Act, an applicant bears the onus pending the determination of an appeal process to satisfy the following requirements: (a) that there are exceptional circumstances justifying the implementation of the order despite the appeal process, (b) that the applicant will suffer irreparable harm if the operation and execution of the order is suspended pending such appeal process and (c) that the respondent will not suffer irreparable harm if the order is granted pending the appeal process..
- [21] The respondents contend that the order by the court of first instance purports to provide status quo relief pending the vindication of certain rights enjoyed by the applicants but goes much further than that and provides the final relief in spite of the court a court's finding to the contrary. Properly distilled, the premise on which the main order was granted is that the deceased estate has succeeded to the leasehold rights over the electronic billboard. Since the billboard ceased working, presumably due to the construction work carried out at the market, the applicants have a claim for both past and future losses for lost revenue. Mr Watt-Pringle contended that, had the applicants sought an order for specific performance, the court would have been able to entertain an application for a *mandamus* requiring the respondents to ensure that the billboard remain where it was or was moved to a suitable place. Consequently, such an order could either have been final if there was no material dispute of facts or interim, pending the final determination as to whether the applicants are entitled to specific performance.
- [22] However, the court of first instance's main order, so it was argued, is final in effect, in that the applicants' alleged leasehold rights were finally determined in their favour. This is because the order is not made pending any final determination of those rights, which the respondents placed ownership of the billboard and the land where it was erected, in dispute. Besides, the applicants on their version defaulted on the lease agreement. In para 8.26 of the founding affidavit in the section 18 (3) it is stated: "*I was paying the rental even though not all the months...*").

[23] The order in paragraph 2 effectively interdicts the construction project, pending calculation of the applicants' loss of past and future income from the rental agreement. Inherently, the order assumes that the applicants are entitled to recover past and future loss of income, which order cannot be revisited by the court of first instance as it disposed of the rights of the parties in that regard. The assumption made in the order that the applicants will suffer future losses was on the basis that the lease agreement has been cancelled in which event; the applicants are not entitled to specific performance, but a damages claim. Counsel for the respondents contends that, if the respondents have already suffered pecuniary losses and will suffer future losses as the court of the first instance found, the need for an interdict was unnecessary as they could simply claim that which is due to them. This contention is meritorious. There is no plausible reason why the vindication of the applicants' rights, if any, requires the construction work to be halted.

[24] It was contended on behalf of the applicants by Mr Ramaite SC, and as the court of first instance concluded that, its judgment is interlocutory in nature. It is trite that the granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court (See *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another*)⁸. The requisites for an interim interdict (on the authority of *Setlogelo v Setlogelo*⁹ is as follows:

- “(a) a right which, ‘though prima facie established, is open to some doubt’;
- (b) a well grounded apprehension of irreparable injury;
- (c) the absence of ordinary remedy”.

[25] However, it is trite that in determining whether a decision is appealable “not merely the form of the order must be considered but also, and predominantly, its effect”¹⁰. In *Zweni v Minister of Law and Order*¹¹ the following was said by Harmse AJA (as he then was): (at 532J-533B):

⁸ 1973 (3) SA 685 (A) at 691C

⁹ 1914 AD 221 at 227)

¹⁰ (*South African Motor Industry Employers' Association v South African Bank of Athens Ltd* 1980 (3) SA 91 (A), a passage approved in, inter alia, *Zweni's case* (supra) at 532I, *Trope and*

“A ‘judgment or order’ is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings ... The second is the same as the oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief” (footnote omitted)

[26] The applicants primarily regurgitate the contents of the founding affidavit in relation to the main order in support of the section 18(3) application. In my view, they failed to cross the first barrier, and that is, the onus is on them to prove the existence of exceptional circumstances to justify the order sought. Without more, the applicants suggest and the court of first instance found, that the respondents would not suffer any prejudice if the orders were granted. The facts of this matter are clearly distinguishable from the facts in *Confuscore (Pty) Ltd v Ehlers and Others*¹²; a judgment by this court (per my brother, the Honourable Makgoba JP) relied upon by the applicants. The judgment does not come to the aid of the applicants. In *Confuscore*, Makgoba JP granted an application in terms of section 18 (3) in circumstances where ownership in respect of certain immovable property was beyond doubt. These were farms bought on public auction and transfer of ownership already effected by the Registrar of Deeds. The application for leave to appeal having failed, the court concluded in essence, that the previous owners had no right discernible in law to hold onto the property in granting the section 18 (3) application.

