



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no:1124/2022

In the matter between:

**THE CITY OF TSHWANE METROPOLITAN
MUNICIPALITY**

APPELLANT

and

VRESTHENA (PTY) LTD

(REGISTRATION NO. 2001/015148/07)

FIRST RESPONDENT

THE BODY CORPORATE OF

ZAMBEZI RETAIL PARK

SECOND RESPONDENT

ZAMBEZI RETAIL PARK

INVESTMENTS (PTY) LTD

THIRD RESPONDENT

THUMOS PROPERTIES (PTY) LTD

FOURTH

RESPONDENT

ZRJ PROPERTIES (PTY) LTD

FIFTH RESPONDENT

Neutral citation: *City of Tshwane Metropolitan Municipality v Vresthena (Pty) Ltd & Others* (Case no 1124/2022) [2023] ZASCA 104 (22 June 2023)

Coram: SALDULKER, MOTHLE, MATOJANE and MOLEFE JJA and DAFFUE AJA

Heard: 4 May 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 22 June 2023.

Summary: Civil Procedure – Section 18(4) of the Superior Courts Act 10 of 2013 (the Act) – interpretation of the 'next highest court' – whether the appellant has a second right to an automatic appeal to approach the next highest court in terms of s 18(4) of the Act where a full court has already heard an appeal in terms of s 18(4) of the Act – whether the notice of appeal is irregular and the appeal void.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Tolmay, Nyati and Koovertjie JJ concurring, sitting as the full court on appeal):

1. The matter is struck from the roll with costs, including the costs of two counsel where so employed.
-

JUDGMENT

Matojane JA (Saldulker, Mothle, Molefe JJA and Daffue AJA concurring):

[1] The issue before us is whether s 18(4)(ii) of the Superior Court Act 10 of 2013 ('the Act') allows for a second automatic right to appeal to the 'next highest court' under s 18(4), against an order granted under s 18(3) of the Act, with further appeals being possible.

Background

[2] The first respondent Vresthena (Pty) Ltd (Vresthena), is the owner of six units in the Sectional Title Scheme known as Zambesi Retail Park, which is a shopping centre. Vresthena leases its properties to different businesses in the scheme. These properties share a single electricity supply point. The City of Tshwane Metropolitan Municipality (the Municipality) provides electricity to these properties through the Body Corporate of Zambesi Retail Park. The Body Corporate has been dysfunctional from its inception. On 28 March 2022, the

Municipality issued disconnection notices to the tenants and occupiers of the scheme. These notices were given because the tenants and occupiers had failed to pay for electricity and other services. As a result, the electricity and water services were disconnected on 13 April 2022.

[3] Vresthena filed an urgent application requesting the court to compel the Municipality to accept and review its application for a separate electricity connection for the tenants. Additionally, Vresthena sought an order to restore its electricity and water supply.

[4] On 16 June 2022, the Gauteng Division of the High Court, Pretoria (the high court) per Madam Justice Ndlovane AJ granted an interim order on an urgent basis, ordering the Municipality to restore electricity and water supply to the property within 14 (fourteen) days of the order. The high court further authorised Vresthena to instruct an electrician to reconnect the electricity should the Municipality fail to comply with the order.

[5] On 6 July 2022, the Municipality delivered an application for leave to appeal. Then, on 23 August 2022, Vresthena filed an application under s 18(3) of the Act. Vresthena sought a declaratory order stating that the order issued by the high court on 16 June 2022 should not be suspended while the Municipality's application for leave to appeal is being considered.

[6] On 28 September 2022, the high court granted the Municipality leave to appeal the judgment granted on 16 June 2022. The high court also ordered that the order given on 16 June 2022 should be put into effect and carried out while the appeal decision is pending. The Municipality exercised its automatic right of appeal under s 18(4) by filing an appeal to the full court of the Gauteng Division of the High Court, Pretoria (the full court), against the execution order.

On 10 November 2022, the full court rejected the s 18(4) appeal and issued an order allowing the main order to be implemented while the appeal decision was pending.

[7] On 22 November 2022, the Municipality filed a ‘notice of appeal’ in this Court, asserting that the phrase ‘next highest court’ in s 18(4) of the Act should be interpreted to include more than one court of appeal. Vresthena, on the other hand, contends that s 18(4) allows for only one appeal to the court immediately above the lower court. Therefore, the Municipality’s notice of appeal is irregular and, as a result, void.

Statutory provisions

[8] Section 16 of the Act regulates appeals generally and provides in s 16(1) (b) that an appeal against any decision of a high court on appeal or of a full bench sitting as a court of first instance lies with this Court. Leave to lodge such appeal may be granted by the full bench or upon special leave having been granted by this Court.

