IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 15996/2017

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

.....
SIGNATURE

15 February 2021
DATE

In the matter between:

DUDUZILE CYNTHIA MYENI APPELLANT

and

ORGANISATION UNDOING TAX ABUSE NPC FIRST RESPONDENT

SOUTH AFRICAN AIRWAYS PILOTS' ASSOCIATION SECOND RESPONDENT

Section 18 of Superior Courts Act – execution of principal judgment and order – 18(4)(ii) – automatic right of appeal against execution of principal judgment and order – preliminary point on jurisdiction – failure to timeously lodge petition to SCA – right of appeal lapsed – no existing

right of appeal – suspended judgment non-existent – condonation application to SCA – principal judgment and order executable and final pending condonation application – application premature – appeal struck from the roll

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JUDGMENT

THE COURT

INTRODUCTION

[1] On 27 May 2020 Tolmay J declared Ms. Dudu Myeni ("the appellant") to be a delinquent director in terms of section 162(5) of the Companies Act[1] based on the finding that the appellant has seriously misconducted herself during her tenure as the former non-executive chairperson of South African Airways SOC Ltd ("the principal order.")

[2] When Tolmay J made her order declaring the applicant a delinquent director, the order immediately came into operation on the date of the order (27 May 2020) and could be executed. When the applicant filed her application for leave to appeal on 18 June 2020 – which was well within the prescribed time period for the filing of an application for leave to appeal[2] – the principal order was immediately suspended pending the outcome of the application for leave to appeal. On 9 July 2020 the respondents (the Organisation Undoing Tax Abuse NPC and the South African Airways Pilots' Association) filed their counter-application in terms of section 18 of the Superior Courts Act[3] for the enforcement of the principal order pending the outcome of the decision in the application for leave to appeal.

[3] On 22 December 2020, Tolmay J dismissed the appellant's application for leave to appeal and simultaneously upheld the respondents' counter-application in terms of section 18(1) and 18(3) of the Superior Courts Act. The relevant parts of her order read as follows:

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[1] Act 71 of 2008.
[2] In terms of Rule 49(1)(b) of the Uniform Rules of Court and section 17 of the Superior Courts Act.
[3] Act 10 of 2013.

"2. The application for leave to appeal is dismissed with costs, on a party and party scale;

3. The application in terms of section 18 for *interim* enforcement of the court's order as set out in the judgement of 27 May 2020 is granted; and the order granted will be immediately enforceable pending the finalisation of all appeal processes."

[4] The appellant now brings an appeal in terms of section 18(4) of the Superior Courts Act against the order of Tolmay J dated 22 December 2020. This section provides for an automatic statutory appeal which is to be heard with extreme urgency.

SECTION 18(1) OF THE SUPERIOR COURTS ACT

[5] It is a trite principle that, in terms of the common law, the noting of an appeal suspends the operation and execution of a judgement pending the outcome of the appeal.[4] Section 18(1) of the Superior Courts Act, whilst restating the common law position,[5] 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. A court may grant an order to execute under exceptional circumstances and, in addition, where the applicant 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 (section 18(3)). 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 leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

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

[5] *Ibid ad* para 28.

(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."

[6] On 29 January 2021 the appellant's legal representative (Mr. Mabuza) wrote to the Judge President seeking the constitution of a Full Court and an urgent enrolment and hearing of the section 18(4) appeal by the Full Court. Mr. Mabuza stated in his letter that a petition had been lodged in the Supreme Court of Appeal ("SCA") and that, that "court is accordingly seized with that issue". In a letter to the Judge President, the respondents' attorneys responded stating that Ms. Myeni "had failed to file any application for leave to appeal in the Supreme Court of Appeal (SCA) within the one month period specified under section 17(2)(b) of the Superior Courts Act", that the Registrar of the SCA and the appellant's own correspondent attorneys had confirmed that no petition had in fact been lodged in the SCA and that consequently "the order granted by Tolmay J on 27 May 2020 is now in full force and effect." Mr. Mabuza responded to this letter admitting that no petition had in fact been filed in the SCA due to unspecified "logistic problems", but noted that a petition for leave to appeal together with an application for condonation would be filed in the SCA the next day.

