IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA13/17

In the matter between:

MINISTER OF HIGHER EDUCATION AND TRAINING	**First Appellant**
DIRECTOR-GENERAL HIGHER EDUCATION AND TRAINING	**Second Appellant**

and

SOUTH AFRICAN COMMERCIAL, CATERING AND ALLIED WORKERS UNION	**First Respondent**
ENTERTAINMENT CATERING COMMERCIAL AND ALLIED WORKERS UNION OF SOUTH AFRICA	**Second Respondent**
FEDERAL COUNCIL OF RETAIL AND ALLIED WORKERS	**Third Respondent**
NOZIOHO PEARL MAPHOSHE AND 23 OTHERS	**Fourth to Twenty-Four Respondents**

Held: **06 April 2017**

Delivered: **16 May 2017**

Summary: Appointment of an administrator in terms of s15 of the Skills Development Act – appellant alleging financial mismanagement of sixteenth respondent in invoking s15 - whether decision by the appellant to place the sixteenth respondent under administration falling within the scope of s15 of the SDA – held that such decision could only be taken strictly in terms of the powers under s15 of SDA on the basis of the principle of legality – The Auditor General's reports forming the basis to invoke s15 evince that sixteenth respondent received qualified audits and these reports cannot therefore fairly be used to justify the invocation s15(1) of SDA. Evidence further reveals that the appellants paid no attention to the final management report of sixteenth respondent of 31 March 2016 which indicates that 60% of the recommendations accepted by management of sixteenth respondent regarding issues which were contained in the Auditor General's report were implemented while 40% were still in the process of implementation. No reason was given by appellants as to why this explanation did not prove to be adequate - appellant acting outside of the powers in terms of s15 of SDA and contrary to the principle of legality and that decision stands to be set aside. Appeal dismissed with costs.

Coram: Waglay JP, Davis and Landman JJA

JUDGMENT

DAVIS JA

<u>Introduction</u>

[1] On 28 September 2016, first appellant took a decision to instruct second appellant to appoint an administrator to take over and administer the affairs of the sixteenth

respondent. The second appellant informed the Chairperson of the Accounting Authority of the Wholesale and Retail Sector Education and Training Authority, sixteenth respondent, of his decision in a letter of 28 September 2016. The decision was taken in terms of s15 of the Skills Development Act 97 of 1998 ("SDA").

[2] The first to fourteenth respondents then brought an application to have first appellant's decision reviewed and set aside. This application was successful and thus on 23 December 2016, the court *a quo* reviewed and set aside the decision of first appellant.

[3] The court *a quo* held that the decision taken by first appellant on 28 September 2016 constituted an administrative action as contemplated in the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). The court went on to consider whether, in terms of s6(2)(f) of PAJA, the action taken by first appellant had been authorised by the empowering provision, namely s15 of SDA and was rationally connected to the purpose for which it was given. The court answered this question in favour of the respondents, finding that "the preconditions for the exercise of the Minister's powers in terms of s 15 of SDA had not been met at the time the decision to place W&RSETA in administration was taken". Following upon this finding, the court ordered the reinstatement of the members of the board of sixteenth respondent and directed that the administration and control of the affairs of sixteenth respondent vest lawfully with its board.

[4] On 07 February 2017, the court granted an order in terms of s18 of the Superior Courts Act 10 of 2013 (Supreme Court Act), read with Rule 11(3) of the Labour Court Rules, directing that the operation and execution of the order granted on 23 December 2016 ('the main order') would come into operation immediately and be executable, pending the appeal launched by first appellant.

[5] Appellants also appealed this decision, contending that respondents had not met the test imposed by s18 of the Superior Courts Act for the granting of the order.

[6] This Court then directed that the automatic appeal against the s18 order and the main appeal be heard together at a consolidated hearing.