[9] Section 17(1) of the Act provides that leave to appeal can only be granted if the judge or judges concerned are of the opinion that there is a compelling reason why the appeal should be heard. This may include factors such as conflicting judgments on the subject matter, the practical implications of the order, or whether the appeal would result in a fair and timely resolution of the actual disputes between the parties.

[10] Section 17(3) of the Act provides that an application for special leave to appeal brought under s 16(1)(b) of the Act may be granted by this Court on an application filed with the registrar of the court within one month after the decision sought to be appealed against, or such longer period as may on good

cause be allowed, and the provisions of subsecs 2(c) to (f) shall apply with the necessary changes required by the context.

[11] Sections 16 and 17 of the Act establish a requirement for obtaining leave to appeal as a precondition for prosecuting a civil appeal. Should a litigant wish to appeal a judgment from a provincial or local division, they must first obtain leave to appeal from that division. Should that division not grant leave, the person may then seek leave from this Court. This provision serves as a screening mechanism to prevent the abuse of the appeal process and to ensure that only cases with merit proceed to appeal. By requiring leave to appeal, the law aims to filter out cases that do not have a reasonable chance of success, allowing the appellate courts to focus on cases that raise significant legal issues or have a genuine chance of being overturned.

[12] Section 18 of the Act contains a *sui generis* provision for an automatic right of appeal to the next ‘highest court’ against an order made under s 18(3) of the Act. I now turn to deal with the provision of s 18 which reads as follows:

‘(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 order 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.’

[13] Section 18(1) of the Act regulates the suspension of a decision pending appeal. It provides that when an application for leave to appeal or an appeal is being considered, the implementation and execution of the decision in question is suspended until a decision is reached regarding the application or appeal.

[14] An order issued in terms of s 18(3) is an extraordinary remedy reserved for exceptional circumstances. It empowers a high court to deviate from the general principle that pending an appeal, a judgment and attendant orders are suspended if the party requesting the court to do so can prove, on a balance of probabilities, two things. Firstly, they must demonstrate that they will suffer irreparable harm if the court does not issue the requested order. Secondly, they must show that the other party involved will not suffer irreparable harm if the court grants the requested order. This provision allows the court to consider the potential harm to both parties and make a decision that aims to prevent irreparable harm to the party seeking the order because of the extreme nature of the remedy.

[15] Considering the context of s 18(4), it is evident that it specifies that an appeal should be made from a single judge to a full court within the same division, as mandated by s 17(6)(a), which designates the next highest court.

Consequently, if an order under s 18(1) is granted by a court composed of a single judge, an automatic right of appeal lies with the full court, as it is the ‘next highest court’ in the hierarchy, which was the case in the present matter.

[16] Section 18(4)(ii) introduces a provision that grants an automatic right to appeal to the ‘next highest court’ against an order issued under s 18(3) of the Act. This provision is unique because it changes the general appeal processes in that such orders, being interlocutory in nature, are generally not appealable and that

leave to appeal must first be obtained before an appeal can be lodged. Section 18(4) establishes a mechanism for a single appeal that will be concluded in an expedited process, as evidenced by the absence of provisions for appealing the decision of the ‘next highest court’. In essence, the decision made by the ‘next highest court’ in the appeal process is final and cannot be appealed any further.

[17] The current matter exemplifies the mischief that the legislature intended to address through the introduction of s 18(4). Despite a reconnection order being issued on 16 June 2022, an order under s 18(3) in September 2022 and an order of the full court in November 2022, the Municipality has still not reconnected the electricity to Vresthena, thus thwarting the purpose of the extraordinary appeal process introduced by s 18(4).

[18] Section 18(4) of the Act serves as a protective measure to prevent irreversible harm caused by a court granting an execution order inappropriately. The court is required to immediately document its reasons for such a decision. The party affected by the order has an automatic right to appeal, unlike the usual situation where leave to appeal is required. The appeal against the execution order is an inherent right, and the party who obtained the order cannot object to

it. If they want to uphold the execution order, they must contest the appeal. In an instance where they want to avoid the suspension of the execution order and potential harm, their recourse is to approach the head of the court overseeing the appeal and take all necessary steps to expedite an urgent hearing, as provided by this section.

[19] The Municipality argues that the automatic right of appeal should be interpreted in a less restrictive manner. They contend that limiting litigants to only one right of appeal would result in an interpretation that goes against the Constitution and constitutional rights. They contend that such a restriction would lead to injustices. Essentially, the Municipality is suggesting that allowing multiple appeals is necessary to ensure fairness and protect the constitutional rights of aggrieved litigants.

[20] A general principle of statutory interpretation is that the words used in a statute should be understood in their normal grammatical sense unless this would lead to an absurd result. In *Cool Ideas 1186 CC v Hubbard and Another*,¹ (*Cool Ideas*), the Constitutional Court added three additional principles to this general rule. Firstly, statutes should be interpreted purposively. Secondly, the relevant statutory provision must be properly contextualized, and lastly, all statutes must be construed consistently with the Constitution. These three principles serve to guide the interpretation of statutes and ensure that the law is applied in a manner that aligns with the intended purpose and constitutional principles.

