

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION – MTHATHA)**

Reportable/~~Not Reportable~~

Case no.: 3264/2024

Matter heard on: 07 August 2024

Judgment delivered on: 20 August 2024

In the matter between:

SIMVUMILE MAMBAFULA

Applicant

And

ALRED NZO DISTRICT MUNICIPALITY

Respondent

JUDGMENT

Zono AJ

Introduction

[1] This application was brought pursuant to a directive issued in this court, setting out directions for urgent matter. Consequently, the matter was enrolled in the unopposed motion court on 01st August 2024 wherein it was postponed to 06th August 2024 with the following terms:

“2. The applicant shall file their replying affidavit on or before 02nd August 2024. (sic)

3. The parties shall file their heads of argument/ supplementary heads of argument on or before 05th August 2024.”

[2] On 06th August 2024 the matter appeared in court and due to congestion of the roll and lateness of hour the matter was scheduled to be heard 07th August 2024. This matter was duly heard on 07th August 2024 with all sets of papers, including parties’ respective heads of argument, having been filed.

[3] The applicant’s main relief appears in paragraph 3 of the notice of motion which reads as follows:

“3. That the operation of the order of this court issued on 10th July 2024 by the Honourable Justice Brooks be in operation and extended in terms of section 18(2) and (3) of the Superior Court Act 10 of 2013 pending the application for leave to appeal.

[4] It is prudent and expedient to quote verbatim the contents of the order of Brooks J dated 10th July 2024. The following are its terms:

“1. The applicant’s non-compliance with the Uniform Rules of court relating to form, time frames and service is condoned.

2. The respondent is hereby interdicted and restrained from conducting any interviews relating to the post of Director Co-operative services advertised under re-advertisement notice 18/2023/2024, External, and from making any permanent appointment to the post pending the finalization of the review contemplated in Part B of the notice of motion.

3. The costs attendant upon the prosecution and argument on an opposed basis relating to the determination of the relief sought in Part A of

the notice of motion are reserved for decision by the court determining the relief sought in Part B thereof.”

[5] I am mindful of the fact that the application is purported to be made in terms of Section 18(2) and (3) of the Superior Court Act 10 2013. For the sake of expediency, I deem it appropriate to quote the full text of the provisions of Section 18(1), (2) and (3) of the Superior Court Act 10 of 2013.

[6] Section 18¹ provides:

“(1) Subject to subsections (2) and (3), 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 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.”

[7] This matter involves and invokes interpretation of Rule 18(1), (2) and (3) of the Superior Court Act 10 of 2013 and the court order dated 10th July 2024 by Books J. **Wallis JA**² held:

¹ Superior Court Act 10 of 2013

“[18] Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.”

[8] Under the section 18(1) mere filing of no application for leave to appeal automatically suspends the operation and execution of a decision,³ unless the court under exceptional circumstances otherwise directs. In simple terms the operation and execution of a decision is automatically suspended unless the court grants an order that has an effect of lifting that suspension. A party in favour of whom an order was granted cannot simply execute on the said order if there is an application for leave to appeal duly filed unless the court directs otherwise.

[9] It is clear from the notice of motion that the applicant does not intend to invoke the provisions of section 18(1) of the Superior Court Act. The applicant seeks to retain the operation of the court order of Brooks J dated 10th July 2024. The position under this subrule is that, only the court which granted the order appealed against had the power to grant an application for leave to allow its judgment to be carried into effect pending decision of the appeal.⁴ Section 18(1)

² *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012* (4) SA 56 Para 18

³ *Incubeta Holdings (Pty) Ltd v Ellis* 2014 (3) SA 189 (GT) at 195F-196C

⁴ *Hermansburg Mission v Sugar industry Central Board* 1981(4) SA 717 (D) at 723E-H and 726A

of the Superior Court Act applies to all final decisions, that is those granting as well as those dismissing a claim or an application.⁵

[10] However section 18(2) of the Superior Courts Act governs a different situation all together. Under this subsection, if a court order or decision which is subject of an application for leave to appeal or of an appeal has an attribute of being an interlocutory order not having the effect of a final judgment, it is not suspended pending the decision of the application or appeal. Proper Construction of this subsection is that an interlocutory order not having the effect of a final judgment which is subject of an application for leave to appeal or an appeal demonstrates that such an order may be executed notwithstanding filing or existence of an application for leave to appeal. Such an order is not suspended pending finalization of an application for leave to appeal or of an appeal.

[11] If the party against whom an interlocutory order having no effect of a final judgment wishes to suspend the operation and execution of that order, that party must approach the high court to otherwise direct or to order the suspension of an interlocutory order pending the decision of an application for leave to appeal or of an appeal. Otherwise, the default position is that an interlocutory order with no effect of a final judgment is readily operational and executable notwithstanding the filing or existence of an application for leave to appeal. I pause to mention that exceptional circumstances must exist for that order to be granted.