The factual background

[7] The core facts do not appear to be contested. Sixteenth respondent was established in 2000 and its period of establishment was extended on numerous occasions, the latest being on 06 October 2015 when it was re-established until 31 March 2018. The primary purpose of sixteenth respondent is to meet the skills and development needs of the wholesale and retail sector, having regard to the functions of the Sectorial Education and Training Authority ('SETA') as set out in s10 of the SDA. During 2016, first appellant addressed written instructions to sixteenth respondent, acting in terms of s14 A of the SDA, which provides as follows:

> '(1) The Minister may issue a written instruction to a SETA if -
>
> (a) the SETA is not performing any of its functions or not complying with its service level agreement;
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> (b) the SETA is not managing its finances in accordance with this Act;
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> (c) the SETA's membership is not representative of the constituencies contemplated in s 11; or
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> (d) the SETA has not prepared or implemented an employment equity plan as contemplated in s 20 of the Employment Equity Act, 1998 (Act Number 55 of 1998).
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> (2) An instruction issued under subsection (1) must set out –
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> (a) the reason for issuing the instruction;
>
> (b) provision of the Act that the SETA has not complied with; and
>
> (c) the steps that the SETA is required to take and the period within such steps must be taken.'

[8] In his letter, first appellant noted that he had received "anonymous communiques making serious allegations about the poor state of governance" at sixteenth respondent, in particular that the Acting Chief Executive Officer and the Chief Operations Officer had been guilty of:

(1) 'deliberately delaying payments and approval of transactions, such as stipends and other training activities;

(2) not paying stipends for some learnerships and graduate internships;

(3) not paying staff salaries on the normal day leading to unnecessary bank charges due to returned debit orders;

(4) using defamatory statements such as calling staff a "bunch of useless managers and useless staff";

(5) threatening to fire employees "because of their stupidity";

(6) treating staff members with rudeness and disrespect thereby demoralising and emotionally draining them; and

(7) not following Human Rights policies when the appointments of the Acting Chief Executive Officer, Acting Chief Financial Officer and Board Secretary was made.'

[9] As a result of these allegations, first appellant instructed the accounting authority of sixteenth respondent to submit:

(1) 'a clarification on the appointment of Ms Maggie Mofokeng, the Chief Financial Officer (CFO), appointed on contract who also acts as Chief Executive Officer (CEO) and Chief Officer: Qualifications;

(2) a comprehensive report addressing the veracity of the allegations raised and an action plan / turnaround strategy with timeframes that addresses all the issues identified in order to ensure that the governance challenges are resolved;

(3) a comprehensive corrective plan that will address the Auditor-General's qualification, indicating what action has been taken to address the Auditor-General's concerns and if no action has been taken, to state the reasons why and explain when such action will be taken; and

(4) the reason why the Accounting Authority decided to withdraw from the Rural and Township Revitalisation Programme despite signing the Memorandum of Agreement with the Department committing to support the programme with R 107 million.'

[10] The sixteenth respondent replied on 1 July 2016 and provided a detailed explanation in respect of each of the items requested and advised first appellant that it would make every effort to investigate and resolve any performance or governance related issues faced by it. On 16 August 2016, first appellant generated a letter recording that, in his view, sixteenth respondent had failed satisfactorily to respond to the instruction and gave notice of his intention to apply s15(1) of the SDA, thereby giving the accounting authority of sixteenth respondent five days within which to advise him of why the powers contained in s15 should not be applied by him.

[11] Sixteenth respondent replied on 26 August 2016. In a letter which extended to over 50 pages, it assured first appellant that it was in a position to correct the problems and to resolve the challenges identified by first appellant, as a result of which it urged first appellant not to apply powers in terms of s15(1) of the SDA.

[12] On 15 September 2016, second appellant wrote a letter to sixteenth respondent in which he stated, *inter alia*, that first appellant supported the proposal "to meet in good faith in an attempt to salvage the Rural and Township Revitalisation Programme ('RTRP') in a manner that the W&RSETA has committed to".

[13] On 20 September 2016, sixteenth respondent's attorneys replied to this letter of 15 September 2016 stating that "our client is pleased to have received the invitation to meet with representatives of the Department on behalf of the Minister and is hopeful

that the meeting can be conducted in the spirit of reaching a mutually satisfactory resolution of the parties concerns."

