



# IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

1. DELETE WHICH IS NOT APPLICABLE
2. [1] REPORTABLE: ~~YES~~ / NO
3. [2] OF INTEREST TO OTHER JUDGES:  
~~YES~~ / NO
4. [3] REVISED
5. DATE 11/12/17 SIGNATURE [Signature]

12/12/17

Case no. 54391/2017

In the matter between:

**BLOEMFONTEIN CORRECTIONAL CONTRACTS (PTY) LTD** Applicant

and

**THE MINISTER FOR THE DEPARTMENT OF  
CORRECTIONAL SERVICES**

First Respondent

**GROUP 4 CORRECTION SERVICES  
BLOEMFONTEIN (PTY) LTD**

Second Respondent

**THE ACTING NATIONAL COMMISSIONER:  
DEPARTMENT OF CORRECTIONAL SERVICES**

Third Respondent

**JUDGMENT**

**LOUW, J**

[1] This is an urgent application in which the applicant seeks an order in terms of prayers 2, 3 and 4 of the notice of motion that the Acting National Commissioner: Department of Correctional Services be joined as third respondent, that the first and third respondents are declared to be in contempt of the court order handed down by Hughes J on 13 September 2017 and that the first and third respondents be committed to prison for a period not exceeding 30 days. The relevant part of the order of Hughes J, which was made pursuant to an urgent application brought by the applicant and which the applicant says was not complied with, was the following:

*2. The first respondent is ordered to make payment of the applicant's June 2017 invoice in the sum of R24 901 200.00 together with interest thereon at prime overdraft rate as published from time to time by reference banks from 31 July 2017 to date of payment.*

*3. That pending the final determination of an action to be instituted by the first respondent out of this honourable Court the first respondent is interdicted and restrained from setting off as against any amounts due to the applicant any amounts that the first respondent claims in respect of the costs allegedly incurred by it, between the period 9 October 2013 and 1*

August 2014, under section 112 of the Correctional Services Act, 111 of 1998.

[2] The further orders sought by the applicant in the present application are the following:

5. *The first and third respondents are directed to:*

5.1 *make payment, in compliance with the Order of Court, of the balance of BCC's<sup>1</sup> June 2017 invoice in the sum of R24 901 200.00, together with interest thereon at prime overdraft rate as published from time to time by the Reference Banks from 31 July 2017 to date of payment, within 2 (two) business days of the date upon which this Order is granted;*

5.2 *make payment of the amount of R24 901 200.00, being the balance of BCC's August 2017 invoice, together with interest thereon at prime overdraft rate as published from time to time by reference banks from 30 September 2017 to date of payment, within 2 (two) business days of the date upon which this Order is granted; and*

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<sup>1</sup> The applicant's.

5.3 make payment of the amount of R1 790 281.00, being the amount deducted from BCC's September 2017 invoice, together with interest thereon at prime overdraft rate as published from time to time by reference banks from 30 September 2017 to date of payment, within 2 (two) business days of the date upon which this Order is granted.

6. It is declared that paragraph 2 of the order of the High Court per Hughes J granted on 13 September 2017 is not suspended, and shall come into effect, and remain in operation pending the determination of any application to the Supreme Court of Appeal ("SCA") brought by the first respondent in terms of section 17(2)(b) of the Superior Courts Act<sup>2</sup> 10 of 2013 ("Superior Court Act") to challenge Judge Hughes' refusal to grant leave to appeal, the subsequent appeal (if any), and any further appeal processes.
7. In the event of it being found that paragraph 3 of the order of the High Court per Hughes J granted on 13 September 2017 is not interlocutory, then it is declared that the order contained in paragraph 3 is not suspended, and shall come into effect, and remain in operation pending the determination of any application to the SCA brought by the DCS<sup>3</sup> in terms of section 17(2)(b) of the

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<sup>2</sup> The notice of motion incorrectly refers to the Superior "Court" Act.

<sup>3</sup> Department of Correctional Services.



*Superior Court Act to challenge Judge Hughes' refusal to grant leave to appeal, the subsequent appeal (if any), and any further appeal processes.*

8. *Costs of suit on the scale as between attorney and client, such costs to include the costs consequent upon the employment of two counsel.*

### **Joinder of the third respondent**

[3] The applicant states in its founding affidavit that the Acting National Commissioner is apparently the person who took the decisions, alternatively under whose authority and direction the decisions were taken, not to pay the applicant the amount that it was ordered to pay and to continue to apply set-off, all in contempt of the order granted by Hughes J on 13 September 2017. The deponent to the applicant's answering affidavit, a director of the applicant and also the deponent to the founding affidavit in the main application, states that she reasonably apprehends that the decision to withhold payment of the June, August and September 2017 invoices, and to refuse to make the payments, were decisions taken by the Acting National Commissioner of the DCS.

