

REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT
GAUTENG DIVISION,**



**OF SOUTH AFRICA
JOHANNESBURG**

Case Number: 27669/2022

- | | |
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| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED: YES/NO |

DATE

SIGNATURE

In the matter between:

NOLUTHANDO LANGENI

First Applicant

KATLEGO RATHEBE-MATHOLE

Second Applicant

and

**SOUTH AFRICAN WOMEN IN MINING
ASSOCIATION**

Respondent

VICTORIA SEHAKE	Second Respondent
MASIKINI SITHOLE	Third Respondent
PATRICIA MAHIWA	Fourth Respondent
FEZEKA MAVUSO	Fifth Respondent
MABEL PHOOKO	Sixth Respondent
INNOCENT MATHONSI	Seventh Respondent
FASKEN ATTORNEYS	Eighth Respondent

LEAVE TO APPEAL AND SECTION 18(3) JUDGMENT

SENYATSI J

[1] This Court is faced with two applications, namely, an application brought by South African Women In Mining Association (SAMIWA) and Others, who are the respondents in the judgment appealed against which was handed down on 10 November 2023. In terms the said judgment, certain reliefs were granted in favour of Ms Langeni and another, the applicants in the main application. The second application was brought by Ms Langeni and another in terms of section 18(3) of the Superior Courts Act, No: 10 of 2013 (“the Act”) and they sought for the execution of the judgment appealed against pending the leave to appeal application brought.

Leave to appeal.

- [2] SAMIWA criticises the judgment on several grounds in respect of the findings made and argued that the Court erred on a number of grounds which will not be repeated in this judgment.
- [3] It is a trite principle of our law that leave to appeal may only be given where the Judge or Judges concerned are of the opinion that the appeal would have a reasonable prospect of success or where there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.¹ The bar has been raised regarding the application for leave to appeal and the applicant bears the onus to show that the appeal would have a reasonable prospect to succeed.²
- [4] Having considered the papers before me and the submissions made on behalf of the applicants, I am of the view that the applicants have passed the muster that the appeal would have a prospect of success.

Section 18(3) application

- [5] On 10 November 2023 I granted the following order in favour of the applicants in the main case:
- (a) The decision of the board of directors of the first respondent taken, at the meeting of the board, on 2nd December 2022 purporting to remove the applicants as directors of first Respondent is set aside.

¹ Section 17 (1)(a)(i) and (ii) of the Act .

² Acting National Director of Public Prosecutions and Others v Democratic Alliance v Acting National Director of Public Prosecutions and Others (1957/09) [2016] ZAGPPHC 489 (24 June 2016).

- (b) The applicants are reinstated as Directors of first respondent with immediate effect.
 - (c) The first to seventh respondents are ordered to disclose, to the applicants, information in respect of all financial activities related to the accounts held by, for or on behalf of the first respondent or in relation to any financial activities purportedly carried for or in relation to the funds of first respondent.
 - (d) The first to seventh respondents are directed to commission an independent forensic investigation into all financial activities related to the accounts held by, for or on behalf of the first respondent or in relation to any financial activities purportedly carried for or in relation to the funds of the first respondent.
 - (e) The second to seventh respondents are ordered to reimburse all the monies which were illegally paid from the first respondent's budget by the respondents to any other party and/or company or persons or entity outside the ordinary business of the first respondent.
 - (f) The first to seventh respondent are ordered to pay the costs of this application.
- [6] The applicants brought an application in terms of section 18(3) of the Superior Courts Act 10 of 2013 in terms of which they seek a declaratory order that the order made on 10 November 2023 is not suspended by any application or any appeal and that it shall continue to be operational until the final determination of all present and future leave to appeal applications and the appeal. The application in terms of section 18(3) is opposed.

[7] Section 18 of the Act provides as follows: -

“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;

(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.”

I will deal with the principles on urgency and whether there are exceptional circumstances to warrant the hearing of the application as set out above.

The test for consideration of section 18(3) application

[8] The test for consideration of section 18(3) application is trite and has been stated by our Courts that factors to be considered are as follows³:-

(a) First, whether or not ‘exceptional circumstances’ exist, and

(b) Second, proof on a balance of probabilities by the applicant of:-

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

(ii) The absence of irreparable harm to the respondent/loser, who seeks leave to appeal.