[27] Section 18(1) however states, in peremptory terms, 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 section 18(4), which provides that a court granting the order must immediately record its reasons and that the aggrieved party has an automatic right of appeal. Furthermore that, the appeal must be dealt with as a matter of extreme urgency and that pending the outcome of the appeal the

Others v South African Reserve Bank 1993 (3) SA 264 (A) at 271F-G and *Trakman's case* (supra) at 289E.) *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A)

¹¹ Above footnote 9.

¹² 2019/2016 [2019] ZALMPPHC 2 (1 February 2019)

order is automatically suspended. As Binns-Ward J stated in the *Minister of Social Development Western Cape and others v Justice Alliance of South Africa and Another*¹³ (Fortuin and Boqwana JJ concurring):

“... the less sanguine a court seized of an application in terms of s 18(3) is about the prospects of the judgment at first instance being upheld on appeal, the less inclined it will be to grant the exceptional remedy of execution of that judgment pending the appeal. The same quite obviously applies in respect of a court dealing with an appeal against an order granted in terms of s 18(3).”

[28] In *University of the Free State v Afriforum and Another*¹⁴, the SCA was of the view that *Justice Alliance* serves as a prime example why the prospects of success in the appeal are relevant in deciding whether to grant the exceptional relief. In attempting to meet the requirement of exceptionality in the founding papers, the applicants based their argument upon the premise that, *“the main application was launched, prosecuted and adjudicated on urgent bases”* (sic). In addition that, the suspension of the court order because of *“the application for leave to appeal creates/causes the status quo to prevail”*, which will cause them to suffer irreparable harm.

[29] In granting the section 18(3) order, the court of first instance reasoned with reference to paragraphs 34 to 43 of the applicants' founding papers *“proves that for the purposes of this application the unchallenged averments by the applicants relating to the irreparable harm they would suffer and that no irreparable harm or prejudice would issue to the respondents has (sic) discharged the onus that they bear on a balance of probabilities”*. The court of first instance reasoned that its evaluation *“serves to found reasons (sic) for granting the prayers of the application in favour of the applicants”*. The respondents contend that they have strong prospects of success on appeal given the applicants' lack of standing in relation to the lease agreement, which

¹³ [2016] ZAWCHC 34

¹⁴ *supra*

is not materially disputed coupled with the over breadth of the interdicts which by far exceed any relief required to protect the applicants' rights, if any.

- [30] As Binns-Ward J observed in *Justice Alliance* case, it is not the function of this Court to in any manner pre-empt the appeal in the principal case, but it is unavoidable for current purposes, having regard to the basis given for the interim order, that we should consider how well-grounded the court a quo's reason was in the context of the evidence and the applicable statutory provisions. The court of first instance reasoned, in summary that, the applicants will suffer irreparable harm in the absence of an income from the billboard without execution of the prior order as opposed to the respondents.
- [31] I have serious difficulties to see how this could amount to an "exceptional circumstance" as envisaged in section 18(1) of the Act. It is nothing more than an inconvenience, and a partisan commercial interest, which confronts numerous litigants in civil proceedings, daily. To the contrary, with the respondents now precluded from continuing with the construction of the market project, it has the potential to waste substantial public resources incurred because of increased costs in completing the project. The project is likely to suffer undue delay. The applicants do not dispute this. These are substantive averments, which clearly underscore the conclusion that the respondents would suffer irreparable harm in the event of the order of the court of first instance not being suspended pending appeal. As Moseneke DCJ held: "*when a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of State against which the interim order is sought*"¹⁵.
- [32] The prohibitory interdict against the respondents, most importantly, has the effect of undermining the local community and the public at large's access to water and adequate hygienic conditions in conflict with the fundamental rights

¹⁵ Para 46, *National Treasury and Others v Opposition to Urban Tolling Alliance and Others (Road Freight Association as applicant for leave to intervene)* 2012 (11) BCLR 1148 (CC), 2012 (6) SA 223 (CC).

to human dignity (section 10 of the Constitution) as well as water security (section 27(1)(c) of the Constitution) protected by the Bill of Rights. That cannot be in the interest of justice given the totality of the facts regarding this matter. As to the interests of justice, the Chief Justice had this to say in *Tshwane City v Afriforum and another*¹⁶ at para 40:

“The over-arching role of interests of justice considerations has relativised the final effect of the order or the disposition of the substantial portion of what is pending before the review court, in determining appealability.”

