24/10/17

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 46825/2017

Date:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

24/10/2017 .....
DATE SIGNATURE

In the matter between:

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICE **FIRST APPLICANT**

DIRECTOR GENERAL OF THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **SECOND APPLICANT**

And

MMELA INVESTMENT HOLDINGS (PTY) LTD **RESPONDENT**

JUDGMENT

(SECTION 18 OF THE SUPERIOR COURTS ACT APPLICATION)

PRETORIUS J.

(1) I have delivered judgment on the application for leave to appeal, where I refused leave to appeal to the Supreme Court of Appeal ("SCA").

(2) Ordinarily, this would mean that the section 18 application would be unnecessary as there would be no appeal suspending the order. In this instance, however, I have been requested to grant an order in terms of section 18 of the **Supreme Courts Act**[1] ("the Act"), as the respondent has already indicated, before the hearing, that should leave to appeal not be granted, the SCA will be petitioned for leave to appeal. The applicants in the court *a quo* will be referred to as the applicants and the respondent as the respondent, for ease of reference.

(3) The purpose of the application is for the order handed down on 2 August 2017 to remain in operation throughout any future appeal processes the respondent may choose to pursue.

(4) Section 18(3) of the Act provides:

> *"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*

[1] Act 10 of 2013

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) The applicants have to prove that exceptional circumstances exist, that the applicants will suffer irreparable harm should the order not remain in operation through-out the appeal proceedings and, furthermore, prove on a balance of probabilities that the respondent will not suffer irreparable harm should the order remain in operation pending the outcome of the appeal process.

(6) I have a wide discretion to grant or refuse leave to execute such an order and the court has to decide what is just and equitable in these circumstances.

(7) I will deal with each of the three requirements separately.

(8) Exceptional circumstances were described by Sutherland J in **Incubeta Holdings and Another v Ellis and Another**[2]:

"[15] The thesis advanced on behalf of the Respondent is that the discretion hitherto exercised by the court is history and that one must now look exclusively to the text of Section 18.

[2] 2014(3) SA 189 (GJ) at 194 B-D:

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

[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."

(9) In **Nyathi and Others v Tenitor Properties (Pty) Ltd**[3] it was held that *"the fact that an appeal has a weak prospect of success cannot be exceptional".*

(10) The applicants set out the exceptional circumstances which they rely on as the respondent still remains in possession of property to which it has no entitlement as the SLA had been terminated by effluxion of time; the respondent admits that this court is not requested to pronounce on the parties' contractual rights; the respondent conceded

[3] 2015 JDR 1296 (GJ) at paragraph 30

that it can proceed with instituting action against the Department for any alleged damages suffered; despite the Department having appointed a new service provider (METROFILE) in April 2017 already, the Department has paid the respondent a further R2 798 760 in storage costs for the period 1 April 2017 to 31 August 2017; suspension of the order will frustrate the administration of justice so that, once again, members of the public are frustrated in their access to the courts, court files and documents; the respondent is attempting to compel the Department to enter into a "case retrieval" contract with it, whereby each file will be retrieved one by one as requested. This will lead to further expenses and exacerbate the problem of accessing files by the public, the Department and the courts.

(11) At all times, during the litigation, the applicants have provided examples of how members of the public is being prejudiced each day by not being able to access court files and so to prevent the Department to deliver service to the public. The examples mentioned by the applicants in the affidavits by the applicants, clearly sets out the difficulty they have in accessing files under circumstances where the respondent alleges that this court's order results in a re-design of the contract entered into by the parties.

(12) This court was, from the outset, not to deal with the contractual relationship between the parties, as it will be dealt with at a later stage,

if required. This court only found that the applicants, and public at large, are being held hostage by the respondent by its refusal to release the 6 million files and held at paragraph 32:

> *"It is unconscionable that the public has to suffer due to an ongoing dispute between the two parties. Furthermore, it is clear that the dispute will be resolved at a later stage in another appropriate forum, according to the respondent. There is currently no contract or agreement between the parties, but the respondent's actions forces the Department to continue to pay for storage and to uphold a relationship with the respondent in an artificial manner."*

(13) There is no allegation by the respondent that it is impossible to do the hand-over to the new service provider. The respondent tendered retrieval of the files on 22 August 2017, but on condition that the terms of the SLA will still apply. The respondent's counsel conceded, during argument, that no action as yet had been instituted, although such a course of action was being contemplated.

