



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Before:

*The Hon Mr Justice L G Nuku
The Hon Mr Justice M Francis
The Hon Mr Justice J D Lekhuleni*

Case No: 8500/2022

In the matter between:

THE PUBLIC PROTECTOR OF SOUTH AFRICA

Applicant

and

THE SPEAKER OF THE NATIONAL ASSEMBLY

First Respondent

**THE CHAIRPERSON OF THE SECTION 194
COMMITTEE**

Second Respondent

**THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA**

Third Respondent

**ALL POLITICAL PARTIES REPRESENTED
IN THE NATIONAL ASSEMBLY**

Fourth to Seventeenth Respondents

Date of hearing : *25 October 2022*

Date of Judgment : *03 November 2022*

JUDGMENT ON APPLICATIONS FOR LEAVE TO APPEAL

THE COURT:

INTRODUCTION

[1] This is an urgent application for leave to appeal to the Supreme Court of Appeal (“the SCA”) in terms of section 17(1)(a)(i) and section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013 (“the Superior Courts Act”), against the whole judgment and order of this Court handed down on 11 October 2022 (“the section 18 Judgment”). In that judgment, this Court dismissed the applicant’s application in terms of section 18(1) and section 18(3) of the Superior Courts Act to render the judgment of this Court delivered on 09 September 2022 (“the Part B Judgment”) to be operational and executable, pending any application for leave to appeal or appeal delivered in respect thereof. It is that order that the applicant seeks to challenge before the SCA. The tenth, eleventh, and the sixteenth respondents (“the supporting respondents”) have also filed their applications for leave to appeal to the SCA in similar terms against the section 18 Judgment. At the hearing of this application, both applications for the applicant and the supporting respondents were by agreement consolidated and were heard together. The third and the fifth respondents opposed both applications.

GROUNDINGS OF APPEAL

[2] The grounds of appeal filed on behalf of the applicant and the supporting respondents can be summarised briefly as follows: the applicant contends that this Court erred in holding that the orders numbered 187.5 and 187.6 of the Part B judgment were made in terms of section 172(2)(a) of the Constitution as no party,

including the court, ever raised the issue of confirmation during the hearing of the application. The applicant also contends that the court erred in its finding that these orders were made in terms of section 172(2)(a), as the Registrar was not directed to refer the orders to the Constitutional Court until after the expiry of 15 days prescribed in Rule 16(1) of the Constitutional Court Rules.

[3] In the alternative, the applicant submitted that this Court erred in holding that the order numbered 187.6 of the Part B judgment was ancillary to or flowed from the order numbered 187.5 when, in fact, the order numbered 187.6 flowed independently from the findings pertaining to common law breaches, which are not sourced from the Constitution. The applicant further contends that the mere fact that the exercise of power was effected under a constitutional duty does not automatically mean that the breach falls under section 172(1) because Section 172(1) does not apply to conduct which is inconsistent with the common law or legislation but only to conduct which is inconsistent with the Constitution.

[4] The applicant has also filed with the Constitutional Court an urgent Conditional application for leave to appeal in terms of Rule 19 of the Constitutional Court Rules for the consolidation of the present application with cases CCT251/22 and CCT252/22. The application for leave to appeal before the Constitutional Court is conditional upon the outcome of this application and the proceedings before the SCA if leave to appeal is granted in this application. In the Constitutional Court, the applicant seeks, among other things, an order setting aside the section 18 Judgment of this Court and for the immediate execution of the orders granted in the Part B

Judgment in terms of section 18 of the Superior Courts Act and or section 172(2)(b) of the Constitution.

[5] The applicant also relied on section 17(1)(a)(ii) of the Superior Courts Act and noted, among other things, that the lodging of appeals by the fifth respondent and the President has had the effect of re-suspending the applicant. This, so it is argued, is clearly not in the interests of justice in the circumstances of this case considering the obligations of the State to respect the applicant's rights enshrined in the Bill of Rights.

[6] The supporting respondents, for their part, contended that the court erred in finding that the orders in 187.5 and 187.6 of the Part B Judgment are composite, not self-standing, and must be referred to the Constitutional Court for confirmation. Had the court correctly appreciated the structure of section 172(2), so their argument went, the court would have indeed concluded that its orders in paragraphs 187.5 and 187.6 were self-standing orders, and separate from each other. The supporting respondents contend that the order in paragraph 187.6 of the Part B Judgment was an order under section 172(2)(b) of the Constitution: a temporary relief granted to the applicant pending the decision of the Constitutional Court on the validity of the President's conduct in suspending the applicant.