[14] Further correspondence was then exchanged between second appellant and sixteenth respondent's attorneys in order to settle upon a mutually acceptable date for a meeting. However, sixteenth respondent's request to meet at a mutually convenient date was ignored by first appellant and on 28 September 2016 he informed sixteenth respondent that he had decided to exercise his powers in terms of s15(1) of the SDA and place sixteenth respondent under administration and, further, that he had directed second appellant to take the necessary steps.

The basis for the review application

[15] First to fourteenth respondents raised three main grounds in support of their application to review the decision of first appellant of 28 September 2016, namely that the decision was contrary to ss3 and 6 of PAJA in that the preconditions established in terms of s15 (a) to (e) of SDA had not been fulfilled when first appellant took his decision; the decision was irrational and unreasonable in that the drastic intervention contemplated by s15(1) of SDA constituted irrational and unreasonable action in a context where the sixteenth respondent had committed itself to fully cooperate with the appellants and finally, they raised the issue of procedural unfairness in the decision making process.

The appeal

[16] As indicated in the introduction to this judgment, the court *a quo* found that the decision of the first appellant to direct second appellant to appoint an administrator constituted administrative action and thus fell within the scope of PAJA. The learned judge found further that, in terms of s6(2) (f) of the PAJA, the administrative action by first appellant had not been properly authorised by the empowering legislation and was not rationally connected to the purpose for which the power was given.

[17] Much of the debate, certainly as contained in the heads of argument of the parties respectively, turned on whether the impugned decision constituted administrative action.

[18] Given the approach that I proposed to adopt to this case, there is no need to come to a clear decision as to whether the action taken by appellants was administrative or executive action. Suffice to say that there is considerable merit in the analysis conducted by the court *a quo*. As Nugent JA said in *Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works (Greys Marine Hout Bay),*[1] the scope of the term administrative action eludes a comprehensive definition. It appears, however, from a number of cases that the courts have adopted the view that whether particular conduct constitutes administrative action depends primarily on the nature of the power exercised rather than upon the identity of the person who exercises the power. See *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) at para 141.

[19] From this premise, it has been held that administrative action does not extend to the exercise of legislative powers by democratically elected legislative bodies, nor to the ordinary exercise of judicial power, to the formulation of policy or the initiation of legislation by the executive nor to the exercise of original powers conferred upon the President. See *Greys Marine Hout Bay, supr*a at para 24 and the cases captured therein.

[20] On this basis, a sound foundation exists for the finding by the court *a quo* that the decision taken by first appellant in terms of s15 of the SDA did not represent action whereby first appellant developed policy or initiated legislation. He purported to act in terms of power derived exclusively from s15 of SDA, the content of which does not appear to fall into any definition of the implementation or conception of policy.

[21] Be that as it may, it is clear that, on the basis of the principle of legality, first appellant could only act strictly in terms of the powers entrusted to him under s15 of SDA. As has been held in numerous cases, the doctrine of legality is an incident of

[1] 2005 (6) SA 313 (SCA) at para 21.

the rule of law which is one of the fundamental constitutional controls through which the exercise of public power is regulated by the Constitution of the Republic of South Africa 108 of 1996. It has been held consistently that no power or function can be exercised by the legislature or a member of the executive beyond that which had been conferred upon them by law. See *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at para 49 and the further authorities set out in footnote 40 and 41 thereof.

<u>First appellant's purported application of s 15(1) of SDA</u>

[22] For this reason, the critical question is whether first appellant acted outside of the scope of s15 of SDA. This section provides as follows:

> 'The Minister may, after consultation with the National Skills Authority and the SETA in question, direct the Director-General to appoint an administrator to take over the administration of a SETA or to perform the functions of a SETA if –
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> (a) the SETA fails to perform its functions;
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> (b) there is mismanagement of its finances;
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> (c) its membership no longer substantially represents the composition contemplated in s 11;
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> (d) the SETA has failed to comply with its service level agreement; or
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> (e) the SETA failed to comply with an instruction issued by the Minister in terms of s 14 A.'

