THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 930/23

In the matter between:

JUSTICE FOR ALL WORKERS OF SOUTH AFRICA **Applicant**

and

REGISTRAR OF LABOUR RELATIONS **First Respondent**

THE DEPARTMENT OF EMPLOYMENT AND LABOUR **Second Respondent**

Heard: **20 February 2024**

Delivered: **27 February 2024**

This judgment was handed down electronically by consent of the parties' representatives by circulation to them by email. The date for hand-down is deemed to be 27 February 2024.

JUDGMENT

PRINSLOO, J

<u>Background</u>

[1] The Applicant is an unregistered trade union, which was established in August 2020. On 31 March 2023, the Applicant submitted an application in accordance with section 96(1) of the Labour Relations Act[1] (LRA) to be registered as a trade union.

[1] Act 66 of 1995, as amended.

On 3 April 2023, the First Respondent (Registrar) informed the Applicant that its application did not meet the requirements for registration in terms of section 96(4) of the LRA, as the information provided was not sufficient and the Applicant was afforded an opportunity to prove that its application complied with the LRA and that it is indeed a genuine trade union. The Registrar listed the information to be submitted for consideration and the Applicant was afforded 30 days to meet the requirements in terms of section 96(4).

[2] On 25 May 2023, the Registrar issued a letter to the Applicant, referring to the application for registration and the information received from the Applicant, which was considered. The letter stated that the Applicant's application failed to comply with the registration requirements of the LRA, that it was found not to be a genuine trade union and that the application for registration was refused with effect from 25 May 2023.

[3] The Applicant subsequently appealed to this Court in terms of the provisions of section 111 of the LRA. The appeal was enrolled for hearing on 5 December 2023 and judgment was handed down on 24 January 2024. The Court (per Mongie AJ) ordered that:

'1. The appeal is upheld;

2. The first respondent's decision to refuse to register the applicant is set aside;

3. The first respondent is ordered to register the appellant as a trade union in terms of section 96(5) and 96(7) of the Labour relations Act and to issue a certificate of registration in the appellant's name, within 14 days of date of this order;

4. The first respondent [is] ordered to pay the costs of this appeal in terms of section 111(3).'

[4] Pursuant to receipt of the judgment, the Respondents filed an application for leave to appeal against the whole judgment and orders made on 24 January 2024.

[5] The Applicant subsequently and on 13 February 2024 approached this Court on an urgent basis for an order directing that the operation and execution of the orders granted in the judgment of 24 January 2024 not be suspended pending the application for leave to appeal filed by the Respondents and any subsequent appeal.

[6] The Respondents opposed the application.

Section 18 of the Superior Courts Act: general principles

[7] The default position is that the operation and execution of a decision (other than a decision not having the effect of a final judgment) is suspended pending the outcome of an application for leave to appeal or an appeal. Section 18 of the Superior Courts Act[2] regulates the circumstances under which a party may apply for an order that departs from the ordinary consequence of filing an application for leave to appeal. The court may order otherwise under exceptional circumstances if it is established on a balance of probabilities that the applicant 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.[3]

[8] Section 18 of the Superior Courts Act provides that:

'18 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;

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[2] Act 10 of 2013.

[3] See: *Luxor Paints (Pty) Ltd v Lloyd and another* [2016] ZALCJHB 505; (2017) 38 ILJ 1149 (LC).

(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.'

[9] The Labour Appeal Court (LAC) in *Road Traffic Management Corporation v Tasima (Pty) Ltd and others*[4] (*Tasima*) considered the provisions of section 18(3) versus the common law position as follows:

'[43] Prior to the enactment of section 18(3) of the SC Act there was no statutory provision regulating interim execution orders. In terms of the common law, the noting of an appeal automatically suspends execution of the judgment appealed against. Where the successful party wishes to execute upon the judgment, it is required to make an application for leave to do so and bears the onus to show why the judgment should be executed pending the appeal, subject, in appropriate cases to the furnishing of security *de restituendo*. The court had a wide discretion to grant or refuse leave to execute and was required to determine what was just and equitable in all the circumstances having regard to the potentiality of irreparable harm or prejudice to the parties, the balance of convenience and the prospects of success on appeal. At common law, an interim execution order is itself an interlocutory order and was generally not appealable on the grounds that such an order may be varied by the court granting it in the light of changed circumstances.