PRINCIPAL SUBMISSIONS OF THE PARTIES

[7] At the hearing of this application, Mr Mpofo contended on behalf of the applicant that this matter raises very complex, novel, and constitutionally weighty issues which merits the attention of all our courts. Applicant's counsel submitted that

a dismissal of this application, would strip the matter of its great potential to put to bed important issues concerning both section 18 of the Superior Courts Act and section 172 of the Constitution. Counsel further contended that granting leave to appeal in this matter will advance the administration of justice by allowing the much-needed objective interpretation of the relevant court orders in both the Part B and section 18 Judgments of this court.

[8] Mr Mpofu further contended that this court refrained from dealing with the merits of the section 18 application and that this *per se*, is a compelling reason to grant leave to appeal. Counsel submitted that the Constitutional Court has on more than one occasion pointed out that it is undesirable for it to sit as a court of first instance to adjudicate matters which could have been dealt with by the High Court. To this end, Counsel relied on the Constitutional Court decision of *S v Jordan and Others*¹ and *Minister of Justice and Another v SA Restructuring and Insolvency Practitioners Association and Others*,² where it was stated that where the constitutionality of a provision is challenged on several grounds and the court upholds one such ground, it is desirable that it should also express its opinion on the other challenges.

[9] Mr Mpofu submitted that the mere fact that the matter might be heard before the Constitutional Court on 24 November 2022 is not a good reason to refuse leave to appeal. To this end, it was argued that this matter affects the applicant's section 34 rights, and it is expected that if leave is granted, the SCA will deal with this matter as a matter of extreme urgency as prescribed by section 18 of the Superior Courts

¹ 2002 (6) SA 642 (CC) at para 21.

² 2017 (3) SA 95 (SCA) at para 38.

Act. It was Counsel's submission that this matter does not need confirmation as the orders made in paragraphs 187.5 and 187.6 were made in terms of section 172(1)(a) and (b) of the Constitution. Furthermore, paragraphs 187.5 and 187.6 circumscribe the executive part of this Court's judgment as it defined what the court required of the parties who are bound by it.

[10] The supporting respondents also submitted that the issues raised in this matter are of great public importance such that it is compelling for leave to appeal to be granted. Mr Ngalwana, who appeared on behalf of the supporting respondents, submitted that the question of law that must be determined by the appeal court is this: in what circumstances is the confirmatory jurisdiction of the apex court triggered when the High Court finds the President to have acted unlawfully or in breach of the Constitution. Counsel contended that there are conflicting judgments on the issue of automatic confirmation by the apex court of a declaration of invalidity of the President's conduct by the High Courts. Thus, this is a sufficient ground for leave to appeal to be granted, regardless of the prospects of success on the merits of the appeal. It was further submitted on behalf of the supporting respondents that the issues raised in this court turn on the proper interpretation of not only section 18 of the Superior Courts Act, but also on section 172 of the Constitution that engages the jurisdiction ultimately of the Constitutional Court. As a result, Mr Ngalwana submitted that this Court cannot be the final arbiter of the proper interpretation of the Constitution. For these compelling reasons, so the contention proceeded, leave to appeal should be granted.

[11] Ms Pillay who appeared for the President submitted that this application is a manifest abuse of process as the applicant and her legal representatives were aware before this application was launched that the Constitutional Court will, on 24 November 2022, hear various appeals against the judgment of the full court declaring the decision of the President invalid. Ms Pillay submitted further that the pending applications before the Constitutional Court will be dispositive of the lawfulness or otherwise of the applicant's suspension. If this court was to grant leave to appeal, so the argument went, an appeal to the SCA against the refusal of the section 18 application could not, as a matter of practicality, be dealt with by the SCA prior to the hearing of the pending application before the Constitutional Court for consolidation and an execution order. Having regard to the facts of this matter, counsel submitted that an appeal against the section 18 order is not in the interests of justice and thus not appealable. Counsel also contended that the fact that this court did not deal with the merits of the section 18 application, is not a compelling reason for leave to appeal to be granted because this matter does not involve a constitutional challenge to a statutory provision.

