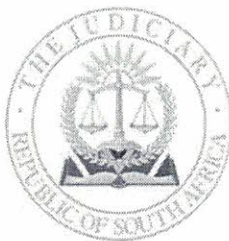


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
Signature <i>[Handwritten Signature]</i>	
Date... 25/5/2018	

CASE NO: 5261/2017

In the matter between:

MINISTER OF SCIENCE AND TECHNOLOGY**APPLICANT**

and

CHRISMA BREDENKAMP**1ST RESPONDENT****WOLKBERG FRUIT PROCESSORS (PTY) LTD****2ND RESPONDENT**

JUDGMENT

MAKGOBA JP

- [1] This is an application in terms of Section 18 of the Superior Courts Act, 10 of 2013 ("the Act") for the operation and execution of a Court order pending the outcome of the Respondents' application for leave to appeal, including the appeal, if any, to be noted.
- [2] The Respondents have filed an application for leave to appeal against the judgment of this Court dated 16 March 2018 which judgment was delivered on 20 March 2018
- [3] In this application the Applicant seeks an order that the operation and execution of the aforesaid judgment is not suspended pending the decision on the application for leave to appeal or the appeal.
- [4] In terms of the aforesaid judgment and order the First and Second Respondents are directed and ordered to return to the Applicant certain movable assets listed in Annexure "A" to the Notice of Motion which were removed by the Respondents from the Applicant. The Court made a finding that the Applicant is the lawful owner of the said movable assets.

[5] In terms of section 18 of the Act once an application for leave to appeal has been filed the judgment and order of the Court is suspended pending the decision of the application for leave to appeal or appeal unless the Court, under exceptional circumstances, orders otherwise.

[6] 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.”

[7] 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.**

[8] 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 hereto 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 an order, pending an appeal, as formulated on ss 18(1) and (3).

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:

- *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 applicants / 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”.*

[9] 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 the 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], now reported as 2018 (3) SA 428 (SCA).

[10] 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:

- 10.1. Exceptional circumstances;
- 10.2. Irreparable harm to the Applicant if the order is not granted; and
- 10.3. 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.

[11] 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 derives from the actual predicaments in which the given litigants find themselves”.

[12] 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.

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

13.1. The Respondents' prospects of success on appeal are poor;

13.2. As at the date of the filing of the application for leave to appeal the judgment and order of this Court had been partly executed by the Sheriff of Court, Tzaneen. Therefore the application for leave to appeal cannot undo what has been done in terms of the judgment. The proverbial horse has bolted.

13.3. This matter involves the return of assets that were meant to service the community of Nkowankowa by the Department of Science and Technology through the Nkowankowa Demonstration Centre. Failure to

execute the Court order immediately will negatively affect service delivery to the community.

13.4. The assets are depreciating in value in the hands of the Respondents.

In the event that the appeal by the Respondents is unsuccessful, which is most likely, by the time the appeal is finalised the goods would have been lost to the Applicant and the entire community of Nkowankowa.


13.5. The Respondents will not be in a financial position to reimburse the Applicant and the community for the aforesaid goods.

13.6. If the goods are released to the Applicant, the Applicant is in a position to guarantee their safety and above all the Applicant is a State organ and is able to restore the value of the goods if it is ultimately found that the Respondents are entitled to the goods.

[14] In my view the foregoing circumstances sufficiently satisfy the novel prejurisdictional requirements of section 18(3) of the Act. It is clear from the circumstances given above that the Applicant would suffer irreparable harm if the judgment and order is not put into operation. On the other hand the Respondents do not stand to suffer irreparable harm if the Court orders that the judgment be executed despite the pending appeal.

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

- (1) The judgment and order of this Court dated 16 March 2018 and delivered on 20 March 2018 shall operate and be executed pending the outcome of the application 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) of the Uniform Rules of Court.
- (3) There shall be no order as to costs.



E M MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE

APPEARANCES

Heard on	:	25 May 2018
Judgment Delivered	:	25 May 2018
For Applicant	:	Adv. Mokhwetyana
Instructed by	:	State Attorney - Pretoria c/o Mashamba Inc - Polokwane
For Respondents	:	No appearance