[44] Section 18 of the SC Act has significantly altered the common law in more than one respect. The court no longer has a wide discretion to do what is just and equitable or to rely exclusively on the balance of convenience or the appeal's prospects of success. Now, before a court may order interim execution, the applicant for that relief must prove three things on a balance of probabilities. Firstly, the applicant must show that exceptional circumstances exist (perhaps including the

[4] [2018] ZALAC 47; [2019] 5 BLLR 434 (LAC) at paras 43 - 44.

balance of convenience and prospects of success) justifying the reversal of the ordinary principle of suspension pending appeal. Secondly, it must prove on the probabilities that it will suffer irreparable harm if interim execution is not ordered. Thirdly, it must prove that the other party will not suffer irreparable harm if an order of interim execution is granted. Should the applicant fail to discharge its onus in relation to any one of these requirements, the court may not grant an interim execution order. Additionally, in terms of section 18(4) of the SC Act, where an interim execution order is granted, the aggrieved party has an automatic right of appeal against that order to the next highest court and the order will be automatically suspended, pending the outcome of such appeal.'

[10] In *Incubeta Holdings (Pty) Ltd and another v Ellis and another*[5] *(Incubeta),* the Court held that:

'[16] It seems to me that there is indeed a new dimension introduced to the test by the provisions of Section 18. The test is twofold; the requirements are:

16.1 First, whether or not 'exceptional circumstances 'exist, and

16.2 Second, proof on a balance of probabilities by the applicant of –

16.2.1 The presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order, and,

16.2.2 The absence of irreparable harm to the respondent/loser, who seeks leave to appeal.'

[11] In *University of the Free State v Afriforum and another*[6] *(Afriforum),* the Supreme Court of Appeal (SCA) held:

'[9] What is immediately discernible upon perusing sections 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 section 18(4), which provides that a court granting the order must immediately record its reasons; that the

[5] 2014 (3) SA 189 (GJ) at para 16.
[6] [2017] 1 All SA 79 (SCA) at paras 9 – 10.

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.

[10] 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.'

[12] The effect, in short, is this: the Superior Courts Act limits the discretion of a court to grant the relief of interim execution and section 18(3) introduced a higher threshold and more onerous requirements. An applicant must prove three distinct requirements on balance of probabilities:

1. Exceptional circumstances (including the balance of convenience and prospects of success);
2. That it will suffer irreparable harm if interim execution is not ordered;
3. That the other party will not suffer irreparable harm if an order of interim execution is granted.

[13] Section 18(3) places a heavy onus on an applicant and if an applicant fails to prove any one of the requirements, the application must fail and be dismissed.

[14] It is in the context of the requirements of section 18(3) that this application is to be decided.

<u>Analysis: The section 18(3) application</u>

Exceptional circumstances

[15] The first issue to be decided is whether there are exceptional circumstances.

[16] The question as to what would constitute ‘exceptional circumstances’ had been considered in *Incubeta* and the Court held that exceptionality must be fact-specific and circumstances which are or may be ‘exceptional’ must be derived from the actual predicaments in which the given litigants find themselves. The Court held that:

‘In my view the predicament of being left with no relief, regardless of the outcome of an appeal, constitutes exceptional circumstances which warrant a consideration of putting the order into operation. The forfeiture of substantive relief because of procedural delays, even if not protracted in bad faith by a litigant, ought to be sufficient to cross the threshold of ‘exceptional circumstances’.’[7]

[17] *Incubeta* has been quoted with approval by the SCA[8] and it is clear that the determination of whether exceptional circumstances exist is a fact-specific enquiry and each case has to be decided on its own facts as there is no definition of exceptional circumstances.

[18] In *Incubeta,* it was held that:

‘Significantly, although it is accepted in that judgment that what is cognisable as ‘exceptional circumstances’ may be indefinable and difficult to articulate, the conclusion that such circumstances exist in a given case, is not a product of a discretion, but a finding of fact.’[9]

[19] In *Afriforum,* with regard to proving exceptional circumstances, it was held that:

‘Whether or not “exceptional circumstances” for the purposes of section 18(1) are present, must necessarily depend on the peculiar facts of each case. In *Incubeta Holdings* at paragraph 22 Sutherland J put it as follows:

[7] *Incubeta supra* at para 27.
[8] *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA); 2*Afriforum supra*.
[9] *Incubeta supra* at para 18.

"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."
I agree. Furthermore, I think, in evaluating the circumstances relied upon by an applicant, a court should bear in mind that what is sought is an extraordinary deviation from the norm, which, in turn, requires the existence of truly exceptional circumstances to justify the deviation.'[10]

[20] The LAC confirmed in *Tasima* that the applicant must show that exceptional circumstances exist, including the balance of convenience and prospects of success, justifying the reversal of the ordinary principle of suspension pending appeal.