[12] The Supreme Court of Appeal⁶ makes a contradistinction between the provisions of section 18(1) on one hand and section 18(2) on the other and come to a conclusion that an interlocutory order that does not have the effect of a final

⁵ *Uitzig Secondary School Governing Body v MEC for Education, Western Cape* 2020 (4) SA 618 (WCC) Para 6-15

⁶ *Ntlemeza v Helen Suzman Foundation and another* (402/201) [2017] ZASCA 93 (9 June 2017); 2017 (5) SA 402 SCA Para 25-26

judgment is not suspended pending the decision of the application for leave to appeal or appeal.

[13] The full text of the relevant paragraphs in Ntlemeza matter is as follows:

“[25] In order to embark on a determination of whether the preliminary jurisdictional point raised on behalf of General Ntlemeza, set out in para 17 above, has substance, it is necessary to consider the provisions of s 18(1) and (2). These sections provide for two situations. First, a judgment (the principal order) that is final in effect, as contemplated in s 18(1): In such a case the default position is that the operation and execution of the principal order is suspended pending ‘the decision of the application for leave to appeal or appeal’. Second, in terms of s 18(2), an interlocutory order that does not have the effect of a final judgment: The default position (a diametrically opposite one to that contemplated in s 18(1)) is that the principal order is not suspended pending the decision of the application for leave to appeal or appeal. This might at first blush appear to be a somewhat peculiar provision as, ordinarily, such a decision is not appealable. However, this subsection appears to have been inserted to deal with the line of cases in which the ordinary rule was relaxed referred to in para 20 above.

[26] Both sections empower a court, assuming the presence of certain jurisdictional facts, to depart from the default position. It is uncontested that the high court’s judgment on the merits of General Ntlemeza’s appointment is one final in effect and therefore s 18(1) applies. This section provides that the operation and execution of a decision that is the ‘subject of an application for leave to appeal or appeal’ is suspended pending the decision of either of those two processes. Section 18(5) defines what the words ‘subject of an application for leave to appeal or appeal’ mean: ‘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.

[14] As things stand in this case, the default position obtains, that is, the order of 10th July 2024 is not suspended. The respondent remains interdicted from conducting interviews regarding the post of a Director- Corporate Services, pending final determination of the review application in part B.

[15] The court order referred to in paragraph 4 above which is the subject matter of these proceedings is in the nature of an interlocutory order not having effect of a final judgment. It is admittedly confronted with an application for leave to appeal. That order is operational irrespective.

[16] The court order dated 10th July 2024 was granted as a temporal measure, pending finalization of a review application in Part B hereof. A pertinent question that needs to be answered is whether this application was necessary in the light of the nature of the court order that is subject of an application for leave to appeal. I think not. Applications of this nature are made only when the principal order is final in nature, which has its attributes.⁷

[17] **Harms JA**⁸ held:

“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

⁷ Section 18(1) Superior Court Act 10 of 2013

⁸ **Zweni v Minister of Law and order** 1993 (1) SA 523 (A) at 532H-533A

proceedings (Van Streepen & Germs (Pty) Ltd case supra at 586I-587B; Marsay v Dilley [1992] ZASCA 114; 1992 (3) SA 944 (A) 962C-F).

[18] The order dated 10th July 2024 by Brooks J is susceptible to alteration by the review court, which is a court of first instance. The court order aforesaid has no effect of disposing of a portion of review application in Part B. This court order is not definitive of the rights of parties hereto. Consequently, and as a corollary this is not a final order that is liable to be suspended by mere existence and filing of an application for leave to appeal. It is an interlocutory order having no effect of a final judgment that, by operation of the Law, cannot be suspended by a mere filing of an application for a leave to appeal.

[19] It is plain from paragraph 2 and 3 of the court order dated 10th July 2024 that Brooks J granted an interlocutory order and that order is the one envisaged in section 18(2) of the Superior Court Act. The Ordinary grammatical meaning of words used in section 18(2) relating to the interlocutory order must be adhered to.⁹ Departure from the ordinary grammatical meaning would lead to an absurd result.¹⁰

[20] If the relief sought by the applicant can be granted, that would be done *ex abundanti cautela* to make it abundantly clear that filing of an application for leave to appeal does not suspend the operation and execution of the interlocutory order, otherwise it was not legally necessary to bring this application.

[21] It is not only from the submissions made by the respondent's Counsel in court, but also in the respondent's answering affidavit that the respondent is intent on proceeding with the interviews notwithstanding that there is a court

⁹ *Natal Joint Municipality pension fund v Endumeni Municipality* 2012(4) SA 593 SCA Para 17

¹⁰ *Cools Ideas 1186 CC v Hubbard and another* 2014 (4) SA 474 (CC) Para 28

order of Brooks J interdicting same. In what follows I make few excerpts from the answering affidavit to illustrate respondent's intention.

[22] The following are relevant paragraphs in the answering affidavit that manifestly demonstrate respondent's intentions to defeat Books J's Order of 10th July 2024.

