REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION PRETORIA)

CASE NO: 76183/2019

APPEAL CASE NO: A318/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

14 October 2022

DATE SIGNATURE

In the matter between:

EMFULENI LOCAL MUNICIPALITY FIRST APPELLANT
(First Respondent in court *aquo*)

THE MUNICIPAL MANAGER,
DITHABE NKOANE N.O. SECOND APPELLANT
(Second Respondent in court *aquo*)

And

ESKOM HOLDINGS SOC LTD FIRST RESPONDENT
(Applicant in court *aquo*)

THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	SECOND RESPONDENT (Third Respondent in court *aquo*)

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary. The date of this judgment is deemed to be 14 October 2022.

JUDGMENT

COLLIS J

[1] Before this Court, the appellants have invoked their right to bring an automatic appeal in terms of section 18(4) of the Superior Courts Act, 10 of 2013 against an order of Vorster AJ dated 2nd November 2021.

[2] The Notice of Appeal has listed the grounds of appeal as follows:

2.1 In terms of section 48 of Superior Courts Act 10 of 2013 ("Superior Courts Act") Vorster AJ was not an Acting Judge at the time when he granted the order in terms of section 18(3) as his acting stint had ended on 27 September 2021. As such, the order granted by Vorster AJ was not competent and valid and of no force and effect. At the time when Vorster AJ adjudicated the section 18(3) application, he was not appointed in terms of section 175 of the Constitution.

2.2 Acting Judge Vorster ignored the Answering Affidavit filed by the Appellants.

2.3 Acting Judge Vorster's order is a nullity for its failure to comply with section 18(4)(1)(i) of Superior Courts Act.

2.4 Acting Judge Vorster granted the order which does not comply with Rule 45 of the Uniform Rules of Court.

2.5 Acting Judge Vorster, was not legally competent to grant the execution order when the first respondent has not provided security.

2.6 Acting Judge Vorster was not legally competent to grant an order at the time when the Leave to Appeal was already seized with the Supreme Court of Appeal.

BACKGROUND

[3] On 21 August 2021 the *court a quo* granted summary judgment in the main application which was in favour of the first respondent and against the first appellant. The court had ordered the first appellant to pay amounts owed to the first respondent in terms of an Acknowledgement of Debt Agreement and the Electricity Supply Agreement entered into between the parties.

[4] Subsequently, on 2nd November 2021, Acting Judge Vorster ordered that the operation and execution of the summary judgment order is not to be suspended pending the decision of the application or appeal. It is the aforementioned order that the appellants are appealing against. In that order, Judge Vorster put into operation the Summary Judgment order he

granted on 21 August 2021, notwithstanding any Leave to Appeal or Appeal. This order the Appellants contend was granted in contravention of section 18(4)(i) of Superior Courts Act.

SECTION 18 OF THE SUPERIOR COURTS ACT

[5] In terms of the common law, the noting of an appeal suspends the operation and execution of a judgment pending the outcome of an appeal.[1]

[6] Section 18(1) of the Superior Courts Act, whilst restating the common law position, provides that a party in whose favour judgment was given, may apply to the High Court in terms of section 18(3) for an order that the execution and operation of the decision not be suspended pending the decision of the application or appeal, but that the order be executed.

[7] Section 18 of the Superior Courts Act reads as follows:

"***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

[1] Ntlemeza v Helen Suzman Foundation and Another 2017 (5) SA 402 (SCA) at para 19 with reference to the decision in South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A).

leave to 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 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 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."

THE TEST

[8] A court may grant an order to execute under exceptional circumstances. The empowering provision requires the applicant to prove 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 (section 18(3)).[2]

GROUNDS OF APPEAL

Whether Section 48 of the Superior Courts Act extended the powers of Judge Vorster to act as a Judge of the High Court beyond his appointment to the time that the Section 18 Application was argued?

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[2] Incubeta Holdings & Another v Ellis Another 2014(3) SA 189 (GJ); Ntlemeza v Helen Suzman Foundation [2017] ZASCA 93.

[9] In respect of this first ground of appeal, the argument advanced on behalf of the appellants is that Acting Judge Vorster, was no longer an appointed Judge when he presided on the application in terms of section 18(3) and when he made the subsequent order.

[10] At the time of the hearing his acting appointment had ended and this fact was confirmed on record by the Judge when the application was heard.