[7] It is therefore common cause before us that the application for leave to appeal to the SCA was not filed timeously in terms of the one-month period for an application for leave to appeal to the SCA specified under section 17(2)(b) of the Superior Courts Act. It is also common cause that in terms of section 17(2)(b) of the Superior Courts Act, this period expired on 22 January 2021.

PRELIMINARY POINT

[8] The respondents raised a preliminary point, as foreshadowed in their attorney's letter referred to above, arguing that, by virtue of the fact that no application has been filed in the SCA, there is currently no pending application for leave to appeal against Tolmay J's delinquency order of 27 May 2020. The effect thereof, so argument went, is that the belated petition (coupled with an application for condonation) does not have the effect of suspending the delinquency order. This, they argued, means that the delinquency order granted by Tolmay J is now in full force and effect and that we were incompetent to hear this urgent appeal in terms of section 18(4) against the section 18(3) order which it was submitted had now been rendered moot: The argument was further that, until the appellant is granted condonation in the SCA for the late filing of the petition, the section 18(4) appeal was thus premature.

[9] It is necessary to deal with this preliminary point first. Only in the event that it is decided that the preliminary point is without substance, will we proceed to deal with the requirements set out in section 18 and determine whether Tolmay J was correct that there are exceptional circumstances justifying the granting of the execution order.

THE RESPONDENTS' SUBMISSIONS

[10] The appellant took issue with the preliminary point and, relying mainly on the decision in *Ntlemeza v Helen Suzman Foundation and Another*,[6] submitted that the fact that an application for leave to appeal had not been filed timeously did not prevent this court from hearing the present application.

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[6] *Supra* note 4.

[11] In *Ntlemeza*, the SCA was similarly seized with an automatic appeal against an execution order made by a full court of the High Court.[7] In that matter, the High Court presided over the review application to have General Ntlemeza's appointment set aside. The High Court set aside the appointment of General Ntlemeza on grounds of unfitness ("the principal order"). Subsequently, General Ntlemeza applied for leave to appeal the principal order. The respondents in turn filed a counter-application for a declarator that the operation and execution of the principal order not be suspended by virtue of any application for leave to appeal or any appeal.

[12] The full court dismissed the application for leave to appeal and upheld the counter-application and ordered that the principal order be executed in full during the appeal process ("the execution order"). The date of the execution order was 12 April 2017 the reasons of which were provided on 10 May 2017. General Ntlemeza exercised his automatic right to appeal the execution order "to the next highest court" (the SCA) as provided for in section 18(4)(ii).

[13] The question on appeal before the SCA was whether General Ntlemeza ought to be permitted to continue in his post as National Head of the Directorate for Priority Crime Investigation pending the finalisation of an application for leave to appeal filed in that court. The point was raised on behalf of General Ntlemeza that, because at the time when the application in terms of section 18(3) was made to the High Court there was no appeal pending against the principal order, the respondents' application for execution was premature. It was submitted that the jurisdictional point was dispositive of the appeal before the SCA.

[14] The SCA considered the power granted to the court in terms of section 18 taking into consideration the general inherent power granted to courts in terms of section 173 of the Constitution[8] to regulate their own process. The court held as follows:

> "[29] The preliminary point on behalf of General Ntlemeza .... does not accord with the plain meaning of s 18(1). As pointed out on behalf of HSF and FUL, and following on

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[7] Because a full bench was constituted to hear the review and the application to execute the principal order, the automatic appeal had to be brought before the SCA in terms of section 18(4).
[8] Act 108 of 1996.

what is set out in the preceding paragraph, s 18(1) does not say that the court's power to reverse the automatic suspension of a decision is dependent on that decision being subject to an application for leave to appeal or an appeal. It says that, unless the court orders otherwise, such a decision is automatically suspended."