[23] The importance of the letter of 28 September 2016 by first appellant to the chairperson of sixteenth respondent to the determination of whether the decision fell within s15(1) of SDA requires that it be reproduced in full:

> 'Due to the governance challenges and failure by the Accounting Authority to satisfactory address me on the following:

1. The Accounting Authority failed to submit a comprehensive plan to address the Auditor-General's qualification for the 2014/15 financial year, which should have indicated what actions were taken to address the Auditor-General's concerns and if no action has been taken, to state the reasons why and explain when such action would be undertaken. The SETA's failure to mitigate the identified risks has resulted in W&RSETA receiving another qualified audit from the Auditor-General for the 2015/16 financial year.

2. Regarding the Accounting Authority's explanation on the matter of the Chief Financial Officer, who is appointed on contract by W&RSETA and subsequently also appointed as the acting Chief Executive Officer (CEO) and Chief Officer: Qualifications were not satisfactorily addressed. The implications of this appointment compromises the effectiveness of internal control processes and exposes W&RSETA to a risk of self-review as the acting CEO would have been reporting to herself on operational tasks she performs, as supported by a letter received from the Auditor-General.

3. When the National Skills Authority conducted the investigation on the matters, some of the Accounting Authority members were not aware of my s 14A instruction letter. These members were also not involved in compiling a response to this instruction letter. This demonstrates a serious lack of unity, cohesion and cooperation among the Accounting Authority, which is necessary for optimal execution of its fiduciary responsibilities. This view is further supported by the fact that some Accounting Authority members wrote to me indicating that the resolution was for the "*correction of the contents of the MoA and not withdrawal from the RATERP*".

4. W&RSETA failed to provide satisfactory reasons responding to its withdrawal of all financial support towards the Rural and Township Economies Revitalisation Programme. The reasons advanced by the Accounting Authority are not satisfactory noting the impact of this project, which was initiated by the Department as its contribution to Governments 9 Point Plan to unlock the potential of Small, Medium and Micro-sized Enterprises (SMMEs), cooperatives, townships and rural enterprises W&RSETA has failed to comply with its Service Level Agreement.

> 5. The Accounting Authority never communicated or consulted with the Department before taking such a drastic decision, i.e. to withdraw all financial support for the Rural and Township Economies Revitalisation Programme. Neither had the Department been informed of the actions that had been taken regarding other stakeholders whom also committed to fund the project substantially, such as the Unemployment Insurance Fund and Department of Small Business Development. The drastic decision by W&RSETA and its failure to communicate with affected stakeholders has a potential to bring the Department and the SETA system into disrepute.
>
> I have consulted with the National Skills Authority of my intention to act as required by s 15 of the Skills Development Act. Based on the advice I have received from the National Skills Authority and the reasons stated above, amongst others, I have decided to impose s 15 of the Act to place W&RSETA under administration.'

[24] In substantiation of his decision to invoke powers in terms of s15, first appellant, in his answering affidavit, sought to justify his decision on sixteenth respondent's failure to provide a satisfactory reason as to its withdrawal of financial support towards the RATERP, a lack of cohesion within the accounting authority, and the failure to submit a comprehensive plan to address the Auditor General's qualifications for the financial year ending 31 March 2015. He also noted that sixteenth respondent had received another qualified audit opinion from the Auditor-General. First appellant then states in his answering affidavit that the listed circumstances in s15 are "only some of the basis upon which the Minister may act in terms of ss 14 and 15 of the SDA".

[25] This affidavit has to be read with the critical letter of 28 September 2016, for it is in that letter that first appellant provided his reasons for invoking powers in terms of s15(1) of SDA.

[26] Appellants' justification for invoking s15(1) of SDA was narrowed further. When the notice of application for leave to appeal was filed on 26 January 2017, the appellants reduced their primary arguments to the contention that there was irregular expenditure and poor governance and further that there had been

mismanagement of finances as was evident from the Auditor General's reports of 2014/15 and 2015/16.

[27] It is to these specific grounds raised by appellants to which I must turn. The first argument regarding, poor governance, hardly appears in any specific detail in the letter of 28 September 2016, save for copious references to the report of the Auditor General.

[28] Presumably, the reference to the failure to deal with the Auditor-General's qualifications were invoked in order to contend that s15(1)(b) was of application, namely that there was a mismanagement of sixteenth respondent's finances.