[12] The DA 's submissions were in substance aligned with the arguments advanced by the third respondent. In addition, Mr Bishop, on behalf of the DA, contended that there are no merits in the applicant's application. Counsel contended that at the hearing of Part B, none of the parties sought interim relief and, further, that issue was not argued in this court. Mr Bishop contended that the submission that the order in terms of paragraph 187.5 is predicated on the common law and does not require confirmation is misplaced. Counsel relied on *Pharmaceutical Manufactures of SA: In Re Ex Parte President of RSA*,³ where the Constitutional

³ 2000 (2) SA 674.

Court held that the common law principles that previously provided the grounds for judicial review of public power have been subsumed under the constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. Counsel also contended that there are no prospects that another court would come to a different conclusion.

APPLICABLE LEGAL PRINCIPLES AND DISCUSSION

[13] The applicant's application for leave to appeal is based squarely on section 17(1)(a) of the Superior Courts Act. Section 17 of the Superior Courts Act regulates applications for leave to appeal from a decision of a High Court. It provides as follows:

'(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and

(c) Where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'

[14] The test that was applied previously in applications of this nature, was whether there were reasonable prospects that another court may come to a different conclusion. With the enactment of section 17 of the Superior Courts Act, the threshold for granting leave to appeal a judgment of the High Court has been significantly raised. The use of the word 'would' in subsection 17(1)(a)(i) of the Superior Courts Act imposes a more stringent threshold in terms of the Act,

compared to the provisions of the repealed Supreme Court Act 59 of 1959.⁴ In *Mount Chevaux Trust [IT 2012/28 v Tina Goosen and 18 Others]*,⁵ Bertelsmann J stated as follows:

“It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court may come to a different conclusion, See *Van Heerden v Cronwright and Others* 1985 (2) SA 342 (T) at 343H. The use of the word ‘would’ in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against”.

[15] What is required of this court is to consider, objectively and dispassionately, whether there are reasonable prospects that another court will find merit in the arguments advanced by the losing party.⁶

[16] Reverting to this case, it is undeniable that the issues raised by the applicant and the supporting respondents in their notices of appeal are weighty and of great public importance. This case involves a proper interpretation of section 172 of the Constitution and section 18 of the Superior Courts Act in determining the rights of the parties, particularly those of the applicant and the supporting respondents. In the Part B Judgment, this Court found that the President as a servant of the Constitution, is under an obligation to obey its commands. Further, this Court observed that the President had a duty to exercise his public power within the parameters of the law

⁴ See *S v Notshokovu* [2016] ZASCA 112 at para 2.

⁵ 2014 JDR 2325 (LCC) at para 6.

⁶ *Valley of the Kings Thaba Motswere (Pty) Ltd and Another v Al Maya International* [2016] 137 (ZAECGHC) 137 (10 November 2016) at para 4.

and to comply with the principle of legality and the Constitution. In addition, this Court also found that the applicant's suspension was certainly tainted by bias of a disqualifying kind and perhaps an improper motive. As a result, the court declared the suspension invalid in paragraph 187.5 of the Part B Judgment and directed the suspension to be effective from the date of judgment in paragraph 187.6.

[17] In dismissing the application to render the Part B judgment to be operational and executable, pending any application for leave to appeal or appeal, the Court emphasised that the Part B judgment was inchoate and of no force until the Constitutional Court confirmed the judgment. In addition, it was held that the orders granted by this Court were composite in nature and both orders required confirmation.

[18] We have carefully considered the submissions of the applicant and the supporting respondents but can find no redeeming features to persuade us that there is a reasonable possibility that another Court would come to a different conclusion. Our reasons have been extensively catalogued in both the Part B and section 18 judgments and it is unnecessary to repeat them here.

[19] There is another reason why the applications for leave to appeal must fail. Section 18 of the Superior Courts Act is intended, under exceptional circumstances, to bring into operation a decision which is the subject of appeal. A court is empowered in exceptional circumstances to order that a decision which is the subject of an application for leave to appeal or appeal to be put into operation or executed pending the final determination of the appeal. The Constitutional Court in

Department of Transport v Tasima (Pty) Ltd; Tasima (Pty) Ltd v Road Traffic Management Corporation,⁷ held that an order made under section 18(3) serves to regulate the interim position between the litigants from the time when such an order is made until the final judgment on appeal is handed down.

[20] Having regard to the dictum of the Constitutional Court in *Tasima*, we are of the view that an order granted in terms of section 18(1) and read with section 18(3) is interim in nature, regulating as it does the interim position between the litigants from the time when such an order is made until the final judgment on appeal is handed down. Consequently, the appealability for the refusal of an order sought in terms of section 18(1) read with section 18(3) is to be determined with reference to the settled legal principles governing the appealability of interim orders generally.

