IN THE HIGH COURT OF *SOUTH AFRICA*

GAUTENG DIVISION, **JOHANNESBURG**

CASE NO: 2023-126318

A2024 - 013109

1. Reportable: Yes
2. Of interest to other judges: Yes
3. Revised

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27 March 2024
Wright J

In the matter between:

MINISTER OF JUSTICE, CONSTITUTIONAL DEVELOPMENT **1ST APPELLANT**

AND CORRECTIONAL SERVICES

NATIONAL COMMISSIONER, CORRECTIONAL SERVICES **2ND APPELLANT**

THE AREA COMMISSIONER,

JOHANNESBURG CORRECTIONAL CENTRE **3RD**

APPELLANT

THE HEAD OF CENTRE C,

JOHANNESBURG CORRECTIONAL CENTRE **4TH APPELLANT**

and

CLINT KRAMER **1ST RESPONDENT**

ANTON MEYER **2ND RESPONDENT**

The High Court does not have jurisdiction to hear an application under section 18 of the Superior Courts Act, 10 of 2013 to enforce an order of the Supreme Court of Appeal pending an appeal from the SCA to the Constitutional Court.

JUDGMENT – SECTION 18(4) APPEAL

THE COURT

[1] This appeal is heard as of right and in extreme urgency under section 18(4) of the Superior Courts Act, 10 of 2013.

[2] A brief chronology helps to place the matter in perspective.

[2.1] Prior to 27 September 2019 - Mr. Ntuli, a prisoner, launches an application to this court. He seeks to be allowed to use his computer for study purposes. The matter comes before Matsemela AJ.

[2.2] 27 September 2019 – Matsemela AJ grants certain relief to Mr Ntuli, including the right to use a computer.

[2.3] After 27 September 2019 – The Minister appeals the Matsemela AJ decision. We shall refer to the present appellants collectively as "*The Minster* ".

[2.4] 8 November 2023 – the SCA, Unterhalter AJA writing for a unanimous court, grants an order. Those parts of the order which are relevant to the present appeal are -

"3. The appeal is partially upheld and the order of the court a quo is set aside and replaced with the following:

1. *To the extent that the Policy Procedure Directorate Formal Education as approved by the second respondent and dated 8 February 2007 prohibits the use of personal computers in cells, it is declared invalid and set aside.*
2. *The order in paragraph 1 is suspended for 12 months from the date of this order.*
3. *The first and second respondents are directed, within 12 months from the date of this order, after consultation with the Judicial Inspectorate for Correctional Services ("JICS"), to prepare and promulgate a revised policy for correctional centres permitting the use of personal computers in cells for study purposes ("the revised policy").*
4. *The first and second respondents are directed, within one week after promulgating the revised policy, to disseminate that policy to the head of*

every correctional centre, and, where one is employed, to the head of education at each centre.

5. *Notice of the revised policy must be posted on notice boards in all prisons where prisoners customarily receive information, and such notice must set out where prisoners may obtain copies of the revised policy.*

6. *Pending the revision of the education policy:*

6.1 The applicant is entitled to use his personal computer in his cell, without the use of a modem, for as long as he remains a registered student with a recognised tertiary or further education institution in South Africa.

6.2 Any registered student in a correctional centre who needs a computer to support their studies, and/or any student who has registered for a course of study that requires a computer as a compulsory part of the course, is entitled to use their personal computer without the use of a modem in their cell for as long as they remain a registered student with a recognised tertiary or further education institution in South Africa.

6.3 The applicant or any other student who keeps a personal computer in their cell in accordance with paragraphs 6.1 and 6.2 above must make it available for inspection at any given time by the head of the correctional centre or any representative of the first and second respondents.

6.4 In the event of a breach of the rules relating to the use by a prisoner of their computer in their cell, the head of the correctional services centre may, after considering any representations the prisoner may make, direct that the prisoner may not use their computer in their cell.

6.5 The first and second appellants are directed to disseminate this order to all correctional centres and make it available to prisoners, within ten days of the order."

[2.5] 29 November 2023 - The Minister applies to the Constitutional Court for leave to appeal the SCA order in the Ntuli matter.

[2.6] 30 November 2023 - The respondents in the present appeal, Mr Kramer and Mr Meyer launch an urgent application to this court. The notice of

motion includes prayers that the Minister be held in contempt of the SCA Ntuli judgment and order. An order is sought that the Minister complies with the SCA order. Related relief is sought.

