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.

……………………….
……………………….

DATE 21/12/2016 SIGNATURE……………

CASE NO: 2187/2016

In the matter between:

SILVER EDGE TRADING 8 CC	**APPLICANT**
and	
MEC FOR EDUCATION: LIMPOPO PROVINCE	**FIRST RESPONDENT**
HOD FOR EDUCATION: LIMPOPO PROVINCE	**SECOND RESPONDENT**

JUDGMENT

MAKGOBA JP

[1] This is an application in terms of Section 18 of the Superior Courts Act, 10 of 2013 for the operation and execution of the order of MG Phatudi J pending the outcome of the Respondents' application for leave to appeal, including the appeal, if any, to be noted.

[2] It is common cause that on the 19 September 2016 MG Phatudi J granted an order in favour of the Applicant. Subsequent thereto the Respondents brought an application for leave to appeal before MG Phatudi J which application was dismissed with costs on 3 November 2016.

[3] It is against this background that the Respondents took the matter up on appeal in the form of a petition to the Supreme Court of Appeal. The Applicant consequently brought the present application in terms of Section 18 of the Superior Courts Act 10 of 2013.

[4] The appropriate provisions of section 18 of the Act read as follows:

"18(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.

18(2) …………

18(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 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."

[5] Under the common law practice the Court to which the application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised.

See: **South Cape Corporation (Pty) Ltd v. Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) at 545 C.**

[6] Section 18 of the Act introduces a fresh test for leave to put into operation and execute an order pending the appeal process and accordingly, judicial authority that predates the section has been overtaken by its enactment.

In **Incubeta Holdings (Pty) Ltd v. Ellis 2014 (3) SA 189 (GJ) at 194 B-D** Sutherland J stated the position as follows:

"*The thesis advanced on behalf of respondents is that the discretion hitherto exercised by the Court is history, and that one must now look exclusively to the text of section 18.*

Emphasis was placed on the heavy onus on the litigant who seeks to execute on an order, pending an appeal, as formulated on ss 18(1) and (3).

It seems to one that there is indeed a new dimension introduced to the test by the provisions of section 18. The test is twofold. The requirements are:

- *First, whether or not exceptional circumstances exist and*
- *Second, proof on a balance of probabilities by the applicant of –*
    - *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".*

[7] The test for leave to put into operation and execute an order pending the appeal was authoritatively set out in a more recent judgment of Full Court (per Ranchod, Fabricius and JW Louw JJ) Gauteng Division, Pretoria in the matter of **Member of the Executive Council for Co-Operative Governance, Human Settlements and Traditional Affairs (COGHSTA) and Others v. Mogalakwena Municipality and Another,** Case Number **A484/2016** dated **10 November 2016** at paragraphs [24] – [25].

See also, more recently, the Supreme Court of Appeal decision in **University of the Free State v. Afriforum and Another [2016] ZA SCA 165 (17 November 2016)** at para [9] – [11].

[8] It is clear therefore that in terms of the present legal dispensation the Applicant must prove three jurisdictional requirements on a balance of probabilities: namely:

8.1 Exceptional circumstances

8.2 Irreparable harm to the Applicant if the order is not granted; and

8.3 That the Respondent will not suffer irreparable harm if the order is granted.

If the above jurisdictional requirements are met, the Court has discretion to grant or dismiss the application. Such discretion should be exercised in the interest of justice.

[9] In **Incubeta Holdings (Pty) Ltd v. Ellis supra,** Sutherland J held:

"[22] Necessarily, in my view, exceptionality must be fact-specific. The circumstances which are or may be "exceptional" must be derived from the actual predicaments in which the given litigants find themselves".

[10] I now proceed to examine the facts of the present application in order to determine the predicaments of the litigants herein so as to make a finding as to 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.

[11] The following circumstances and / or considerations come to the fore upon my analysis of the facts of this case:

11.1 The respondents' prospects of success on appeal are poor.

11.2 If this application is not granted and the appeal is eventually dismissed, such dismissal of the appeal will work cold comfort for the applicant as it would by then be left without adequate or effective relief. This is so because the bid / contract in issue is for a limited period.

11.3 The duration of the tender for which the Applicant made bid unsuccessfully is three years. The first year has come and gone and only two years are left. The remaining two years continue to run.

11.4 The remainder of the period of the tender (two years) will in all probability expire before finalisation of the appeal process. Even if the appeal were to be disposed of earlier by the Supreme Court of Appeal, the respondents are on record as saying they would proceed to the Constitutional Court, therefore prolonging the appeal process.

11.5 The main application was brought in terms of Section 6 of PAJA. The Applicant cannot avail itself of a remedy of an award of damages in the event of the failure of the appeal process.

11.6 If this application is refused, the potential of the applicant having to shut down business and retrench employees is real and very high.

11.7 If the order is granted the respondents will not be required to expend any monies in favour of the Applicant unless and until the latter has rendered service to the Department of Education.

11.8 The Department will not be indebted to the Applicant unless and until the Applicant had rendered service and presented invoices therefor.

11.9 The Applicant has a good record of delivering quality service to various Departments as shown in Annexures "E1","E2","E3" & "E4" attached to the Founding Affidavit.

The Respondents do not stand to suffer any harm emanating from the Applicants performance in terms of the tender.

[12] In my view the aforegoing sufficiently satisfy the novel prejurisdictional requirements of Section 18(3) of the Act. It is plain from the summary of the circumstances given above that the Applicant would suffer irreparable harm if the order is not put into operation.

[13] In the result I grant the following order:

1. The order of Phatudi J dated 19 September 2016 shall operate pending the outcome of the application in terms Section 17(2) of Act 10 of 2013 for leave to appeal, including any appeal noted, if at all.

2. The Applicant is exempted from furnishing security in terms of Rule 49(12).

3. The Respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.

EM MAKGOBA JP
JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

For the Applicant	:	Adv. K Lengane
	:	L Mbangi Inc.
For 1st & 2nd Respondent	:	Adv. TF Mathibedi SC
		Adv. A Mofokeng
		State Attorney
Heard on	:	20 December 2016
Judgment delivered on	:	20 December 2016