[21] The question is thus whether the circumstances *in casu* are truly exceptional and whether an extraordinary deviation from the norm is justified. This question is to be answered by considering the facts and the circumstances relied upon by the Applicant.

[22] The prospects of success in the appeal is a relevant factor in the consideration of the application, as was held in *Minister of Social Development, Western Cape and others v Justice Alliance of South Africa and another*[11] where the court said that:
'It follows that the less sanguine a court seized of an application in terms of section 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 section 18(3). The position is very much akin to that which pertains when interim interdictory relief pending a judicial review is being considered.'

[23] In *Afriforum*, the SCA also confirmed that the prospect of success in the appeal is a valid consideration when determining whether exceptional circumstances have been established by an applicant seeking leave to execute pending appeal.

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[10] *Afriforum supra* at para 13.
[11] [2016] JOL 35612 (WCC) at para 27.

[24] The Applicant submitted that the exceptional circumstances are *"evident and proven on the account [of] what is set out under irreparable harm".* Exceptional circumstances and the existence or absence of irreparable harm are distinct requirements that must all be satisfied in order for an applicant to succeed with an application in terms of section 18(3). As alluded to *supra,* section 18(3) places a heavy onus on an applicant and an applicant must prove the three distinct requirements on a balance of probabilities.

[25] It must be emphasized that an order in terms of section 18(1) and (3) of the Superior Courts Act is a drastic and extraordinary remedy reserved only for exceptional circumstances.

[26] The Applicant's pleaded case, in respect of exceptional circumstances, is that the Registrar blatantly refused the Applicant the opportunity, as afforded by section 96(4) of the LRA, to attend to any shortcomings in the application for registration and to mend its application. Had the Registrar followed the mandatory prescripts of section 96(4) of the LRA, there might not have been an appeal in terms of section 111 of the LRA. In the judgment of 24 January 2024, the Court made a finding on the Registrar's failure to observe the mandatory statutory responsibility.

[27] The Respondents dispute that there are any truly exceptional circumstances and that any deviation from the normal position that the judgment is suspended pending an application for leave to appeal, will not be justified. The Respondents' case is that, as an attempt to make out a case for exceptional circumstances, the Applicant alleged that the Registrar blatantly refused the Applicant the opportunity as afforded by section 96(4) of the LRA to attend to any shortcomings in the application for registration and to mend its application. This averment is factually incorrect.

[28] It is evident from annexure 'J1' to the Applicant's founding affidavit and annexure 'AA3' to the Respondents' answering affidavit that the Registrar indeed addressed a letter to the Applicant, dated 3 April 2023, indicating that the application did not meet the requirements and that the information provided was not sufficient. The letter stated that the Applicant was afforded an opportunity to prove that its

application complies with the LRA and that it is a genuine trade union. The letter recorded the documents submitted and listed the further information to be submitted, within 30 days, to enable the Registrar to determine whether the Applicant's application complied with the LRA and that it is a genuine organisation.

[29] The Respondent denies that the Registrar did not afford the Applicant an opportunity, as alleged and submitted that this does not amount to exceptional circumstances. The Respondents' version is supported by the letter of 3 April 2023, which was attached to both parties' affidavits.

[30] In its replying affidavit and in response to the Respondents' version, the Applicant did no more than to refer to paragraph 59 of the judgment of Mongie AJ, where it was found that the Registrar made a decision without affording the Applicant the opportunity to remedy any defects that might have existed. The Applicant did not in its replying affidavit deal with the Respondents' denial of the existence of exceptional circumstances.

[31] *In casu,* no facts placed before this Court are sufficient to constitute exceptional circumstances. I say so for the following reasons:

[32] The Applicant's pleaded case in respect of exceptional circumstances is that the Registrar blatantly refused the Applicant the opportunity, as afforded by section 96(4) of the LRA, to attend to any shortcomings in the application for registration and to mend its application. The letter attached to the Applicant's own affidavit as annexure 'J1' contradicts this version and shows that the Applicant was afforded an opportunity to submit further documents. The Respondents' version that there are no exceptional circumstances is not meaningfully disputed and the only version put forward is that the judgment of 24 January 2024 found that the Registrar made a decision without affording the Applicant the opportunity to remedy any defects that might have existed.

[33] A perusal of paragraph 59 of the said judgment shows that the Court indeed found that the Registrar requested further information to assess the application for registration. The Court's finding was on a different aspect and does not accord with

the Applicant's allegation before this Court, namely that the Registrar blatantly refused the Applicant the opportunity, as afforded by section 96(4) of the LRA to attend to any shortcomings in the application for registration and to mend its application.