[4] In the first and second respondents' answering affidavit, these allegations are simply noted. They are not denied. There is therefore no

reason why the Acting National Commissioner should not be joined as third respondent. Such order will accordingly be granted.

### **Contempt of the court-order**

[6] Two weeks after the order of 13 September 2017 was granted, with knowledge of the order, the DCS disregarded the order by setting off the amount of R24 901 000.00 from the applicant's August 2017 contract fee. The first respondent thereafter, on 29 September 2017, filed an application for leave to appeal the order, contending that the entire order was thereafter suspended, and proceeded to set off an amount of R1 790 281.00 from the applicant's September 2017 contract fee.

[7] Paragraph 2 of the order was, as a result of the filing of the application for leave to appeal, suspended. Paragraph 3 of the order, interdicting any further set-off, was an interlocutory order which, in terms of s 18(2) of the Superior Courts Act, was not suspended by the filing of the application. The application for leave to appeal was dismissed by Hughes J on 7 November 2017.

[8] It is common cause that as at the date of the hearing of the present application, 29 November 2017, the first and third respondents had failed to comply with paragraphs 2 and 3 of the order of Hughes J. In paragraph 7.7 of the first respondent's answering affidavit, which was deposed to on

22 November 2017, it is stated that the case is very important to the DCS and that the state attorney informed the applicant on 8 November 2017 that it had received instructions to petition the SCA for leave to appeal “*against the refusal of leave to appeal by Judge Hughes*”. No petition had been filed as at 29 November 2017. It was indicated by counsel for the respondents during argument that the petition was being prepared and would be served within the next day or two. In terms of s 17(2)(b) of the Superior Courts Act, a petition to the SCA must be filed with the registrar of that court within one month after refusal of leave by the judge against whose decision leave to appeal is sought. This means that the first respondent’s petition had to be filed not later than 6 December 2017.

[9] The set-off of the applicant’s August 2017 contract fee even before the application for leave to appeal was filed, was clearly done in contempt of paragraph 3 of the court order. The set-off of a portion of the applicant’s September 2017 contract fee was also in contempt of paragraph 3 of the order since it was an interlocutory order which was not suspended by the filing of the application for leave to appeal. Even if a petition for leave to appeal to the SCA was filed before these amounts were set off, the petition would not have suspended the operation of paragraph 3 of the order. I find, therefore, that the first and third respondents have acted in contempt of paragraph 3 of the order of Hughes J.



[10] Paragraph 2 of the order of Hughes J for the payment of an amount of money is an order *ad pecuniam solvendam*. The court has no power to imprison a judgment debtor for his failure to pay a judgment debt of a commercial character which the court has ordered him to pay.<sup>4</sup>

[11] Paragraph 3 of the order of Hughes J interdicted the first respondent, pending the final determination of an action to be instituted by the first respondent, from setting off as against any amounts due to the applicant any amounts that the first respondent claims in respect of the costs allegedly incurred by it between 9 October 2013 and 1 August 2014. The effect of that order is that the first respondent must pay the applicant the full amount of its monthly contract fee. The order is therefore, in my view, akin to an order *ad pecuniam ad solvendam*.

[12] It follows that the application for an order that the first and third respondents be committed to prison, cannot succeed.

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<sup>4</sup> *Hofmeyr v Fourie*; *B.J.B.S. Contractors (Pty) Ltd v Lategan* 1975 (2) SA 590 (C); *Bannatyne v Bannatyne (CGE as amicus curiae)* 2003 (2) SA 363 (CC) para 18.



## **The section 18 application**

[13] The relief sought in prayer 6 of the applicant's notice of motion relates to paragraph 2 of the order of Hughes J. Such relief may be granted in terms of s 18 of the Superior Courts Act, which provides the following:

- (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.*

[14] The question which arises is whether relief in terms of s 18(1) may be granted where there is no pending application or petition for leave to appeal. It has been held by the SCA that where the high court reasonably anticipates a further appeal process, anticipatory relief may be granted in terms of s 18.<sup>5</sup> In the present matter, the court was expressly informed that a petition for leave to appeal would be filed within a day or two of the hearing.

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<sup>5</sup> *Mthandazo Berning Nilemeza v Helen Suzman Foundation and Ano.* [2017] ZASCA 93 (9 June 2017).

[15] The provisions of s 18 were considered by Sutherland J in *Incubeta Holdings & another v Ellis & another*.<sup>6</sup> The court said the following:

*"What constitutes 'exceptional circumstances' has been addressed by Thring J in MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and Another 2002 (6) SA 150 (C), where a summation of the meaning of the phrase is given as follows at 156I – 157C:*

*'What does emerge from an examination of the authorities, however, seems to me to be the following:*

- 1. What is ordinarily contemplated by the words "exceptional circumstances" is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; "besonder", "seldsaam", "uitsonderlik", or "in hoë mate ongewoon.*
- 2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.*
- 3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.*
- 4. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.*

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<sup>6</sup> 2014 (3) SA 189 (GJ).