[21] The Constitutional Court in *UDM and Another v Lebashe Investment Group (Pty) Ltd and Others*,⁸ held that the test of appealability for interim orders is now the interests of justice. The Constitutional Court also held in *City of Tshwane Metropolitan Municipality v Afriforum and Another*,⁹ that the common law test for appealability has since been denuded of its somewhat inflexible nature. Unlike before, the court noted, appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. The court further observed that all of this is now subsumed under the constitutional “interests of justice” standard.

⁷ 2018 (9) BCLR 1067 (CC) at paras 45 – 56.

⁸ (CCT 39/21) [2022] ZACC 34 (22 September 2022).

⁹ 2016(6) SA 279 (CC) at para 40.

[22] Pursuant to the authorities cited above, we are of the view that the refusal of the section 18(1) read with section 18(3) application falls to be considered with reference to the interests of justice standard. We share the views expressed by the President's legal Counsel that an appeal against the section 18 order in this case, does not meet the interests of justice standard and is thus not appealable. This is borne out by the fact that section 18 does not find application when the orders relate to the conduct of the President. This view is buttressed by section 172(2)(a) of the Constitution which makes it clear that orders relating to the conduct of the President have no effect unless confirmed by the Constitutional Court. Section 167(5) also reinforces this provision and provides that the Constitutional Court makes the final decision whether the conduct of the President is constitutional, and must confirm any order of invalidity made by a High Court before that order has any force.

[23] Finally, there is a further compelling reason why the applications for leave to appeal must fail. If leave is granted to appeal to the SCA, it would have no practical result. We are aware that according to the revised directives issued by the Chief Justice on 12 October 2022, the appeal by the third and the fifth respondents and the cross-appeal against the Part B Judgment, are scheduled to be heard by the Constitutional Court on 24 November 2022. In terms of these directives, any appeals, and cross-appeals (conditional or otherwise) will be heard simultaneously with the consolidated applications set down for hearing on 24 November 2022, at 10h00. Thus, the Constitutional Court is seized with the pending applications and appeals which will finally determine the lawfulness of the applicant's suspension. This is due to be heard in less than a month from now.

[24] As explained above, the applicant has since filed a conditional application with the Constitutional Court to have the issues raised in this application consolidated with the appeals lodged by the third and fifth respondents in the Constitutional Court. That application is conditional upon the outcome of this application. In the conditional application, the applicant seeks to set aside the decision of this Court in the section 18 Judgment and to substitute it with an order for execution of the Part B Judgment. In a month, that application and the issues raised in this application will be before the Constitutional Court. Clearly, the SCA will not be able to determine the appeal against the refusal of the section 18 order before the Constitutional Court hears and possibly decides on the pending appeal and applications. In any event, even if the SCA was to hear and determine the appeal, its decision in all probability is likely to be challenged in the Constitutional Court. The expedited appeals proceedings in the Constitutional Court will finally resolve the issues raised in this matter.

[25] In our view, granting leave to appeal in this case would lead to piecemeal adjudication and delay the determination of the dispute. In addition, leave to appeal to the SCA under these circumstances would be impractical and a waste of public funds, time, and judicial resources. As the Constitutional Court noted in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*,¹⁰ courts are loathe to encourage the wasteful use of judicial resources and of legal costs by allowing appeals against interim orders that have no final effect, and that are susceptible to reconsideration by another court when final relief is determined.

[26] We are alive to the constitutional rights implicated in this matter, particularly those of the applicant and the office of the Public Protector. However, we are of the

¹⁰ 2012 (4) SA 618 (CC) at para 50

view that the Constitutional Court will deal with these issues in due course. Furthermore, any prejudice that the applicant may suffer, if at all, would be minimal if leave to appeal is refused. In addition, any potential prejudice that the applicant may suffer is ameliorated by the fact that in a month's time, these issues will be debated before the apex court. Importantly, if the Constitutional Court finds that there is indeed substance in the section 18 application, it will, with respect, no doubt grant appropriate relief.

[27] In the circumstances, it is our firm view that an application for leave to appeal to the SCA in these circumstances, will be an exercise in futility and a waste of public funds and judicial resources.

