THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 929/2016

In the matter between:

UNIVERSITY OF THE FREE STATE **APPELLANT**

and

AFRIFORUM **FIRST RESPONDENT**

SOLIDARITY **SECOND RESPONDENT**

Neutral citation: *UFS v Afriforum & another* [2016] ZASCA 165 (17 November 2016)

Coram: Cachalia, Swain and Mathopo JJA and Fourie and Schippers AJJA

Heard: 3 November 2016

Delivered: 17 November 2016

Summary: Appeal in terms of s 18(4)(ii) of the Superior Courts Act 10 of 2013 (the Act) against the implementation of an order pending an appeal: the requirements for the granting of an order in terms of s 18 of the Act considered: appeal upheld due to applicant's failure to prove the existence of 'exceptional circumstances' and to discharge the onus imposed by s 18(3) to show irreparable harm: circumstances justifying a costs order against the unsuccessful applicant.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Hendricks J, Mokgohloa J and Motimele AJ concurring, sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court a quo is set aside and the following substituted therefor:

'The application to implement the order of this court under case no A70/2016 delivered on 21 July 2016, is dismissed with costs, including the costs of two counsel.'

JUDGMENT

Fourie AJA (Cachalia, Swain and Mathopo JJA and Schippers AJA concurring):

[1] This is an appeal by the University of the Free State, a university as defined in the Higher Education Act 101 of 1997 (the UFS), exercising its automatic right of appeal in terms of s 18(4)(ii) of the Superior Courts Act 10 of 2013 (the Act), against the order of the Full Court of the Free State Division of the High Court, Bloemfontein (the Full Court), directing that its judgment and order delivered on 21 July 2016 not be suspended pending the determination of an appeal by the UFS to the Constitutional Court, alternatively to this court.

[2] The first respondent is Afriforum, a registered non-profit company, which describes itself as 'an active non-governmental organisation involved in the protection and development of civil rights within the context of the Constitution'. Solidarity, a registered trade union under the Labour Relations Act 66 of 1995, is cited as the second respondent, but took no part in the proceedings in the Full Court nor is it a party to this appeal. No further reference will be made to it.

[3] The events giving rise to this appeal are the following: On 11 March 2016, the Council of the UFS (with the concurrence of the Senate) decided to adopt a new multilingual language policy with effect from the commencement of the 2017 academic year. This new policy provides for English becoming the primary medium of instruction at the UFS (with tutorials in Afrikaans and Sesotho), excluding the faculties of theology and teacher education where Afrikaans will remain the medium of instruction. The new policy replaced the 2003 language policy which provided for parallel medium instruction in Afrikaans and English. Aggrieved by this decision of the Council of the UFS, Afriforum launched an application to review and set it aside. The UFS opposed the application and, in the event, the Full Court was convened to hear the matter.

[4] On 21 July 2016 the Full Court delivered its judgment reviewing and setting aside the decision of the Council to 'adopt and approve' the new language policy for the UFS. The UFS then sought direct leave to appeal to the Constitutional Court, alternatively leave to appeal to this court, against the order of the Full Court. The Constitutional Court subsequently declined direct access to it, but as the Full Court had granted the UFS conditional leave to appeal to this court, the appeal of the UFS against the order of 21 July 2016 shall be heard by this court in due course. The appeal process initiated by the UFS, in turn, prompted Afriforum to approach the Full Court in terms of s 18 of the Act, for an order implementing the Full Court's order of 21 July 2016, pending the finalisation of the appeal. The UFS opposed the application, but on 12 September 2016 the Full Court ordered that its order of 21 July 2016 would remain in force pending the finalisation of the appeal against it.

[5] Prior to analysing the provisions of s 18 of the Act, it is apposite to have regard to the common law principles regarding the suspension of orders of court pending appeal. The well-established common law rule of practice in our courts has been that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment. See *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 544H-545A. In *South Cape*

Corporation at 545B-C, Corbett JA reiterated that the purpose of the rule was to prevent irreparable damage being done to the intending appellant by the execution of the judgment pending the appeal. However, as further explained by Corbett JA at 545D-G, the court to which application was made for leave to execute the judgment pending appeal, had a wide general discretion to grant or refuse such leave and would, inter alia, have regard to the following factors:

'(1.) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal if leave to execute were to be granted.

(2.) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal . . . if leave to execute were to be refused.

(3.) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose. . . .

(4.) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.'