"63.... As already demonstrated the respondent stands to suffer prejudice in the event the position that is subject of this litigation is not filled, because the vacancy may and is likely to cause Labour instability since the efficiency of the Department will lag behind.

64.It will also result in a negative audit finding since in terms of the policy of the Human Resources of the respondent no position must remain vacant for longer than three months, this one has been vacant for more than a year now. It is necessary that the respondent must ameliorate potential suffering of the Department by securing a permanent appointment."

[23] Now that it is plain that the order of this court granted on 10th July 2024 is operational and executable regardless of the fact that it is subject of an application for leave to appeal,¹¹ the respondent is duty bound to obey that court order. All orders of court have to be obeyed until they are properly set aside.¹² The Constitution¹³ provides that:

"An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

¹¹ Section 18(2) of the Superior Court Act 10 of 2013

¹² Culverwell v Beira 1992 (4) SA 490 (W) at 494 A-C

¹³ Section 165 (5) of the Constitution

[24] Allowing parties to ignore court order would shake the foundations of the law and compromise the status and constitutional mandate of the courts. The duty to obey orders is the Stanchion around which a state founded on the Supremacy of the Constitution and the Rule of law is built.¹⁴ An instability may only occur when parties are allowed to ignore court orders with disdain and impugntity.

[25] The intention of the respondent as adumbrated above leads to an inescapable impression that the application for leave to appeal was only filed with the sole purpose of opening gates for the respondent to frustrate the operation of the court order dated 10th July 2024. While it is apparent from the papers, it was also argued in court on behalf of the respondent that the appeal may not have practical effect or result¹⁵ in that the respondent intends to conduct the interdicted interviews possibly before the appeal could be finalized. The respondent does not, for that reason, intend to succeed on the appeal as the process of appeal will be academic and hypothetical once the interdicted interviews run its course to the end.¹⁶ Part B of this application will be rendered nugatory as well.

[26] It is unnecessary to deal in this judgment with the kind of harm and prejudice that would befall the applicant should the interviews be conducted before the finalization of the review in Part B of this application. It is so because Brooks J, when granting the interlocutory order of 10th July 2024 considered that as part of the requisites for the grant of an interlocutory order.¹⁷

[27] I share all of these sentiments only to make a point that it is necessary for the sake of clarity and certainly that the respondent must be made aware that it

¹⁴ **Department of Transport and others v Tasima (Pty) Ltd** 2017 (2) SA 622 (CC) Para 123

¹⁵ Section 16(2) of the Superior Court Act 10 of 2013

¹⁶ Section 16(2) (a) of the Superior Court Act 10 of 2023 provides:

(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

¹⁷ **Setlogelo v Setlogelo** 1927 AD 222 at 227

has a constitutional obligation to obey the order of Brooks J granted on 10th July 2024 notwithstanding that it is subject of an application for leave to appeal.

[28] However, I am mindful that of the fact that this application was ill conceived and premised on wrong principles of the law, alternatively on a clear misunderstanding of the law or correct legal principles. When the applicant came to this court for protection, that protection had already been provided by the law, to wit, Section 18(2) of the Superior Court Act 10 of 2013. As corollary it was not necessary for this application to have been made.

[29] The trajectory which this application took requires this court to exercise power bestowed upon it in terms of section 172(1) of the Constitution, which provide:

“1. When deciding a Constitutional matter within its power a court-

(a) must declare that law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including-

(i) an order limiting the retrospective effect of the declaration of invalidity; and an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

[30] In paragraph 5 of the notice of motion the applicant seeks a discretionary order for further and / or alternative relief. I therefore seek to make use of that to grant just and equitable relief envisaged in Section 172(1) of the Constitution.

[31] For the sake of completion and clarity it is underscored that this matter concerns not only the provisions of section 18(2) of the Superior Act 10 of 2023, but also the provisions of section 1 of the Constitution coupled with the provisions of section 165(5) of the Constitution. The binding nature of the order of Brooks J dated 10th July 2024 is implicated in the instant proceedings. If that court order may be allowed to be undermined for any reason that may have devastating effect on the Rule of law and our Constitutional order.

Costs

[32] As adumbrated above, the protection the applicant sought by means of this application is a protection already provided by section 18(2) of the Superiors Court Act 10 of 2013. Therefore, it was not necessary for this application to have been launched in the first place. This application was premised on a clear misunderstanding of the law. Accordingly, the applicant cannot be entitled to any costs.

[33] The respondent followed the incorrect premised upon which this application was made, and even labored under the misapprehension that its application for leave to appeal had an effect of suspending an interlocutory order which is clearly having no effect of a final judgment. Opposition of this application would equally not have made any difference. It was unnecessary.

[34] On the facts of this case there is no party who is a winner. No party is entitled to costs.

Order

[35] In the result I make the following order:

35.1 The respondent is directed to obey the order of this court granted on 10th July 2024 by not conducting the interdicted interviews pending final determination of Part B of this application.

35.2 There shall be no order as to costs.

Zono AJ
Acting Judge of the High Court

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