[9] As to what constitutes exceptional circumstances, Courts have always eschewed any attempt to lay down a general rule as to what constitutes exceptional circumstances.⁴ The reason is that the enquiry is factual one.⁵ The Court has no discretion to exercise and the circumstances must justify the departure from the ordinary process pertaining to appeals.⁶

³ Incubeta Holdings (Pty) Ltd v Ellis 2014 (3) SA 189 (GJ) para 16.

⁴ Norwich Union Life Insurance Society v Dobbs 1912 AD 395 at 399;

⁵ S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat [1999] ZACC8; 1999(D4) SA 623 (CC) paras 75-77

⁶ MV Ais Mamas: Seatrans Maritime v Owners MV Ais Mamas and Another 2006(2) SA 150 (C) 156 E-157; Liesching and Others v The State [2018] ZACC 25; 2019 (4) SA 219 (CC).

- [10] The applicants contend that the finding appealed against shows that there are exceptional circumstances why the order must be executed in spite of the pending appeal and that the applicants will suffer irreparable harm.
- [11] The applicants contend that the judgment deals with an abuse of power and funds by the respondents and that this includes purging directors who speak out against the grand scale looting of SAMIWA's funds by the respondents. They contend that the respondents' purging of directors is an attempt to insulate themselves from accountability.
- [12] The applicants contend that because there was a finding that the removal of the applicants as directors of SAMIWA did not meet the threshold set out in section 71 of the Companies Act, 2008, the execution of judgment should not be suspended.
- [13] I do not agree with the contention by the applicants. I say so because they have not been on the board of SAMIWA since November 2022 and no prejudice will be suffered if the execution of the judgment is automatically suspended pending the appeal. In my view, SAMIWA and the respondents may be prejudiced if the appeal set aside the judgment appealed against. Consequently, there is no basis to suspend the execution of the order in terms of section 18(3) based on the ground set out herein.
- [14] The second exceptional circumstance as contended by the applicants is that the current directors are using SAMIWA for their own personal benefit to the detriment of SAMIWA's beneficiaries and that for that reason, the leave to appeal application should not suspend the execution of the order. For the reason set out in the preceding paragraph, I do not agree with the contention.

Irreparable Harm

[15] The applicant must show that they will suffer irreparable harm if the order is not executed. They do not need to show that there is certainty that they would suffer irreparable harm.⁷ Although it had been held in *Incubeta Holdings (Pty) Ltd v Ellis*⁸ that in considering the section 18(3) the merits on the prospect of success of the appeal were of no consequence, this judgment was overtaken by the Supreme Court of Appeal as will be shown below.

[16] The prospects of success of the appeal are of relevance. In *University of Free State v Afriforum*⁹ and Another, the Court said the following:-

“ [14] A question that arises in the context of an application under s 18, is whether the prospects of success in the pending appeal should play a role in this analysis. In *Incubeta Holdings* Sutherland J was of the view that the prospects of success in the appeal played no role at all. In *Liviero Wilge Joint Venture Satchwell J, Moshidi J concurring*, was of the same view. However, in *Justice Alliance Binns-Ward J (Fortuin and Boqwana JJ concurring)*, was of a different view, namely that the prospects of success in the appeal remain a relevant factor and therefore ‘. . . the less sanguine a court seized of an application in terms of s 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

⁷ Minister of Social Development Western Cape and Others v Justice Alliance of South Africa and Another [2016] ZAWCHC 34 at para 25.

⁸ 2014 (3) SA 189 (GJ) para 16.

⁹ [2017] ZACC 48; 2018 (2) SA 185 (CC); 2018 (4) BCLR 387 (CC) (29 December 2017)

granted in terms of s 18(3)'. ” It is also settled that where the prospects of appeal are weak, there is no need to find that the victorious party has demonstrated “a sufficient degree of exceptionality to justify an order in terms of section 18(3)”.¹⁰

[17] Having regard to the papers and the submissions before me, I am of the view that the applicants will not suffer irreparable harm and if the order is not executed pending the appeal. I have already found that there is a reasonable prospect the appeal would succeed and need not repeat myself in that regard.

Order

[18] As a result the following order is made:-

(a) Application for leave to appeal is granted to the full Court of this Division and the costs will be the costs in the appeal;

(b) Application to declare that the execution of the order granted on 10 November 2023 be suspended is refused with costs.

ML SENYATSI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

¹⁰ University of Free State supra at para 15