[21] Section 18(4) of the Act establishes a distinct provision that establishes a unique category of appeals, specifically designed to be utilized solely for orders made under s 18(3) of the Act. This provision carves out a specific and

¹ *Cool Ideas 118 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 28.

extraordinary avenue for appeals in exceptional circumstances, especially when it can be proved that irreparable harm would follow if the operation and execution of a decision is suspended. The provision enhances access to court on appeal by guaranteeing one automatic appeal, bypassing the typical screening process outlined in the general provisions of ss 16 and 17 of the Act. The purpose is to streamline and facilitate access to courts for these specific appeals, providing a more efficient and expedited avenue for seeking redress without infringing the s 34 Constitutional right of access to courts.

[22] We endorse Navsa JA's obiter viewpoint in *Ntlemeza v Helen Suzman Foundation*,² that s 18(4) of the Act specifically allows for a single automatic right appeal indicating that multiple appeals are not permitted under the section. He expressed it as follows:

'Understandably, because it is such a dramatic change, only one appeal to the "next highest court" is permissible. No further appeal beyond this court appears competent - for present purposes it is not necessary to decide this point.'

[23] The language of s 18(4)(ii) is explicit and straightforward. As held in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,³ 'the inevitable point of departure is the language of the provision itself'. The provision in plain language states that a party who is aggrieved *has an automatic right of appeal to the 'next highest court'* (Own emphasis.) The use of the words 'an' and 'court' implies a singular meaning, indicating a restriction on further appeals. Considering the language, context, and purpose of the provision, the clear wording does not support a broader interpretation to support the appellant's interpretation.

² *Ntlemeza v Helen Suzman Foundation* [2017] ZASCA 93; [2017] 3 All SA 589 (SCA); 2017 (5) SA 402 (SCA) para 24.

³ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

[24] The Constitutional Court in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*,⁴ held that when determining whether words should be severed from a provision or added to it, the court takes into consideration two important factors. First, it focuses on ensuring that the resulting provision, after the severance or addition of words, aligns with the Constitution and its fundamental values. Second, the court aims to minimize any interference with the laws established by the legislature. This means that the court strives to maintain consistency with the Constitution while also respecting the legislative intent as much as possible.

[25] The Municipality contends that the fundamental right to access to courts in s 34 of the Constitution entails an automatic right of access to all appeal courts. In *National Union of Metal Workers of SA and Others v Fry's Metal*,⁵ this Court held that s 34 of the Constitution does not explicitly provide for a right of appeal. Unlike s 35(3)(o) of the Constitution, which specifically includes a right of appeal or review for accused persons in their right to a fair trial, the court explained that s 34 does not inherently imply the same right. The Court stated that even if it did, any such right could be subject to reasonable limitations and justifiable restrictions. Moreover, the principle of legality applies to all court decisions, allowing them to be constitutionally reviewed. Therefore, it cannot be said that the court's general appellate jurisdiction automatically extends to the appealability of all justiciable rights.

[26] In *Besserglik v Minister of Trade, Industry and Tourism and Others*,⁶ the Constitutional Court considered the contention by the applicant in that case that

⁴ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1; 2000 (1) BCLR 39 para 65-66.

⁵ *National Union of Metal Workers of SA and Others v Fry's Metal (Pty) Ltd* 2005] ZASCA 39; [2005] 3 All SA 318 (SCA) at para 29.

⁶ *Besserglik v Minister of Trade, Industry and Tourism and Others* 1996 (6) BCLR 745; 1996 (4) SA 331 (CC) para 10.

s 22 of the Interim Constitution (predecessor to s 34 of the Constitution) aimed to ensure that individuals have the right to have their disputes resolved fairly by a court of law, including the right of appeal. The Court dismissed this argument and held that the scope of s 22 does not necessarily imply a right of appeal. The Constitutional Court further stated that a screening procedure, which excludes appeals lacking merit, does not amount to a denial of access to a court. As long as the screening process enables the highest court to assess the likelihood of success for an appeal, it does not violate s 22 of the Interim Constitution.

[27] In view of all of the foregoing, the notice of appeal dated 22 November 2022 delivered by the Municipality is irregular and void and no proper appeal served before us.

[28] In the result, the following order is made:

1. The matter is struck from the roll with costs, including the costs of two counsel where so employed.

K E MATOJANE
JUDGE OF APPEAL

APPEARANCES

For appellant: M Dewrance SC with N Erasmus
Instructed by: Diale Mogashoa Attorneys, Pretoria
Honey Attorneys, Bloemfontein

For first respondent: P Cilliers SC with M Louw
Instructed by: Wiese & Wiese Inc, Pretoria
Hendre Conradie Inc, Bloemfontein.