[6] This common law rule of practice was adopted in Uniform rule of Court 49(11), promulgated under the Supreme Court Act 59 of 1959. In relevant part the rule read as follows:

'Where an appeal has been noted or an application for leave to appeal against . . . an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal . . . , unless the court which gave such order, on the application of a party, otherwise directs.'

The Supreme Court Act 59 of 1959 has been repealed and replaced by the Act which came into operation on 23 August 2013. Subsequent thereto on 22 May 2015, rule 49(11) was also repealed.

[7] Section 18 of the Act has replaced rule 49(11) and the relevant part thereof for purposes of this appeal reads as follows:

'**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.

. . .

(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.'

[8] This is the first appeal under s 18(4)(ii) of the Act that has reached this court. Section 18 of the Act has, however, been considered by divisions of the high court. In this regard reference can be made to *Incubeta Holdings (Pty) Ltd & another v Ellis & another* 2014 (3) SA 189 (GJ); *Liviero Wilge Joint Venture & another v Eskom Holdings Soc Ltd* [2014] ZAGPJHC 150 and *The Minister of Social Development Western Cape & others v Justice Alliance of South Africa & another* [2016] ZAWCHC 34. Although these judgments differ in certain respects as to the application of the requirements of s 18 of the Act, they are closely reasoned and of much assistance in the interpretation of this novel provision.

[9] In embarking upon an analysis of the requirements of s 18, it is firstly necessary to consider whether, and, if so, to what extent, the legislature has interfered with the common law principles articulated in *South Cape Corporation*, and the now-repealed Uniform rule 49(11). What is immediately discernible upon perusing ss 18(1) and (3), is that the legislature has proceeded from the well-established premise of the common law that the granting of relief of this nature constitutes an extraordinary deviation from the norm that, pending an appeal, a judgment and its attendant orders are suspended. Section 18(1) thus states that an order implementing a judgment pending appeal shall only be granted 'under

exceptional circumstances'. The exceptionality of an order to this effect is underscored by s 18(4), which provides that a court granting the order must immediately record its reasons; that the aggrieved party has an automatic right of appeal; that the appeal must be dealt with as a matter of extreme urgency and that pending the outcome of the appeal the order is automatically suspended.

[10] It is further apparent that the requirements introduced by ss 18(1) and (3) are more onerous than those of the common law. Apart from the requirement of 'exceptional circumstances' in s 18(1), s 18(3) requires the applicant 'in addition' to prove on a balance of probabilities that he or she 'will' suffer irreparable harm if the order is not made, and that the other party 'will not' suffer irreparable harm if the order is made. The application of rule 49(11) required a weighing-up of the potentiality of irreparable harm or prejudice being sustained by the respective parties and where there was a potentiality of harm or prejudice to both of the parties, a weighing-up of the balance of hardship or convenience, as the case may be, was required. Section 18(3), however, has introduced a higher threshold, namely proof on a balance of probabilities that the applicant will suffer irreparable harm if the order is not granted and conversely that the respondent will not, if the order is granted.

[11] In *Incubeta Holdings* at para 24 Sutherland J aptly commented as follows on s 18(3):

'A hierarchy of entitlement has been created, absent from the *South Cape* [*Corporation*] test. Two distinct findings of fact must now be made, rather than a weighing-up to discern a "preponderance of equities".'

D E Van Loggerenberg and E Bertelsmann *Erasmus: Superior Court Practice* 2 ed vol 1 Service issue 2, correctly concludes that s 18(3) 'is a novel provision and places a heavy onus on the applicant'. On a proper construction of s 18, it is clear that it does not merely purport to codify the common law practice, but rather to introduce more onerous requirements. As submitted on behalf of the UFS, had the legislature intended the section to merely codify the common law, it would have followed the authoritative formulation by Corbett JA in *South Cape Corporation*.

[12] The concept of 'exceptional circumstances' introduced by s 18(1), was considered by Mpati P in *Avnit v First Rand Bank Limited* [2014] ZASCA 132, in the

context of s 17(2)*(f)* of the Act which provides that in 'exceptional circumstances' the President of this court may refer a decision on an application for leave to appeal to the court for reconsideration. Mpati P held that upon a proper construction of s 17(2)*(f)*, the President will need to be satisfied that the circumstances are 'truly exceptional' before referring a matter for reconsideration.

[13] Whether or not 'exceptional circumstances' for the purposes of s 18(1) are present, must necessarily depend on the peculiar facts of each case. In *Incubeta Holdings* at para 22 Sutherland J put it as follows:

'Necessarily, in my view, exceptionality must be fact-specific. The circumstances which are or may be "exceptional" must be derived from the actual predicaments in which the given litigants find themselves.'