[11] During the proceedings the Judge had advanced as reasons when the point was taken by the appellants, that he will proceed to preside on the matter, as prior to the commencement of the proceedings, he had obtained direction from to the Deputy Judge President as to whether he will be permitted to proceed with the hearing of the section 18(3) application after his acting appointment had come to an end and was assured that it will be competent for him to adjudicate the matter. He was therefore confident that he could proceed to hear the application albeit that his acting appointment had come to an end.

[12] On behalf of the appellants it was contended that Acting Judge Vorster ought to have known well, that it is not the opinion or view of the Deputy Judge President as to whether he can preside, which endowed him with the authority to hear the matter, but the issue is rather whether he has been properly appointed by the appointing authority to have acted as an Acting Judge at the time.

[13] Furthermore, as the authority to appoint Acting Judges does not fall within the purview of the Deputy Judge President, but indeed falls within the purview of the relevant Minister, it follows that any extension or reappointment of an Acting Judge cannot be made by the Deputy Judge President, once it has terminated, but that it can only be made by the designated Minister.

[14] On this basis, the appellants had argued that it was incompetent for the Judge to have presided over the section 18(3) application, as at the time he was not reappointed by the designated Minister.

[15] In addition to the above a further argument advanced relates to the provisions of Section 175(2) of our Constitution. The section reads as follows: “the cabinet member responsible for the administration of justice must appoint acting judges to other courts after consulting the senior judge of the court on which the acting judge will serve.”

[16] Following on this, Section 48 of the Superior Courts Act further provides that:

“any person who has been appointed as an acting judge of a Superior Court must be regarded as having been appointed also for any period during which he or she is necessarily engaged in the disposal of any proceedings in which he or she has participated as such a judge, including

an application for leave to appeal that has not yet been disposed of at the expiry of his or her period of appointment."

[17] In relation to Section 48, counsel had argued that the section is meant to facilitate a proper administration of justice. For instance, to ensure that a person is not reappointed to deal with unfinished business he could have finished as an acting Judge. Examples of such situations are the following: the noting of Leave to Appeal which is not entertained or disposed of at the time the acting appointment ended. This will include all Leave to Appeals lodged against the Judgment and Orders of the acting Judge when his or her term has ended. It also includes any partly heard matters before an acting Judge. A matter where an acting Judge is sitting with other Judges in a Full bench of Appeal which has not been finalized, or the writing of reserved Judgments when the acting appointment has ended.

[18] It is on the above analogy, that counsel had argued, that the proceedings must have been pending at the time that the acting appointment had ended and the acting Judge must have been seized with the matter before such termination.

[19] Further that Acting Judge Vorster had not been necessarily engaged with the section 18(3) application at the time when the proceedings were instituted by the first respondent. By this time, as previously mentioned, he was no longer an acting Judge.

[20] His engagement with the matter, so the argument went, had terminated when he delivered the Summary Judgment order. The only outstanding matter necessary for his engagement was the application for Leave to Appeal, which is expressly mentioned and provided for in Section 48. Acting Judge Vorster had dismissed the application for leave to appeal with a punitive costs order.

[21] It is on this basis that counsel had argued that the orders made by Acting Judge Vorster in the section 18(3) application are therefore a nullity and fall to be set aside.

[22] It is noteworthy that but for the submissions made by counsel, this Court was not directed to any authority to support the arguments advanced by the appellants specifically on this ground of the appeal.

[23] In opposition the first respondent had argued that the authority of Judge Vorster to adjudicate the Section 18 Application, was first raised from the bar by the appellant. At the same time the appellant also informed the Judge that it did not have to comply with his directive previously issued directing it to file opposing papers and Heads of Argument.

[24] This was predicated on the fact that the appellant had made enquiries with the Judge's Registrar and had learned that his appointment as Acting Judge had come to an end. It is on this basis that the appellant had argued that the Judge had to recuse himself from hearing the Section 18 application.

[25] In this regard the first respondent had argued that as it is common cause that Judge Vorster's original appointment in terms of Section 175(2) of the Constitution was good, it was argued, it follows that his appointment in terms of section 48 was extended to the time that the Section 18 application was argued. This is so as the Section 18 application concerned proceedings which Judge Vorster initially participated in as a Judge.

[26] Judge Vorster, counsel contended, was in the best position to deal with the Section 18 application and to do substantial justice between the parties as he was fully acquainted with the proceedings.

[27] His judicial powers, counsel had argued further, were extended beyond his appointment by Section 48. It was on this basis that it was argued that because the Section 18 application arises from proceedings

he participated in prior as the Judge, it must follow that his powers to act as a Judge were extended beyond his appointment.