[34] Prospects of success are to be considered as a factor in deciding whether or not to grant the exceptional remedy of execution of a judgment pending appeal. The Applicant has not made a single averment to address the Respondent's prospects of success on appeal, nor was the issue of the balance of convenience addressed at all.

[35] The Applicant failed to show that there were any exceptional circumstances that entitled it to the drastic and extraordinary remedy in terms of section 18(1) and (3) of the Superior Courts Act, which is to be reserved only for exceptional circumstances.

[36] As already alluded to, section 18(3) places a heavy onus on an applicant and if an applicant fails to prove any one of the requirements, the application must fail and be dismissed. The Applicant is unable to satisfy the very first requirement to show exceptional circumstances and as such, the application has to fail and it is not necessary to consider the other requirements.

[37] In any event, the harm alleged by the Applicant, such as that it is unable to conclude and enforce collective agreements or enjoy the rights envisaged by sections 12 – 16 of the LRA, is not exceptional as those are the natural consequences of operating as an unregistered trade union.

<u>Conclusion</u>

[38] The Applicant must prove the existence of exceptional circumstances and that, on a balance of probabilities, it will suffer irreparable harm should the order for leave to execute or enforce not be granted pending the appeal and that the Respondents, who seek leave to appeal, will not suffer irreparable harm if leave to execute is granted pending appeal.

[39] In *Afriforum,* the SCA confirmed that section 18(3) is a novel provision and places a heavy onus on the applicant. Section 18 does not merely purport to codify the common-law practice, but introduces more onerous requirements.

[40] It has been accepted and confirmed by the courts that the prospects of success of the proposed appeal remain a relevant factor for purposes of considering whether the court should grant an order pursuant to section 18(3).

[41] In *Knoop NO and another v Gupta (Execution)*[12], the SCA held that courts ought not to be too eager to enforce judgments pending an appeal:
'The immediate execution of a court order, when an appeal is pending and the outcome of the case may change as a result of the appeal, has the potential to cause enormous harm to the party that is ultimately successful.'

[42] The Applicant was unable to show 'something that is sufficiently out of the ordinary and of an unusual nature'[13] that would constitute exceptional circumstances and which would warrant a departure from the ordinary rule.

[43] The Applicant failed on the first substantive requirement for departing from the default position that an appeal suspends execution of the order appealed against. It follows that all the requirements under sections 18(1) and (3) of the Superior Courts Act have not been satisfied and that this application must fail.

Costs

[44] The last issue to be decided is the issue of costs.

[45] Insofar as costs are concerned, this Court has a broad discretion in terms of section 162 of LRA to make orders for costs according to the requirements of the law and fairness.

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[12] 2021 (3) SA 135 (SCA) (*Knoop*) at para 1.
[13] *Knoop supra* at para 46.

[46] Mr Tooka for the Applicant argued that the opposition of the application is frivolous and that the Applicant is suffering harm, an aspect that had not been addressed by the Respondents. The Respondents should pay the cost of this application.

[47] Mr Phambuka for the Respondents argued that the Applicant was unable to make out a case for exceptional circumstances and notwithstanding the absence of exceptional circumstances, the Registrar is dragged to Court to oppose this application. He argued that the Registrar is entitled to costs.

[48] In *Zungu v Premier of Kwa Zulu-Natal and Others*[14]*,* the Constitutional Court confirmed the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand, allowing those parties to bring to this Court cases that should not have been brought to Court in the first place.

[49] This is a case where the Court has to strike a balance, considering the requirements of law and fairness. The generally accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation. In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and Others*[15]*,* it was emphasized that:

'…unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this court, whether as applicant, in launching proceedings or as respondent opposing proceedings.'

[14] [2018] ZACC 1; (2018) 39 ILJ 523 (CC) at para 24.
[15] [2017] ZALCJHB 17; (2012) 33 ILJ 2117 (LC) at para 176.

[50] In my view, this is a case where it is appropriate to make a cost order. A cost order is a method of ensuring that decisions to litigate in this Court are taken with due consideration of the law and the prospects of success, more so where an application is filed on an urgent basis.

[51] The Applicant is legally represented and should be aware of the heavy onus in an application such as this one. No case has been made out to show exceptional circumstances and issues to be addressed, remained behind with no averments to support a case for exceptional circumstances. The Respondent, and effectively the taxpayers of this country, cannot be expected to pay the costs for defending an application that failed to meet the basic requirements.

[52] Accordingly, I make an order as follows:

<u>Order</u>

1. The application is dismissed with costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant:	Mr L Tooka from Bareng Mokoena Attorneys Inc
For the Respondents:	Advocate N Phambuka
Instructed by:	The State Attorney, Pretoria