I agree. Furthermore, I think, in evaluating the circumstances relied upon by an applicant, a court should bear in mind that what is sought is an extraordinary deviation from the norm, which, in turn, requires the existence of truly exceptional circumstances to justify the deviation.

[14] A question that arises in the context of an application under s 18, is whether the prospects of success in the pending appeal should play a role in this analysis. In *Incubeta Holdings* Sutherland J was of the view that the prospects of success in the appeal played no role at all. In *Liviero Wilge Joint Venture* Satchwell J, Moshidi J concurring, was of the same view. However, in *Justice Alliance* Binns-Ward J (Fortuin and Boqwana JJ concurring), was of a different view, namely that the prospects of success in the appeal remain a relevant factor and therefore '. . . the less sanguine a court seized of an application in terms of s 18(3) is about the prospects of the judgment at first instance being upheld on appeal, the less inclined it will be to grant the exceptional remedy of execution of that judgment pending the appeal. The same quite obviously applies in respect of a court dealing with an appeal against an order granted in terms of s 18(3)'.

[15] I am in agreement with the approach of Binns-Ward J. In fact, *Justice Alliance* serves as a prime example why the prospects of success in the appeal are relevant in deciding whether or not to grant the exceptional relief. Binns-Ward J concluded that the prospects of success on appeal were so poor that they ought to have

precluded a finding of a sufficient degree of exceptionality to justify an order in terms of s 18 of the Act. This conclusion was subsequently proven to be justified when this court upheld the main appeal in *Justice Alliance*. However, in the present appeal, the appeal record in the review application was not before us. The prospects of success shall therefore not feature in our consideration of whether or not the order of the Full Court should be upheld.

[16] Turning to the facts and circumstances of the present matter, it has to be borne in mind that the deponent to the founding affidavit is an Afriforum official who claims to speak only for prospective Afrikaans first-year students who intend enrolling for the 2017 academic year. It is common cause that current students at the UFS are unaffected by the new language policy as they shall complete their studies in their language of choice under the 2003 policy. Furthermore, as appears from the answering affidavit of the UFS, the new language policy will only be implemented in three pilot faculties in 2017, namely, the faculties of medicine, law and humanities. Based on the 2016 enrollment figures, only 386 students in the three pilot faculties may potentially be affected by the implementation of the new policy in 2017. They represent a mere 1 to 2 per cent of the total student population of the UFS. Further, as pointed out by the UFS, these are faculties and prospective students who are quite clearly capable of successfully implementing the policy without affecting the students' academic success, as the study materials in these courses are overwhelmingly in English and the first-year students who make the grade for enrollment are those who are sufficiently proficient in English to master the subject-matter in that language. In addition, Afrikaans students shall, in terms of the new language policy, be assisted by tutorials in Afrikaans to help them master the study material.

[17] In attempting to meet the requirement of exceptionality in its founding papers, Afriforum based its argument upon the premise that, as a result of the judgment of the Full Court, all prospective first-year students were entitled to accept that the 2003 parallel medium language policy would remain in force and that they would be entitled to apply for admission, enroll and continue with their first-year studies at the UFS in 2017 on the basis that they have a choice to do so either in English or Afrikaans. But, said Afriforum, the decision of the UFS to apply for leave to appeal

the judgment of the Full Court and the resultant suspension of the judgment, had 'resulted in a quandary amongst prospective students who, with less than two months left to apply for admission are left in a state of total uncertainty whilst lofty legal principles are being litigated through the courts'. However, as recorded above, very few prospective 2017 first-year students will be affected by the new policy; the policy will apply only to 386 students in the three pilot faculties. Therefore, Afriforum's initial claim that it spoke on behalf of 'hundreds if not thousands' of matriculants wishing to study in Afrikaans, was clearly wrong. In fact, of the 386 students, Afriforum produced no evidence that any of them found themselves in a 'quandary' as a result of the suspension of the judgment. There is also no suggestion by Afriforum that any prospective student in any of the three affected faculties stands to be prejudiced by the introduction of the new language policy in 2017.

[18] In any event, and even if there was some 'quandary' or 'uncertainty' amongst these students regarding the status of the judgment of the Full Court due to the suspension thereof pending appeal, I fail to see how this could amount to an 'exceptional circumstance' as envisaged in s 18(1) of the Act. In fact, there is no uncertainty about the legal position – pending the appeal the judgment and order of the Full Court is suspended. Section 18 of the Act precisely brings about certainty pending appeal – the status quo ante is restored and the new language policy is to be implemented. In this regard, it should be noted that Afriforum has not challenged the constitutionality of the new language policy. It has sought to review the decision to adopt the policy and that is now the subject of an appeal. Therefore, pending the finalisation of the appeal, the UFS would be legally entitled to implement the new policy.