[28] In support of this argument the first respondent relied on the decision Airy and Another v Cross-Border Road Transport Agency and Others 2001 (1) SA 737 (T).

[29] At paragraph 7 page 740 Tuchten AJ - as he then was, dealt with the issue as follows, albeit in the context of Rule 49(11):

> "[7] I turn to the Rule 49(11) application. Counsel for respondents submitted *in limine* that it was not competent for me to hear the Rule 49 application. I heard the main application by virtue of acting appointment which terminated on 5 May 2000. I do not presently hold any judicial appointment, acting or otherwise. My judicial powers, therefore extend only to proceedings contemplated under section 10(6) of the Supreme Court Act 59 of 1959.
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> [8] Section 10(6) of the Supreme Court reads as follows:

Any appointment made under this section shall be deemed to have been made also in respect of any period during which the person appointed is necessarily engaged in connection with the disposal of any proceedings in which he has taken part as a judge and which have not been disposed of at the termination of the period for which he was appointed or, having been disposed of before or after such termination, or are a re-opened.

[9] The question is, therefore, whether an application under Rule 49 (11) should be viewed as being in connection with the main application or, as is submitted on behalf of the respondents, new proceedings notionally distinct from the main application. The Judge who presides in a Court that considers a Rule 49(11) application must try to do real and substantial justice, for which purpose he may take into account all relevant circumstances surrounding the case. Ideally therefore, he should be fully acquainted with the proceedings which led to the order giving rise to the Rule 49(11) application. He must form a view on the prospects of success on appeal. He must consider the prejudice to the parties. The Judge who made the order under attack will more often than not already

have done a substantial part of the work required for the proper adjudication of a Rule 49(11) application. Another Judge would have to reiterate much of the work of his erstwhile acting colleague.

[10] The proceedings constituted by the main application have not been "disposed of", to use the language of section 10 (6) of the Supreme Court Act. This is because the several parties sought leave to appeal. It follows that my acting appointment is deemed to also to have been made in respect of the period during which I am necessarily engaged in connection with the disposal of such proceedings."

[30] Counsel for the respondents contended that Section 18's predecessor is the now-defunct Rule 49(11) of the Uniform Rules of Court. The subrule was repealed by Government Notice R317 of 17 April 2015 [GG 38694 of 17 April 2015] with effect from 20 May 2015, and that the principles established in a long line of cases decided in relation to Rule 49 (11) still apply, albeit now in relation to Section 18.[3]

[3] Erasmus Superior Court Practise at D1-680.

[31] In addition counsel had argued that it has been a long-established practice not only in this division, but in all other divisions of the High Court, that an application to carry into effect a judgment and order which is the subject of an application for leave to appeal, whether it was in terms of the now defunct Rule 49(11), or in terms of section 18(1) of the Superior Courts Act should be decided by the Court or Judge who adjudicated upon and decided the matter initially. This is a sensible practice, and there are cogent reasons why this practise should be observed.

[32] Applying this analogy, the first respondent had argued that Judge Vorster was properly seized with the matter and he had the authority to adjudicate upon the Section 18 application.

[33] The reasoning employed in the Airy-judgment this Court finds favour with for the following reasons:

33.1 Acting Judge Vorster was fully acquainted with the proceedings which lead to the Section 18(1) application;

33.2 As such, he was best poised to consider and form a view on the appellants prospects of success on appeal;

33.3 Judge Vorster, having been the judge who initially granted the summary judgment order, had already dealt with a substantial part of the merits which would be required for consideration for a proper adjudication of the section 18(1) application;

33.4 If another colleague would have been asked to deal with the application under section 18(1), this other colleague would have been tasked to repeat much of the work already done and considered by Judge Vorster and this may impact on the proper administration of justice;

33.5 Lastly, at the time when the section 18(1) application was adjudicated upon, the application for leave to appeal was still pending.

[34] For the above reasons I conclude that Judge Vorster had the power and authority to consider and adjudicate the section 18(1) application and that any orders granted by him pursuant thereto, did not amount to a nullity.

Failure by Acting Judge Vorster to have regard to the Answering Affidavit of the Appellant.

[35] In order to consider this ground of appeal, it is necessary to consider what transpired before Judge Vorster when the section 18(3) application was heard.

[36] Prior to the hearing of the section 18(1) application, Judge Vorster issued a Directive in anticipation of the hearing regarding how the

exchange of papers should take place. The Section 18 application was set down for hearing on 2 November 2021. The appellant failed to comply with this Directive so issued by the Judge.[4]

[37] When the matter was heard on 2 November 2021, Judge Vorster questioned the appellants' failure to file opposing papers in accordance with the directive he had previously made and questioned its further failure to request condonation for the late filing of the Answering Affidavit.[5] The appellant replied that it does not recognise him as a Judge because his appointment as an Acting Judge had come to an end.