[28] Lastly, it has been stated as a fact in the applicant's application for leave to appeal as well as in her heads of argument that the Registrar of this court was not directed to refer the orders to the Constitutional Court until after the expiry of the 15-day period prescribed in Rule 16(1) of the Constitutional Court Rules. In the section 18 Judgment, we said section 15(1)(a) of the Superior Courts Act, which deals with the referral of an order of constitutional invalidity to the Constitutional Court for confirmation, must be read in tandem with Rule 16(1) of the Constitutional Court's Rules. Rule 16(1) of the Constitutional Court places an obligation on the Registrar of a court which has made an order of constitutional invalidity as contemplated in section 172 of the Constitution, within 15 days of such order, to lodge with the Registrar of the Constitutional Court a copy of such order. Thus, it was the duty of the Registrar of this Court to ensure that the abovementioned rules were observed.

This conclusion is fortified by the Constitutional Court decision in *S v Manyonyo*,¹¹ where Chaskalson P, as he then was, stated:

“The 1996 Constitution makes provision for any order declaring provisions of an Act of Parliament to be inconsistent with the Constitution, to be referred to the Constitutional Court for confirmation. The Constitutional Court rules require the registrar of a court which has made an order of constitutional invalidity to lodge a copy of the order with the registrar of the Constitutional Court within 15 days. It is essential that this rule be complied with and that orders that require to be confirmed are brought to the attention of this Court timeously. This is of particular importance in cases where litigants are not represented. Delays may be highly prejudicial to such persons.”

[9] High Court registrars are under a duty to ensure that the rule is observed. The obligation is to lodge the order of referral with the registrar of this Court. Lodgement takes place when the order is received by the registrar. It is therefore the responsibility of the registrar of the referring court to satisfy herself or himself that this has happened, and to secure confirmation of the receipt of the order from the registrar of this Court.” (Footnote omitted and emphasis added)

[29] In compliance with this statutory injunction, the Registrar of this Court referred the part B Judgment to the Constitutional Court for confirmation on 22 September 2022. On 23 September 2022, the Registrar of the Constitutional Court acknowledged receipt of the order and further confirmed that his office had already received the request for confirmation of the order of invalidity from the attorneys acting on behalf of the respondents. Consequently, the suggestion that this Court

¹¹ 1999 (12) BCLR 1438 (CC) at paras 8 and 9.

has not referred its order to the Constitutional Court for confirmation within the relevant time frame is erroneous and mistaken.

COSTS

[30] The fifth respondent and the President sought costs against the applicant on a punitive scale and in her personal capacity. It is a trite principle of our law that a court considering an order of costs exercises a discretion which must be exercised judicially.¹² Having considered the parties' submissions on the issue of costs, we are of the view that a punitive costs order against the applicant is not warranted. The scale of attorney and client sought by the respondents against the applicant is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner.¹³ Although her application for leave to appeal was ill-conceived and brought with improper haste, it cannot be said that her application is fraudulent, dishonest, or vexatious and that she engaged in conduct that amounts to an abuse of court process that would warrant an award of costs on an attorney-client scale against her.¹⁴ The same can be said with regard to the application for leave to appeal by the supporting respondents.

[31] Nonetheless, we find it concerning that notwithstanding that an expedited date has been determined by the Constitutional Court to dispose of all the issues raised in

¹² *Ferreira v Levin NO and Others; Vreyenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC); *Motaung v Makubela and Another, NNO; Motaung v Mothiba NO* 1975 (1) SA 618 (O) at 631A.

¹³ *Plastic Converters Association of South Africa on behalf of members v National Union of Metalworkers of SA* [2016] 37 2815 (LAC) at para 46.

¹⁴ *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at para 8.

this application, the applicant and the supporting respondents nonetheless soldiered on with their applications for leave to appeal to the SCA. In our view, this placed an unnecessary burden on the court and the opposing parties, especially given the extremely truncated time-periods within which these parties were required to craft their responses. In the circumstances, the court is of the view that there is no basis for deviating from the general rule that the applicant and the supporting respondents, as the unsuccessful parties, should bear the costs of this application. In addition, the applicant's application for leave to appeal was of no direct consequence to anyone else, save for her in her personal capacity; hence, the cost order that follows.

ORDER

In the result, the following order is granted:

32.1 The applications for leave to appeal are dismissed.

32.2 The applicant personally, and the tenth, eleventh, and the sixteenth respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of the third and fifth respondents, which costs shall include the costs of two counsel where so employed.

L G NUKU
Judge of the High Court

M FRANCIS

APPEARANCES

For the Applicant

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Advocate B Shabalala
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For the 3rd Respondent:

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Advocate K Pillay, SC
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For the 5th Respondent:

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For the 10th, 11th & 16th Respondents:

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