[29] The material paragraphs in the Auditor General's report for the financial year 2014/15 read thus:

> 'The financial statements of the public entity were materially misstated, as the public entity did not accurately determine all amounts meeting the definition of a contractual commitment, in accordance with s 1 of the Sector Education and Training Authorities (SETAs) Grant Regulations regarding monies received by a STA and related matters, issued in terms of the SDA. Consequently, contractual discretionary grant commitments as disclosed in note 18.1 to the financial statement stated at R 759,920 million were overstated by R 35,492 million. Additionally, there was a resultant impact on the provision for uncommitted funds due to the National Skills Fund, surplus for the period and the accumulated discretionary grant reserves, due to the amount of discretionary grant commitments forming part of the calculation of the provision for uncommitted funds.
>
> **Qualified Opinion**
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> In my opinion, except for the effects of the matter described in the basis for qualified opinion paragraph, the financial statements present fairly, in all material respects, the financial position of the W&RSETA as at 31 March 2015 and its financial performance and cash flows for the year then ended, in accordance with the SA Standards of GRAP and the requirements of the PFMA and SDA.'

[30] Similarly, in respect of a 2015/16 financial year, the Auditor General reported as follows:

> 'I was unable to obtain sufficient appropriate audit evidence for discretionary grant commitments. As described in note 38 to the financial statements, the restatement was made to rectify a prior year material misstatement, but could not be substantiated by supporting audit evidence. I was unable to confirm the restatement by alternative means. Consequently, I was unable to determine whether any adjustment to the discretionary grant commitments corresponding figure stated?? at R 471 262 000 in the financial statements was necessary. Additionally, there was a resultant impact on the provision for uncommitted funds due to the National Skills Fund, surpluses for the period and the accumulated discretionary grant reserves, due to the amount of discretionary grant commitments forming part of the calculation of the provision for uncommitted funds.
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> Furthermore, I was unable to obtain sufficient appropriate audit evidence for current year discretionary grant commitments balance as the public entity did not maintain accurate and complete records of the contractual information used to determine commitments. I could not confirm the amounts by alternative means. Consequently, I was unable to determine whether any adjustment to discretionary grant commitments stated at R 585 267 000 in the financial statements was necessary.
>
> **Qualified Opinion**
>
> In my opinion, except for the possible effects of the matter described in the basis for qualified opinion paragraph, the financial statements present fairly, in all material respects, the financial position of the Wholesale and Retail Sector Education and Training Authority as at 31 March 2016 and its financial performance and cash flows for the year then ended, in accordance with the South African Standards of GRAP, and the requirements of the PFMA an SDA.'

[31] What is clear from these reports is that sixteenth respondent received qualified audits in both financial years. However, the qualifications were very limited in their scope relating as they did to discretionary grant commitments. They cannot fairly be

employed to justify the conclusion that there was the kind of widespread financial mismanagement which would explain satisfactorily the drastic assumption of powers in terms of s15 (1) of SDA.

[32] In addition, in the letter of 26 August 2016, sixteenth respondent's attorneys made clear that "comprehensive remedial steps had been taken to address the Qualified Opinion in the 2015 DG reports. Considerable success has been achieved through these remedial steps. The Qualified Opinion in the 2016 draft AG Report results from matters that could not be completely resolved by the period ending 31 March 2016. The aforesaid is not an indicator of, *inter alia*, bad management or governance on the part of the Board".

[33] A significant part of the first appellant's letter of 28 September 2016 dealt with the question of withdrawal from the RATERP. Sixteenth respondent's attorneys provided a detailed explanation as to the approach adopted by its client to RATERP. In the letter of 26 August 2016, the following appears:

> 'On 27 May 2016, the Board resolved to rescind the decision to approve the amount of R 107 500 000.00 for allocation to the RATERP on the basis of its having serious concerns with the framework of governance within which the project was proposed to operate, and whether the proposed framework would comply with legislation regulation and best practice governing the public sector.
>
> The Board made a simple request for evidence of strong governance of funds allocated to the project and when this evidence was not forthcoming, the funds were withdrawn. In the light of the Qualified Opinions of the AG, and the remedial steps required to be taken by the W&RSETA, it is submitted that the Board has acted responsibly and proactively in this regard. The Board's decision not to fund the RATERP at this stage and in these circumstances does not constitute evidence of financial mismanagement or a failure to perform its functions.'