[19] Not only did Afriforum in its founding affidavit grossly exaggerate the number of prospective students whose interests it proclaimed to safeguard, but it also failed to show that any prospective first-year student in fact stands to be adversely affected by the introduction of the new language policy in 2017. In its founding papers Afriforum presented the circumstances of two matriculants in an attempt to justify the existence of the 'quandary' amongst prospective 2017 first-year students. However, the two matriculants who deposed to supporting affidavits will not study in any of the three pilot faculties. Matriculant A intends enrolling in the faculty of education and the

faculty of economic management sciences, while matriculant B will be studying exclusively in the faculty of economic management sciences. These faculties are unaffected by the introduction of the new language policy, and neither say that they would be prejudiced if obliged to study in English.

[20] When the deficiencies in Afriforum's case were raised by the UFS in its answering affidavit, Afriforum, in its replying affidavit, changed its stance regarding the requirement of 'exceptional circumstances'. In essence Afriforum now pinned its colours solely to the mast of exceptionality on the ground that, pending the appeal process, the constitutional right of the students in terms of s 29(2) of the Constitution, to receive education in the language of their choice where reasonably practicable, would be taken away and could never be restored.

[21] I fail to see how, even if there had been an infringement of rights as contended for, this would constitute exceptional circumstances as envisaged in s 18(1) of the Act. The mere reliance on the foregoing of the right by the students to exercise a choice does not in itself (ie without proof of any adverse consequences) constitute exceptional circumstances. As submitted on behalf of the UFS, the submission on behalf of Afriforum is conceptually confused because it conflates the deprivation of a right with the adverse consequences flowing therefrom in circumstances where there is no proof at all of such adverse consequences. As recorded earlier, there is simply no evidence of a single individual student intending to exercise this right in the affected faculties or of any adverse consequences which may befall any student until final judgment on appeal. It accordingly follows, in my view, that Afriforum failed to show the existence of exceptional circumstances justifying relief implementing the order of the Full Court of 21 July 2016 pending the determination of the appeal.

[22] This brings me to the additional requirements for an order of this nature as set out in s 18(3). Firstly, Afriforum was required to prove on a balance of probabilities that the students whose interests it represented would suffer irreparable harm if an order in terms of s 18 was not made. As recorded earlier, Afriforum did not suggest that any actual harm would befall this small number of potential 2017 first-year Afrikaans students. In fact, Afriforum based its argument on the same premise as

before, namely that the foregoing of an opportunity or right to be taught in a language of choice per se constitutes irreparable harm. This line of reasoning is, as I have said, conceptually flawed. Infringement of the right per se does not constitute proof of irreparable harm. As recorded earlier, Afriforum had in any event not identified a single student intending to exercise this right in the affected faculties. Nor has any evidence been produced of the harm which may befall any student until final judgment on appeal. There is no suggestion that any prospective student may be prejudiced by any delayed entry into the labour market; in fact, there is no suggestion that any student affected by the pilot implementation of the new language policy in 2017 would suffer any adverse consequence were he or she to study for one year in English and thereafter being permitted to revert to Afrikaans, should the appeal fail. Therefore, as submitted on behalf of the UFS, Afriforum's case in this regard not only failed at the legal level, but on a factual level too.

[23] What remains is the second requirement of s 18(3), namely, proof by Afriforum on a balance of probabilities that the implementation of the order pending appeal would not cause irreparable harm to the UFS. Afriforum submitted that, whereas the new language policy will only be introduced in three faculties, it would not cause the UFS any harm to postpone the limited implementation until it is ready to effect comprehensive implementation in the event that the appeal is upheld. To this Afriforum added that there was in any event insufficient evidence of any financial loss to be suffered by the UFS if the Full Court judgment was not suspended pending the exhaustion of appeals.

[24] The UFS, on the other hand, emphasised that there has been substantial planning and preparation to implement the new language policy in 2017. Furthermore, the UFS has expended extensive human and financial resources in the process. Were the UFS now to be precluded from continuing with the implementation and the introduction of the new policy in the three faculties in 2017, it would have wasted substantial public resources. Afriforum does not dispute this.