[15] It is so that in the *Ntlemeza* matter, General Ntlemeza had not yet filed an application for leave to appeal to the Supreme Court of Appeal at the time the execution order in terms of section 18 was granted. To recap, the section 18 execution order was granted on 12 April 2017. The application for leave to appeal against the High Court's execution order was filed a day later namely on 13 April 2017. The application for leave to appeal against the principal order was filed on 21 April 2017 (which was well within the time limit prescribed by the Rules).[9] General Ntlemeza filed his application for leave to appeal the 12 April order within the period allowed in section 17(2)(b). The urgent appeal in terms of section 18(4) was heard by the SCA on 2 June 2017. In the present matter, the applicant's right to file an application for leave to appeal to the SCA has lapsed.

[16] The difference between the factual matrix in the *Ntlemeza* matter and the present matter is obvious: In the *Ntlemeza* matter, the application for leave to appeal against the principal order was filed well within the one-month time period stipulated in section 17(2)(b) of the Act. Also, at the time when the urgent appeal served before the SCA, the application for leave to appeal the principal order had, as already mentioned, been filed well within the prescribed time limits which is not the case before us.

[17] Mr. Mpofu for the appellant submitted, with reference to *Ntlemeza,* that this court should take into account that the parties in the present matter have always anticipated that there would be further appeals in the present matter. Because further appeal processes were anticipated in the present matter, the fact that the application for leave to appeal to the SCA was not filed in time should not stand in the way of this court hearing the present urgent appeal.

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[9] *Ntlemeza supra* note 4 *ad* para 33.

[18] This argument is misconceived. Section 18(1) provides that "...unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an appeal for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal." The quoted passage denotes that the existence of an application for leave to appeal or an ongoing appeal process is a prerequisite for an application in terms of section 18 to arise. Put differently, the wording of section 18(1) signifies that in the absence of an application for leave to appeal or an appeal, the judgment and order in question are not suspended and are in fact deemed final. The fact that the noting of an appeal suspends the execution of a judgment appealed against logically means that in the absence of such an appeal, the judgment is not suspended and is in fact deemed executable and thus, final. Given that section 18 exists to regulate the position when an application for leave to appeal or an appeal against a judgment is pending, it stands to reason that where no such application for leave to appeal or appeal is pending, the purpose of section 18 ceases to exist and as such, the judgment and order are deemed final and executable for all intents and purposes.

[19] As such, an important question would then be what effect would the lodging of the petition after the right to appeal has lapsed then have on the principal judgment's order. Having regard to the case law, in light of the belated petition now filed by the appellant, the principal judgment's order continues to remain operational for the mere fact that the service of an application to condone the late filing of the petition to the SCA does not suspend the operation and execution of any order.[10] To conclude otherwise would give rise to an untenable situation in law where, after an order has been operational for a number of months, a party could simply bring a condonation application which would result in such an order suddenly being suspended. Such a situation would clearly give rise to far reaching consequences that this court cannot condone.

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[10] See *Panayiotou v Shoprite Checkers (Pty) Ltd and Others* 2016 (3) SA 110 (GJ) and *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* [2004] 3 All SA 169 (SCA).

[20] In *Ntlemeza*, the SCA did take into account that, because further appeal processes were always highly likely and always in prospect,[11] the fact that an application for leave to appeal had not been filed at the SCA at the time of the hearing of the application to execute – the one before the High Court having been dismissed – did not curtail the court's power in terms of section 18, to reverse the automatic suspension of a decision. This was because the court's power in terms of section 18(1) was not dependant on that decision being subject to an application for leave to appeal.[12] In *Ntlemeza* the following was further stated in this regard –

> "[32] There can be no doubt that an application by HSF and FUL for leave to execute, had there not been one earlier, could have been brought and would have been competent after the application for leave to appeal was filed in this court. Courts must be the guardians of their own process and be quick to avoid a toing and froing of litigants. The High Court's order achieved that end. A proper case had been made out by HSF and FUL for anticipatory relief. The High Court reasonably apprehended on the evidence before it that further appeals were in the offing and issued an order that sought not just to crystallise the position but also to anticipate further appeal processes. For all the reasons aforesaid there is no merit in the preliminary point."