[2.7] Mr Kramer and Mr Meyer, relying on paragraph 6.2 of the SCA order, allege that they are registered students and need to be able to use their computers for study purposes. They allege prejudice with each passing day without the use of their computers.

[2.8] 7 December 2023 – The urgent application is heard by a single judge in the Gauteng Division, Johannesburg. During argument, the attorney for Mr Kramer and Mr Meyer files a notice of amendment, seeking leave to amend their notice of motion. The relief originally sought is abandoned and in its place an order is sought "Granting *an order in terms of Rule 18(3) of the Uniform Rules of Court, in that the judgment granted in the Supreme Court of Appeal on 8 November 2023, be declared operational and effective pending any potential appeal of the judgment by the Respondents.*" Ms Ali, for the Minister, does not object and the amendment is granted. It is understood at the hearing that the reference to the Rules was intended to be a reference to section 18 of the Superior Courts Act.

[2.9] 9 January 2024 – Mr Kramer and Mr Meyer are granted, at least substantially, the relief sought by them. On 14 January 2024, the order is corrected to reflect the correct prison number of one of the applicants. In effect, the court below enforces the SCA order. It was common cause then, as it is now, that the operation of the SCA order was suspended from 30

November 2023 pending a decision by the Constitutional Court. The Constitutional Court is yet to make a decision in the Ntuli appeal.

[2.10] 25 January 2024 – Mr Kramer and Mr Meyer launch an urgent application, set down for 30 January 2024. They seek an order that the respondents be held in contempt of the SCA Ntuli order of 8 November 2023 and the 9 January 2024 order. They seek in effect compliance with the SCA order and that of the court below.

[2.11] 1 February 2024 – The Minister files an application for leave to appeal the order of the court below.

[2.12] 2 February 2024 – The application of the previous day is withdrawn.

[2.13] 2 February 2024 – The Minister files a notice to appeal the decision of the court below. Three grounds of appeal are raised. These include the grounds that the court below should not have interfered with a judgment of the SCA and that it had no jurisdiction to traverse what the SCA had done.

[2.14] 2 February 2024 – By agreement, an order is made by Opperman J in the urgent application by Mr Kramer and Mr Meyer of 25 January 2024 allowing Mr Kramer and Mr Meyer limited use of or access to computers. There was some debate between opposing counsel before us as to when the Opperman J order ceases to have effect. It is not necessary for us to decide this question.

[2.15] 22 February 2024 – The Minister files fresh grounds of appeal. These include

the point that only the SCA has jurisdiction to enforce its own orders.

[2.16] 11 March 2024 – The points raised on appeal by the Minister are fleshed out.

[3] Under section 173 of the Constitution, "*The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their* ***own process****, and to develop the common law, taking into account the interests of justice.*" (Emphasis added) We are of the view that in the present matter it is for the SCA, rather than a court in a Provincial Division to protect and regulate *" its own process "*. What Mr Kramer and Mr Meyer sought to do in this Division is to enforce in the High Court an order of the SCA. The Legislature in enacting section 173 seems impliedly to clothe the SCA with jurisdiction to hear the application launched below and impliedly to divest a provincial division of such jurisdiction.

[4] Section 168 (3) of the Constitution reads -

"(3) (*a*) *The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except in respect of labour or competition matters to such extent as may be determined by an Act of Parliament.*

(b) The Supreme Court of Appeal may decide only—

(i) appeals.

(ii) issues connected with appeals; and

(iii) any other matter that may be referred to it in circumstances defined by an Act of Parliament. "

[5] In our view, the matter before the court below was an issue "*connected with appeals* " within the meaning of section 168(3)(b)(ii). While it might be argued that the words used refer only to appeals to be heard by the SCA, rather than appeals already heard by the SCA, we incline to the view that that would place too narrow an interpretation on the words. We are fortified in this interpretation, at least insofar as the present matter is concerned, by the provisions of section 13(4) of the Superior Courts Act.

[6] Section 13(4) reads "(4) *Two or more judges of the Supreme Court of Appeal, designated by the President of the Supreme Court of Appeal, have jurisdiction to hear and determine applications for interlocutory relief, including applications for condonation and for leave to proceed in forma pauperis, in chambers.*" The application before the court below was, in our view, " interlocutory *relief "* for the purposes of section 13(4) and a provincial division did not have jurisdiction to hear the application.