The learned CJ continued and echoed the principle set out in *OUTA* by Moseneke DCJ in these terms:

“This Court has granted leave to appeal in relation to interim orders before. It has made it clear that the operative standard is ‘the interests of justice’. To that end, it must have regard to and weigh carefully all germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable”¹⁷.

- [33] To the extent that the court of first instance concluded that its order was not final, in my respectful view, it did not determine an outcome or even provide a timescale within which such reconsideration must be completed. The effect of the order was final. This serves to underscore the issue of whether the applicants were entitled to an interdict that was finally decided by the court of first instance despite its views to the contrary. In my respectful view, the requirement of section 18(3), namely, proof by the applicant's on a balance of probabilities that the implementation of the order pending appeal would not cause irreparable harm to the respondents has not been met.
- [34] By way of another example, para 4 of the order appealed against is to the effect that pending compliance with the orders in para 2 and 3 all machinery and vehicles must be removed from the construction site. This is an unnecessary burden likely to cause irreparably harm on the respondents and an inconvenience which is most likely to escalate attendant costs and

¹⁶ 2016 (6) SA 279 (CC), [2016] JOL 36299 (CC); [2016] ZACC 19 (CC); 2016 (9) BCLR 1133 (CC)

¹⁷ Ibid at 40

completely unnecessary once the construction activities were brought to a stop. It is beyond any imaginable comprehension why the presence of relevant machinery and vehicles on site, might inconvenience the vindication of the applicants' rights in any way.

- [35] In my respectful view, the factual premise for the primary reason offered by the court a quo for the exceptional order made by it had thus not been established in the main proceedings, which is likely to cause the applicants a serious struggle at the appeal stage. In view of the above, the section 18 (3) application was misconceived and ought to have been dismissed. In the result, the appeal should succeed. For the reasons discussed above in my view, the court of first instance should not have granted the application in terms of section 18(3) of the Superior Courts Act and that the appeal must be upheld.
- [36] Then there is the aspect of prospects of success on appeal against costs on a punitive scale granted to the applicants in the main application. Although the question of costs is a discretionary issue that rests in the court of first instance¹⁸, the court of first instance is silent with regard to why costs in a punitive scale (attorney and own client scale) were awarded to the applicants in that regard by reason of special considerations arising either from the circumstances or conduct of the respondents.
- [37] There is no suggestion of clear vexatious and reprehensible conduct on the part of the respondents. In the absence of weighty consideration, it calls into question whether the discretion was judicially exercised. It is trite that failure to furnish proper reasons amounts to a grave lapse of duty and a serious impediment to the appeal process¹⁹. Finally, there is the issue of costs regarding this appeal. This is a purely factual question, i.e. whether or not the three requirements for relief in section 18 of the Act were met. There is no reason why the question of costs should not follow the result. It follows that an award of costs against the applicants in this appeal as they were unsuccessful is warranted.

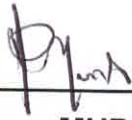
¹⁸ *Ferreira v Levin NO and Others* [1996] ZACC 27; 1996 (2) SA 621 (CC).

¹⁹ See *Botes and another v Nedbank Ltd* 1983 (3) SA 27 (A) at 27H–28A; *Strategic Liquor Services v Mvumbi NO and Others* 2010 (2) SA 92 (CC) at 96G–97A and *Commissioner, South African Revenue Service v Sprigg Investment* 117 CC t/a *Global Investments* 2011 (4) SA 551 (SCA) at 561A–E.

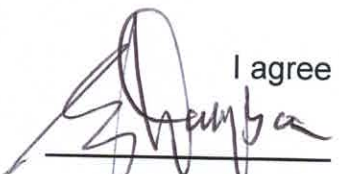
[38] In the result, the following order is made:

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the court a quo is set aside and substituted with the following:

"The application to execute the order of this court delivered on 16 May 2020 is dismissed with costs."

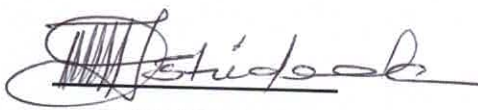

MUDAU J

[Judge of the High Court]

I agree

MAKGOBA J P

[Judge President of the High Court,
Limpopo Division]

I agree


TSHIDADA A J

[Acting Judge of the High Court]

Date of Hearing: 3 July 2020

Date of Judgment: 3 July 2020

APPEARANCES

For the Appellant: C E Watt-Pringle SC

Adv. S Monyela

Instructed by: Lebeya And Associates Attorneys

For the Respondent: M S Ramaite SC

Instructed by: Anton Ramaano Attorneys