(14) I take cognisance of the finding by Sutherland J in the **Incubeta matter**[4] where he states in paragraph 22:

> *"Necessarily, in my view, exceptionality must be fact-specific. The circumstances which are or may be 'exceptional' must be*

[4] *Supra*

derived from the actual predicaments in which the given litigants find themselves. I am not of the view that one can be sure that any true novelty has been invented by Section 18 by the use of the phrase. Although that phrase may not have been employed in the judgments, conceptually, the practice as exemplified by the text of Rule 49(11), makes the notion of the putting into operation an order in the face of appeal process a matter which requires particular ad hoc sanction from a court. It is expressly recognised; therefore, as a deviation from the norm, ie an outcome warranted only 'exceptionality'."

And came to the conclusion in paragraph 27 and 28 that:

"being left with no relief, regardless of the outcome of an appeal, constitutes exceptional circumstances..."

(15) I find that due to the public interest and huge inconvenience to the applicants and the public at large, and the facts as set out above, constitute exceptional circumstances as envisioned by section 18 of the Act and as explained by Sutherland J above.

(16) It is thus clear that the court now has to consider two distinct findings of fact to establish who, if anyone, will suffer irreparable harm under these circumstances, where exceptional circumstances have been found.

(17) The applicants alleged that the Department is suffering irreparable harm daily as it is failing in its constitutional mandate. The applicants cannot give the public access to the courts, due to being unable to access the relevant court files. The only manner which it can be done is on a one by one request basis from the respondent. The respondent's actions have the result that the public is being denied access to justice as has been shown by the applicant's examples in the main founding affidavit. It would seem as the respondent is prepared to release the files, once it has been paid in accordance with the SLA and their interpretation of the provisions of the SLA. This was not the dispute I had to adjudicate, as that will probably be a decision in another forum on another day.

(18) Hence the conclusion by me where I had found that the members of the public are prejudiced due to the respondent's actions. This is ongoing prejudice where members of the public are individually barred from accessing files to obtain certain documents to enable them to carry on with their lives, such as divorce orders, criminal court proceedings and appeals.

(19) In contrast, the respondent alleges that it will have to incur costs which will cause severe losses. The respondent fails to set out exactly what these losses will be that will cause irreparable harm to the respondent.

The respondent does not substantiate these submissions by taking the court into their confidence as to in which manner it will suffer irreparable harm and what the irreparable harm will be.

(20) In these circumstances, if the order is not put into operation, the applicants will suffer irreparable, ongoing harm as the Department will continuously, at least until the petition is granted or dismissed in the SCA, be prejudiced by not being able to access the files, except at an extra cost and on a case by case basis. The respondent will not suffer irreparable harm under these circumstances. The respondent will be able to sue for any harm that it suffers due to the order being implemented, should any such harm exist. I cannot find that the respondent has proven irreparable harm on a balance of probabilities. In these particular circumstances I find that the test as set out in section 18 and applied in the **Incubeta case**[5] has been met on a balance of probabilities and the applicants are entitled to the order being put into operation, pending any petition or appeal.

(21) In the result the order is:

1. The order granted by me on 2 August 2017 under case number 46825/2017 is declares to be effective and enforceable pending petition and, if leave to appeal is granted, pending any appeal.
2. The respondent is ordered to comply with the order handed down

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[5] *Supra*

on 2 August 2017 within 48 hours of the grant of this order.

3. The respondent is ordered to pay the costs of this application, such costs to include the costs consequent upon the employment of two counsel.

Judge C Pretorius

Case number	: 46825/2017
Matter heard on	: 14 September 2017
For the Applicant	: Adv B Neukircher SC Adv L Maite
Instructed by	: State Attorney, Pretoria
For the Respondent	: Adv Trengove SC
Instructed by	: B Xulu & Partners Inc
Date of Judgment	: 24 October 2017