[25] Counsel for Afriforum submitted, albeit faintly, that the averments of the UFS were insufficient to raise a bona fide dispute as to whether or not the UFS would suffer irreparable harm in the event of the order of the Full Court not being

suspended. This submission is without merit. There is simply no basis upon which these averments of the UFS can be disputed. On the contrary, they are averments of substance which clearly underscore the conclusion that the UFS would suffer irreparable harm in the event of the order of the Full Court not being suspended pending appeal.

[26] In view of the above, Afriforum's application was misconceived and ought to have been dismissed. In the result the appeal should succeed.

[27] It is necessary to comment on the reasons furnished by the Full Court for its order implementing its judgment of 21 July 2016. As recorded above, s 18(4)(i) of the Act required the Full Court to immediately record its reasons for doing so. Whilst appreciating that the Full Court may not have had sufficient time to carefully consider and craft its reasons, this did not justify the furnishing of reasons that are materially lacking in substance. There has in fact been no proper attempt at furnishing reasons – all that the reasons (which constitute less than half a page) amount to is an assortment of some conclusions. The reader of these 'reasons', including this court, is none the wiser as to why the Full Court made the order which it did.

[28] It is trite that the furnishing of reasons for a judgment is an indispensable part of the judicial procedure. Failure to furnish proper reasons amounts to a grave lapse of duty and a serious impediment to the appeal process.[1] Not only did the Full Court shirk this duty, but it also failed to consider any of the judgments of the various divisions of the high court dealing with applications under s 18 of the Act (see para 8 above), which had all been delivered prior to the Full Court handing down its order and reasons on 12 September 2016.

[29] Finally, there is the issue of costs. Afriforum, relying on the decision in *Biowatch Trust v Registrar, Genetic Resources & others* [2009] ZACC 14; 2009 (6) SA 232 (CC), submitted that even if the appeal were to be successful, it should not be mulcted in costs. What was confirmed in *Biowatch* is that, as a general rule, in

[1] See *Botes & another v Nedbank & another* 1983 (3) SA 27 (A) at 27H-28A; *Strategic Liquor Services v Mvumbi NO* 2010 (2) SA 92 (CC) at 96G-97A and *Commissioner, South African Revenue Service v Sprigg Investment 117 CC t/a Global Investments* 2011 (4) SA 551 (SCA) at 561A-E.

constitutional litigation an unsuccessful litigant in proceedings against the State should not be ordered to pay costs. However, as pointed out by Rogers J in *Democratic Alliance v President of South Africa & others*; 2014 (4) SA 402 (WCC) para 107, this general rule is not concerned with the characterisation of parties, but the nature of the issues. As held by Rogers J, with reference to paras 16-25 of *Biowatch*, '[T]he critical question is whether the litigation has been undertaken to assert constitutional rights, whether the constitutional issues are genuine and substantive and whether there has been impropriety in the manner in which the litigation has been undertaken'.

[30] In my view Afriforum's reliance on *Biowatch* is misplaced. The issue in the present matter was whether the judgment of the Full Court should be implemented pending the determination of the appeal process. This is a purely factual question, ie whether or not the three requirements for relief in s 18 of the Act were met. That did not concern the assertion of any constitutional rights. It follows that an award of costs against Afriforum as the unsuccessful party will not have any chilling effect on other litigants who might wish to vindicate their constitutional rights, or the rights of others on whose behalf they may litigate.

[31] Further, for the reasons recorded above, Afriforum has acted without circumspection in seeking relief under s 18 of the Act. It purported to act on behalf of prospective first-year students, without any evidence showing that any student in the three affected faculties would suffer any adverse consequences if the judgment of the Full Court were to be suspended pending appeal. There was simply no factual basis for believing that it was entitled to relief under s 18 of the Act.

[32] In these circumstances there is no reason why costs should not follow the event. The parties are ad idem that the matter justified the employment of two counsel.

[33] In the result the following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court a quo is set aside and the following substituted therefor:

‘The application to implement the order of this court under case no A70/2016 delivered on 21 July 2016, is dismissed with costs, including the costs of two counsel.’

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P B Fourie

Acting Judge of Appeal

APPEARANCES:

Counsel for Appellant:	J J Gauntlett SC (with him F B Pelser) Instructed by: Phatshoane Henney Inc., Bloemfontein
Counsel for 1st and 2nd Respondents:	J I du Toit SC (with him M J Engelbrecht and M J Merabe) Instructed by: Hurter Spies Inc., Centurion Schoeman Maree Inc., Bloemfontein