[34] This letter is evidence that a comprehensive answer was provided to first appellant by the sixteenth respondent as to its approach to this project, which answer appears to have been completely ignored by first appellant when he generated his decision

on 28 September 2016. But that is not the main difficulty with the appellants' arguments relating to RATERP. There is no basis provided by appellants as to how the many paragraphs from the critical letter of 28 September 2016 devoted to RATERP and which is included as a key reason for first appellant invoking powers under s15(1) falls within the scope of this section. If the argument is that the sixteenth respondent's conduct with regard to RATERP fell in terms of s15(1)(a), there was no attempt made to explain how this could be justified. Indeed, there was not even an attempt to so argue in appellants' heads of argument

[35] Turning to the findings of the Auditor General, even if the reports could be stretched to support a greater measure of financial mismanagement from what appears in the reports, nowhere does it appear that the appellants paid any attention to the final management report of sixteenth respondent of 31 March 2016 where a clear assessment of "the progress in implementing the commitments made by the entity to address the prior and current years audit findings" is set out comprehensively. The table attached (item 72 of this report) indicates that 60% of the recommendations accepted by management of sixteenth respondent regarding issues which were contained in the Auditor General's report were implemented while 40% were still in the process of implementation. No reason was given by appellants as to why this explanation did not prove to be adequate nor as to why, notwithstanding this response, there was a sufficient basis by which to find that s15 (1) (b) had been shown to exist on the available evidence.

[36] In summary, neither in the letter generated by first appellant of 28 September 2016 nor in his answering affidavit is there any indication as to why sixteenth respondent's explanation as to its conduct regarding the funding of the RATERP was not only disregarded but why there was a sufficient evidential basis in respect of RATERP for the powers under s15(1) to be justified in the circumstances.

[37] On the evidence presented, first appellant acted outside of the powers conferred upon him in terms of s15 of SDA. He failed to show that the necessary preconditions set out in s15(1) existed in order to place sixteenth respondent under

administration. Accordingly, having acted outside the powers conferred upon him in terms of s15 of the SDA, he acted contrary to the principle of legality and his decision stands to be set aside.

[38] For all of these reasons I agree entirely with the conclusion reached by the court *a quo* that "the preconditions for the exercise of the Ministers powers in terms of s 15 of the SDA had not been met at the time the decision to place W&RSETA under administration was taken. The W&RSETA head at the relevant time demonstrated its capacity to address any administrative shortcomings and none of them either singularly or collectively constituted grounds that met the threshold requirements impose by s 15 for the exercises of his powers under that section". The conclusion illustrates that by acting outside of the powers set out clearly in s15 of SDA, appellants had acted outside of the principle of legality. As Chaskalson P (as he then was) said in *Pharmaceutical Manufacturers Association of South Africa: In Re Ex parte President of the Republic of South Africa*:[2]

> 'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.'[3] [Footnote omitted]

The decision of first appellant of 28 September 2016 fails this test and thus must be set aside.

<u>Cross-appeal in terms of s 18</u>

[39] Having come to the conclusion that the appeal against the order of the court *a quo* of 23 December 2016 stands to be dismissed, there is no basis by which to deal

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[2] 2000 (2) SA 674 (CC).
[3] At para 85.

any with the question as to whether the order granted in terms of s18 of the Superior Courts Act should be set aside.

[40] In the circumstances, the appeal is dismissed with costs, including the costs of two counsel. The cross-appeal is dismissed.

Davis JA

I agree

Waglay JP

I agree

Landman JA

APPEARANCES:

FOR THE APPELLANTS:	M C Erasmus SC, Adv M A Dewrance and Adv M P Moropa Instructed by Cheadle Thompson and Haysom Attorneys
FOR THE FIRST TO FOURTEENTH RESPONDENTS:	Adv A Franklin SC and Adv F Hobden Instructed by Bowman Gilfillan INC