[21] Returning to the present matter: Whilst it is correct that in the present matter, as in *Ntlemeza*, further appeal processes have been anticipated (as is also evidenced from a reading of the execution order by Tolmay J), the difference is that, in the present matter, the application for leave to appeal (the petition) to the SCA of the principal order was filed out of time. In *Ntlemeza* the application for leave to appeal was filed shortly after the execution order was made and within the prescribed time period.

[22] What is the effect thereof? We have already referred to the submission on behalf of the respondents that the failure of the applicant to file the application for leave to appeal to the SCA within the prescribed one-month period has the effect that, by operation of law, the order by Tolmay J dated 27 May 2020 is now in full force and effect. On a proper application of the law, this submission is correct.

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[11] *Ntlemeza supra* note 4 *ad* para 31.
[12] *Ibid ad* para 29.

[23] This issue was also pertinently considered by the High Court in *Panayiotou v Shoprite Checkers (Pty) Ltd and Others*.[13] The court in that matter pointed out that, in terms of section 18(5) of the Superior Courts Act, and as a matter of fact and of law, "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". Section 18 thus contains "the conditions necessary for a judgment of the High Court to be suspended, pending a petition to the Supreme Court of Appeal for leave to appeal..."[14]

[24] For a decision to become the subject of an application for leave to appeal, the application must have been lodged in terms of the Rules (section 18(5) of the Superior Courts Act). Although section 18(4) grants an automatic right of appeal to be heard urgently, it does not dispense with the requirement to comply with the time periods prescribed by the rules for the launch of an application for leave to appeal to the SCA.

[25] Where an application for leave to appeal is filed out of time, all that is before the SCA is a condonation application. The court in *Panayiotou*, with reference to a plethora of authority,[15] explains:

> "[12] It has been argued that s 18(5) is prescriptive and that the text emphasises that the application for leave to appeal be lodged with the registrar 'in terms of the rules'. Accordingly, it is argued, until (and only if) condonation is granted can the petition be 'lodged'. All that is before the Supreme Court of Appeal at present is an application for condonation, whose fate is uncertain. In support of this proposition reference was made to several authorities.

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[13] *Supra* note 10.
[14] *Ibid ad* para 9.
[15] Reference is made, *inter alia*, to the well-known decision in *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae) supra* note 10 *ad* para 46: "The second was based on uniform rule 49(11), which provides that where an appeal has been noted or an application for leave to appeal made, the operation and execution of the order is suspended. In this case, as will appear soon in more detail, the 'Modder East Squatters' lodged their application for leave to appeal together with an application for condonation some 18 months after the order had issued. The right to apply for leave to appeal by then had lapsed. Rule 49(11) presupposes a valid application for leave to appeal to effect the suspension of an order.[15] In this case there was none."

[13] The failure to serve notices of appeal or court records within the prescribed periods is commonplace. The result of such failures is that the appeals lapse and require condonation to revive them."

CONCLUSION

[26] The application for leave to appeal in the present matter has lapsed. In order for the application for leave to appeal to be revived, condonation will have to be granted by the SCA. Until such time, there is no application as contemplated by section 18(5) of the Superior Courts Act, and the ineluctable consequence is that the section 18(4) appeal is not competent. We further hold the view that, although the length of the delay in filing the application for leave to appeal to the SCA is negligible, having read the principal judgment of the court *a quo* and the judgment in the application for leave to appeal, the prospects of the appellant succeeding with her condonation application to the SCA are rather slim.

[27] The appeal must clearly be struck off. In respect of costs, both parties were *ad idem* that this is a self-standing application and that costs should follow the result.

ORDER

[28] In the event the following order is made:

1. The application is struck from the roll.
2. The appellant is to pay the costs, such costs to include the costs of three counsel where so employed.

D MLAMBO
JUDGE PRESIDENT OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT

V TLHAPI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

AC BASSON
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 15 February 2021.

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Instructed by:	JENNINGS INC.
Date of hearing:	8 February 2021
Date of judgment:	15 February 2021