[7] Rule 11(1)(b) of the SCA Rules reads "*The President or the Court may of own accord, on request or application … give such directions in matters of practice, procedure and the disposal of any appeal, application or interlocutory matter as the President or the Court may consider just and expedient.*" This Rule appears to give practical Rule content to section 13(4).

[8] In turn, section 13(4) appears to give at least partial content to the provisions of section 173 of the Constitution.

[9] Under section 18 of the Superior Courts Act –

"18. *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. "

[10] In our view, the words " *the court* " in section 18(1) and 18(2) refer to the court which made the order forming the subject matter of the section 18 litigation, in the present matter the SCA. In sections 18(3) and 18(4) the words "*a court* " are used. We do not think that the change in wording from " *the court* " to " *a court* " is intended by the

Legislature to convey a change in meaning such as to allow a Provincial Division to enforce, or for that matter to decline to enforce, an order of the SCA.

[11] In section 18, the Legislature appears to have in mind that it is the court which granted the order which has jurisdiction to suspend its order temporarily pending appeal.

[12] A finding that a provincial division does not have jurisdiction to hear a case such as the one under consideration would have the effect that such application would need to be brought to the SCA (leaving aside any possibility of such application being launched in the Constitutional Court.) This may increase the workload of the SCA but that is not a factor that we may properly take into account.

[13] Section 17(7) of the Superior Courts Act reads "*Subsection (2) (c) to (f) apply with the changes required by the context to any application to the Supreme Court of Appeal relating to an issue connected with an appeal*." These words contain an implied recognition by the Legislature that there may, in a given case, be an application to the SCA relating to an issue connected with an appeal. In our view, the application before the court below was "*an issue connected with an appeal*." It is not necessary, and it is perhaps prudent for us not to go into the question of how a bench in the SCA, considering a section 18 application, would be constituted.

[14] Mr Kramer and Mr Meyer rely on the provisions of section 42 of the Superior Courts

Act which reads

"*42. Scope and execution of process. (1) The process of the Constitutional Court and the Supreme Court of Appeal runs throughout the Republic, and their judgments and orders must, subject to any applicable rules of court, be executed in any area in like manner as if they were judgments or orders of the Division or the Magistrates' Court having jurisdiction in such area.*"

[15] The reliance is misplaced. Section 42 deals with the execution of process, like writs by the sheriff rather than with the question of which court has jurisdiction to implement or stay orders pending appeal. Ms Metzer for Mr Kramer and Mr Meyer argued that it was a reading of section 18(3) with section 42 that gave a provincial division concurrent jurisdiction with the SCA to hear the application. We disagree. Section 18 deals with which court has jurisdiction to suspend an order pending appeal. Section 42 merely allows process to run throughout the Republic.

[16] To hold that a provincial division has jurisdiction to hear the case in question would lead to the possibility of different divisions coming to different conclusions on the enforceability of a particular SCA order pending appeal. This would be regrettable in circumstances where the SCA, having jurisdiction, could give one judgment binding on all provincial divisions. The Legislature, in our view did not intend different outcomes relating to a given SCA order.

[17] Section 42 does not include the limiting words "*exceptional circumstances* " which appear in section 18(1) and 18(2). In our view, this shows that section 18 and section 42 deal with different topics. It would be anomalous, on the argument for Mr Kramer and Mr Meyer that section 18 read with section 42 allows a provincial division and the SCA concurrent jurisdiction, that section 18 allows suspension of an order only in exceptional circumstances while section 42 does not contain a like limitation.

[18]. Uniform Rule 45A reads – " *Suspension of orders by the court - The court may, on application, suspend the operation and execution of any order for such period as it may deem fit: Provided that in the case of an appeal, such suspension is in compliance with section 18 of the Act.* " The proviso to this Rule is in our view in line with statutory requirement.

[19] Mr Seleka SC for the Minister expressly did not seek costs in this appeal or in the court below.

[20] We are indebted to Mr Seleka SC, leading Ms Ali for the Minister and to Ms Metzer for Mr Kramer and Mr Meyer for able argument presented on short notice.

ORDER

1. The appeal is upheld.
2. The order of the court of 9 January 2024, as corrected on 14 January 2024 is set aside and replaced with an order reading "*The application is dismissed."*

I concur

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***PP* MAKUME J**

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

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WRIGHT J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG
I concur

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***PP* WEIDEMAN AJ**
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

HEARD : 20 March 2024

DELIVERED : 27 March 2024

APPEARANCES:

APPELLANTS Adv P Seleka SC

Adv N Ali

RESPONDENTS **Adv Lisa Metzer**