5. *Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional."*

[16] Whether exceptional circumstances are present, depends on the facts of each case.<sup>7</sup> The facts on which the applicant relies, are the following. The applicant has a contract with the DCS to operate the Mangaung prison facility. It has sub-contracted its obligations in terms of the contract to the second respondent. The applicant's sole source of income is the contract fee payable by the DCS in terms of the contract. It states that, without full payment of its invoices, it is unable to pay the second respondent to operate the prison. The income that the applicant receives from the DCS is used principally to pay the cost of employing the second respondent to maintain and operate the prison. The second respondent must, in turn, pay the salaries and wages of its employees stationed at the prison as well as the costs of operating the prison, including the payment of third party suppliers such as catering and medical services. The financial instability caused to the applicant by the non-payment places the continued operation of the prison at risk. The prison is a maximum-security facility. Given the number and status of the persons incarcerated at the prison, the risks of

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<sup>7</sup> See *Ntlemenza* para 39.

loss of control and operation of the prison are too great to be borne. If control of the prison is lost, there is a considerable risk of lives being lost, of injury to inmates and to staff, and of significant damage to property. The applicant states that this is not speculation because these things have happened in the past.

[17] The aforesaid facts, in my view, clearly constitute exceptional circumstances. The first respondent's answer to these facts is a bare denial. It is stated in the first respondent's answering affidavit that, since June 2017 to the date on which the answering affidavit was signed, 22 November 2017, the operations at the Mangaung prison were "*normal as expected*". If they are, they certainly cannot be expected to continue if the first respondent fails to pay the applicant the more than R50 million which it owes and continues to apply set off to the amounts which it has to pay to the applicant.

[18] Added to the above facts, it was submitted on behalf of the applicant that the suspension of the order will defeat the very object of the applicant's initial urgent application and the relief which it successfully obtained; that, having regard to the time it will take to finalise an appeal if leave to appeal is granted, the order directing payment of the amounts which have been set off will be rendered worthless if the order is suspended pending an appeal; and that there can be no harm to the DCS as the money it now seeks to claim back came out of a budget more than 3 years ago. If it is

entitled to payment, it will be adequately recompensed for any delays through the payment of interest. I agree with these submissions. I therefore find that the applicant has satisfied the requirement of showing that exceptional circumstances exist.

[19] In terms of s 18(3), the applicant also has to show on a balance of probabilities that it will suffer irreparable harm if the court does not grant an order in terms of s 18(1) and that the first respondent will not suffer irreparable harm if it is so ordered.

[20] The primary harm which the applicant relies on is that it will have no relief if the order is suspended pending an appeal. This, as has been stated by the applicant in relation to the requirement of exceptional circumstances, will have the result that it will not be able to continue to pay the second respondent for the operation of the prison facility. Should the second respondent consequently refuse to continue to operate the prison, as it probably will, it is obvious that this situation will inevitably lead to the termination of the applicant's contract with the DCS and possible claims against it by the DCS.

[21] In its answering affidavit, the first respondent states that the applicant does not need the R24 901 200.00 to operate the prison and that the DCS should know better as it has the applicant's annual financial statements. The amount which has been withheld by the DCS is, however, now in excess



of R50 million. The first respondent does not say for which financial year the DCS has the applicant's financial statements. The financial statements which the DCS says it has, have also not been attached to the answering affidavit.

[22] The applicant has, in my view, succeeded in showing that it will suffer irreparable harm if the order sought in terms of s 18(1) is not granted.

[23] It is submitted by the applicant that the DCS, on the other hand, will not suffer irreparable harm if the order granted by Hughes J is not suspended pending a petition to the SCA. The applicant states that the costs which the DCS want to recover from the applicant were incurred during the 2013/2014 and 2014/2015 financial years, which costs would have been catered for in the DCS's 2015 and 2016 budgets, thereby not causing any harm to the functioning of the DCS. In the judgment of Hughes J, it was found that the DCS was not entitled to apply set-off to the payments which it was obliged to make to the applicant. The DCS remains entitled to claim the costs which it says it incurred from the applicant in an action, and it will be entitled to payment of interest on the amount which it proves to be due to it. There is a dispute between the applicant and the DCS about the amount which the DCS is entitled to claim from the applicant. I agree with the applicant's submission that the DCS will not suffer irreparable harm if paragraph 2 of the order of Hughes J is not suspended pending a petition to the SCA for leave to appeal.

## **Conclusion**

[24] In the result, an order is granted in terms of prayers 2, 3, 5, 6, and 8 of the applicant's notice of motion.

Counsel for applicant: Adv. B Leech.

Instructed by: Fasken Martineau, Sandton.

Counsel for first and third respondents: Adv. Laka.

Instructed by: The State Attorney, Pretoria.