[38] This is the reason proffered by the appellant why it did not have to comply with the Judge's directive to file its Answering Affidavit timeously and its Heads of Argument within the time periods directed by the Judge as it did not regard those orders/directives to have been made by a Judge.

[39] After the refusal by the Judge to recuse himself, the appellants counsel then refused to further participate in the Section 18 application and asked to be excused from the proceedings. This all transpired without the Judge being asked to condone the late filing of the Answering Affidavit

[4] Caselines: Appeal–160 Line 25
[5] Caselines: Appeal-160 Line 25.

to introduce its evidence. The result being that the Section 18(1) application proceeded on the unopposed basis.[6]

[40] The Rules of Court and Directives issued by the Court cannot simply be ignored or disregarded by a litigant. When issued it must be complied with unless cogent reasons exist which will militate against complying with same.

[41] To the matter at hand, the wilful and intentional failure by the appellants to file its Answering Affidavit timeously was as a result of it not recognizing the authority of Judge Vorster to preside over the Section 18(1) application.

[42] In the absence of any condonation application seeking leave from the Court to file its Answering Affidavit belatedly, Judge Vorster was correct to consider the Section 18(1) application in the absence thereof. Judge Vorster could not have regarded the Answering Affidavit, which had not properly been placed before the Court.

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[6] Caselines: Appeal–168, Line 12

[43] For the above reasons, we similarly could find no merit in the second ground of appeal.

Failure to comply with the provisions of Section 18(4)(i) of the Superior Court's Act

[44] In respect of the third ground of appeal, the argument advanced on behalf of the appellant was to the effect that the subsection enjoins the court to record the reasons for its order immediately. The subsection, it was argued, is couched in peremptory terms and the court has no discretion to dispense with its obligation to record the reasons.

[45] In this regard, counsel argued, that Acting Judge Vorster had failed to comply with this peremptory section with the resultant effect that the order so given by him is a nullity, cannot be given effect to and falls to be set aside on this ground alone.

[46] In support of this argument, counsel had placed reliance on the decision in Mphahlele v First National Bank of SA LTD [1999] ZACC 1; 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC) wherein it was held at para 12 that:

> *"... The rule of law undoubtedly requires Judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which*

has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may well be, too, that where a decision is subject to appeal it would be a violation of the constitutional right of access to courts if reasons for such a decision were to be withheld by a judicial officer."

[47] The provisions of Section 18(4), counsel contended, becomes even more compelling in the case of a Section 18(3) application because of the drastic nature of the order of execution pending appeal and the significance of the automatic right of appeal which a party attracts.

[48] An appellant can hardly be expected to exercise his or her automatic right of appeal without reasons for the order.

[49] In the present instance, Acting Judge Vorster only provided his written reasons after the fact, and most tellingly several days after the Notice of Appeal had been lodged. It is for this reason that it cannot be said that he had complied with the requirements set out is section 18(4)(i) of the Superior Court's Act.

[50] In respect of this ground the arguments advanced on behalf of the first respondent was to the effect that section 18(3) order was given in the absence of the appellant as it had excused itself from further participating in the proceedings when Acting Judge Vorster refused the recusal application.

[51] It was further contended that Judge Vorster had in the presence of the appellants given oral reasons for his refusal to recuse himself and that counsel for the appellants had thereafter asked to be excused.[7]

[52] Judge Vorster then proceeded to deal with the merits of the Section 18(3) application, as it was unopposed in the absence of the Answering Affidavit and granted the relief in the favour of the first respondent.[8] A few days thereafter, the Judge gave written reasons.[9]

[53] It is on this basis that the first respondent had argued that there indeed had been compliance with the provisions of section 18(4)(i) and that the ground taken is bad in law.

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[7] Caselines: Appeal-168
[8] Caselines Appeal-177
[9] Caselines Appeal-173

[54] Having regard to the record of proceedings, it is incorrect to argue that Judge Vorster had failed to furnish reasons for his order in respect of the section 18(3) application. The record clearly depicts that reasons were furnished by the Judge albeit *Ex Tempore* on the day that the application was adjudicated and as mentioned, his written reasons were given a few days thereafter.

[55] It is for these reasons, that I conclude that there had been compliance with the provisions of Section 18(4)(i) of the Superior Court's Act and that this ground of appeal is also found to be without merit.

