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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION , PRETORIA

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

CASE NUMBER: 42949/2013

21/5/2019

In the matter between:

J[....] E[....]

Applicant

(In the application for leave to appeal)

(The respondent in the application in terms of section 18
of the Superior Courts Act)

and

C[....] E[....]

Respondent

(In the application for leave to appeal)

(The applicant in the application in terms of section 18 of
the Superior Courts Act.)

JUDGMENT:
IN THE APPLICATION FOR LEAVE TO APPEAL
IN THE APPLICATION IN TERMS OF SECTION 18 OF THE SUPERIOR
COURT ACT

AC BASSON, J

[1] This is an application for leave to appeal against my judgment and order handed down on 27 July 2018. An application in terms of section 18(2) of the Superior Courts Act¹ ("the Act") brought by the respondent was simultaneously argued.

Application for leave to appeal

[2] In brief the applicant relies on five grounds for leave to appeal: (i) he firstly contended that this court erred in finding that the relief sought by the respondent, is not final in effect; (ii) secondly, the applicant took issue with this court's findings in respect of the settlement agreement and more in particular with this court's reliance on the *Comwezi*² judgment ; (iii) thirdly it is contended that the court erred in finding that in the prevailing circumstances, the court has the power to regulate the position of the parties until final distribution; (iv) fourthly, the applicant contended that the court erred in finding that it was common cause that the assets of the trust form part of the joint estate and that the assets of the trust amounted to approximately thirteen million rand; and (v) lastly, it is argued that this court erred in directing the applicant to make certain payments and more in particular, in directing the applicant to pay *mora* interest on the amounts concerned from the two dates on which the settlement agreement (that was made an order of court) initially obliged the applicant to make. In this regard it was submitted that the finding and order that the applicant is liable for *mora*

¹ Act 10 of 2013.

² *Comwezi Security Services (Pty) Ltd v Mowzer NO 2014 JDR 0610 (SCA)*.

interest on the two capital amounts is final and binding.

[3] In deciding whether to grant leave to appeal, this court has to take into account the provisions of section 17(1)(a)(i) of the Act. Leave to appeal may only be granted where the court is of the opinion that the appeal would have reasonable prospects of success in respect of its findings.

[4] It is not necessary for purposes of this application to discuss the merits of each of these grounds for leave to appeal in detail. Suffice to point out that I am persuaded, after having considered the submissions on behalf of the applicant, that the applicant has reasonable prospects of success on appeal.

Order: Application for leave to appeal

1. The application for leave to appeal is granted to the Full Court of this Division.
2. Costs to be costs in the appeal.

Application in terms of section 18(2) of the Act

[5] The respondent (in this application) refuses to pay the amounts that he has been ordered to pay pending the outcome of the action between the parties, on the basis that his Notice of Intention to Appeal in terms of section 18(1) of the Act suspends the order issued.

[6] The applicant (in this application) filed an application in terms of section 18 of the Act in terms of which she sought an order that the orders granted by this court on 27 July 2018, are *interim* and do not have final effect as intended by section 18(1) of the Act with the result that the orders are not suspended by any application for leave to appeal or appeal proceedings. Alternatively, it was submitted that if leave to appeal is refused, the court should nonetheless order that the orders of 27 July 2018 will be operational and executable pending the outcome of any further applications that the applicant may launch.

[7] I have already granted leave to appeal, *inter alia* , on the basis that the applicant has reasonable prospects of success on appeal in respect of this court's finding that the orders are not final.

[8] The only issue thus remaining is whether this court should grant an order in terms of prayer 2 of the Notice of Motion that the orders of 27 July 2018 will be operational and executable pending the outcome of those appeal procedures.

[9] To succeed with such application, the applicant must show that there are exceptional circumstances. In addition, the applicant must prove on a balance of probabilities that she has complied with the provisions of section 18(3) of the Act which requires her to prove on a balance of probabilities that she will suffer irreparable harm if the court does not grant the order and that the respondent will not suffer irreparable harm if the court grants the order: The Court in *Swart & Another v Cash Crusaders Southern Africa (Pty) Ltd*³ explains:

"[4] ... Both judgments make it clear that s 18 of the Act has introduced a new dimension to these types of proceedings by requiring first that the discretion may be exercised only if the conditions precedent of "exceptional circumstances", and actual irreparable harm to one party, and no harm to the other, are proven. It is now incumbent upon the applicant seeking leave to execute pending an appeal, to prove on a balance of probabilities that it will suffer irreparable harm if leave to execute is not granted, and that the other party will not suffer irreparable harm if the court so orders. Once these jurisdictional facts are established, the court may exercise its wide discretion to grant leave to execute, or not to grant leave."

[10] The applicant contends in her Founding Affidavit that this is "a special and extraordinary situation" and that she needs the funds in order to be financially independent and that she needs the money in order to exercise her right to have her complaint (the main action pending before the court) heard.

[11] Although the applicant sets out in her affidavit why she needs the money, she does not allege that she will suffer irreparable harm if the court does not grant her the order in terms of section 18 of the Act, nor does she allege that the respondent will not suffer irreparable harm if the order is granted. This is a fatal

omission and the application should therefore fail.⁴

[12] In the event the following order is made:

The application in terms of section 18 of the Superior Courts Act is dismissed with costs.

AC BASSON

JUDGE OF THE HIGH COURT

Appearances:

For the applicant: SD Wagener SC

Instructed by: Clark & Van Eck Attorneys

For the applicant: JL van der Merwe SC

Instructed by: Coxwell Steyn Visser & Naude c/o Sanet De Lange Inc.

³ 2018 (6) SA 287 (GP).

⁴ The Court in *Swart* *ibid* came to a similar conclusion at para [9]: "A further submission going to the heart of the matter, and the interpretation of the provisions s 18 (3) was the following: the Respondent did not in its s. 18 (1) application deal with the position of the Second Appellant at all. The Second Appellant employed the First Appellant and also opposed the Respondent's main application. Both the Second Appellant and the First Appellant brought an application for leave to appeal against the judgment of Kollapen J. Thus, the Respondent in seeking relief in terms of s. 18 (1) was required to make out a case of absence of irreparable harm in regard to both the First Appellant and the Second Appellant. The Respondent says nothing in its application in regard to the absence of irreparable harm to the Second Appellant, and this was therefore a fatal omission to the Respondent's application and on this basis alone, it ought to have been dismissed with costs by Kollapen J."