[56] The above grounds of appeal as discussed, I find are dispositive of the appeal and it is for this reasons that on the remainder of the grounds no view will be expressed.

[57] In returning then to the test to be applied by this Court on Appeal, I therefore conclude that:

57.1 On the basis of the appellants failure to dispute its liability towards the first respondent, Acting Judge Vorster did not commit a misdirection in granting the Section 18 application.[10] More so in circumstances where the appellant admitted indebtedness to Eskom in the amounts of R 25 million and R1.3 billion which remains unpaid. In addition, it was specifically agreed between the parties that pending the resolution of disputes, the

[10] Caselines: Appeal-36, para 78.

appellant must still pay the first respondent regardless of such disputes. Further that upon the finalisation of the dispute, there would be an adjustment made on the appellants' account.[11] It is on the basis of the appellants failure to dispute its liability that there can be no potential harm or prejudice which the appellant stands to suffer. Based on this I find that the first requirement in terms of section 18(3) has been met.

57.2 In turning then to the second requirement of potential of irreparable harm or prejudice for the first respondent if the Section 18(3) relief is refused. On this requirement, regard should be had to the fact that the persons in charge of the appellants' affairs do not manage the municipality's business for their own benefit but do so for the benefit of the residents who reside within the municipal area and who continue to pay it for the services rendered by it. If the persons in charge of the appellant thus fail to manage its affairs properly, it is in the interest of the municipality to trigger the mechanisms put in place by the Constitution and legislation to protect the interests of residents and implement a turnaround strategy. If this were not to occur, the first respondent is harmed by the Court not granting the Section 18 relief and allowing those in charge of its affairs to run the municipality into financial distress. The granting of the Section 18 relief actually circumscribes the harm suffered by the appellant by triggering intervention from provincial and or National Governments.

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[11] Caselines: Appeal-36, para 79.1.

57.3 For the above reasons, this Court is of the view that the first respondent had satisfied the requirement of proving on a balance of probability that it will suffer irreparable harm or prejudice if the operation and execution of the order is not suspended and that the appellant will not suffer irreparable harm.

57.4 In assessing the third requirement this Court must consider the appellants' prospect of success on appeal. In the present matter as mentioned, the appellant has not disputed its indebtedness to the first respondent but rather what it disputes is the manner it will be required to repay the first respondent.

57.5 From this, it is apparent that the appeal has not been noted with the bona fide intention of seeking to reverse the judgment of the High Court, but rather for purposes of delaying the implementation of urgent and necessary remedial measures which must be implemented in terms of the Constitution. So, for as long as the judgment of the High Court is not carried into effect there will be no government intervention to mitigate the financial losses which the first respondent is suffering, and the appellants' electricity debt will continue to spiral out of control. It is for this reason that I conclude that the appellants' prospects of success on appeal are virtually non-existent.

57.6 Lastly, in assessing as to whether exceptional circumstances were found in the present case, the first respondent had argued as follows:

> 57.6.1. Electricity has become a basic service without which people cannot go. The first respondent is under a constitutional duty to ensure that municipalities which are solely dependent on it for electricity are able to discharge their obligations under the Constitution. This obligation is undoubtedly reciprocal, and municipalities are under a constitutional duty to ensure that the first respondent is paid for the electricity that it supplies and remains financially sustainable and viable.
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> 57.6.2. The appellant's failure to comply with its constitutional obligations and other legislative instruments is unprecedented. It harms the first respondent and the country as a whole. In this regard, it continues to receive electricity from the first respondent without making payment, and the municipality's electricity debt already exceeds R4 billion. It is on this basis that counsel contended that the facts of this specific case are exceptional. The admission of indebtedness on the part of the appellant coupled with the poor prospects of success on appeal make the circumstances in the present matter exceptional.

[58] This Court aligns itself with these views expressed and consequently, I conclude that the Section 18(3) application had been correctly decided.

ORDER

[59] For the above reasons the appeal is dismissed with costs, including the costs of two counsel where so employed.

COLLIS J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree

p.p

MAKHOBA J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree

p.p

BAM J
JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances

Counsel for the Appellants	: Adv. W.R. Mokhare SC
Attorney for the Appellants	: Seleka Attorneys Inc.
Counsel for the First Respondent	: Adv. P.L. Uys
	: Adv. S.S.Maelane
Attorney for the First Respondent	: GMI Attorneys
Date of Hearing	: 22 March 2022
Date of Judgment	: 14 October 2022

Judgment transmitted electronically