

DELETE WHICHEVER IS NOT APPLICABLE

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

6/03/2023

DATE

*[Signature]*

SIGNATURE



**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**Not Reportable**

**Case No: J 281/23**

In the matter between:

**MINISTER FOR THE OF PUBLIC  
SERVICE AND ADMINISTRATION**

First Applicant

**DEPARTMENT OF PUBLIC SERVICE  
AND ADMINISTRATION**

Second Applicant

and

**NATIONAL EDUCATION, HEALTH AND  
ALLIED WORKERS UNION**

First Respondent

**MINISTER OF FINANCE**

Second Respondent

**DEPARTMENT OF NATIONAL TREASURY**

Third Respondent

**PUBLIC SERVICE COORDINATING BARGAINING  
COUNCIL (PSCBC)**

Fourth Respondent

**Heard: 06 March 2023**

**Delivered: 06 March 2023**

**(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and**

released to SAFLI. The date on which the judgment is delivered is deemed to be 06 March 2023.)

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## JUDGMENT

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**VAN NIEKERK, J**

- [1] The applicants seek an order in terms of section 18 of the Superior Courts Act, granting them leave to execute the order granted by my colleague Tlhothlalemaje J on Saturday 4 March 2023. In terms of the order, a strike notice issued by the first respondent (the union) was set aside and a strike scheduled to commence on the morning of 6 March 2023 interdicted.
- [2] The union served an application for leave to appeal at 15h30 on Sunday 5 March 2023. When the present proceedings commenced at 9h00 on Monday, 6 March 2023, the application for leave to appeal had not yet been filed with the registrar. In the answering affidavit, the union takes the point that the present application is premature, since at the time it was filed, no application for leave to appeal had yet been lodged with the registrar. This averment stands in stark contrast to a document issued by the union after it had filed the application for leave to appeal, stating that the order setting aside the strike notice and interdicting the strike will automatically be suspended pending the outcome of the application for leave to appeal. The notice goes on to state '*We therefore confirm the strike continues as planned on the 06 March 2023.*' When Mr Scholtz, who appeared for the union, was pressed on the contradiction between the notice and the preliminary point to the effect that no application for leave to appeal had been filed, the point was abandoned and a copy of the application for leave to appeal, bearing a court stamp dated 6 March 2023, was handed up. At the time of hearing, no reasons for the order granted on 4 March 2023 had been given; Tlhothlalemaje J had undertaken to file reasons during the course of 6 March 2023.
- [3] Section 18 regulates the suspension of decisions pending appeal. In general terms, the operation and execution of a decision (other than a decision not having the effect of a final judgment) is suspended pending the outcome of an

application for leave to appeal or of an appeal (see s 18(1)). The court may order otherwise in exceptional circumstances (see s 18(3)), if it is established on a balance of probabilities that the applicant 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. (See *Incubeta Holdings (Pty) Ltd & another v Ellis & another* 2014 (3) SA 189 (GJ).) If the court orders that the operation or execution of an order is not suspended, the court must record its reasons for doing so.

- [4] Section 18(3) places a substantial onus on the applicant (see DE van Loggerenberg and E Bertelsmann *Erasmus: Superior Court Practice* (2 ed vol 1 issue 2). In *Swart & another v Cash Crusaders Southern Africa (Pty) Ltd* 2018 (6) 287 (GP), the Full Bench said the following, at paragraph 4 of the judgment:

Sections 18 (1) and (3) of the Superior Courts Act, provide for a twofold enquiry, in that the following requirements must be met before an order appealed against can be put into operation pending the outcome of the appeal:

1. Exceptional circumstances must exist;
2. Proof, on a balance of probabilities must exist, that:
  - 2.1 The particular applicant will suffer irreparable harm if the order is not put into operation;
  - 2.2 The other party will not suffer irreparable harm if the order is put into operation.

(See: *Actom (Pty) Ltd v Coetzee and Another* ZAGPPHC 548 (31 July 2015), a judgment by the Full Court, agreeing with the judgment of Sutherland J in *Incubeta Holdings (Pty) Ltd (supra)*).

- [5] Both judgments make it clear that section 18 of the Act has introduced a new dimension to these types of proceedings by requiring first that the discretion may be exercised only if the conditions precedent of 'exceptional circumstances', and actual irreparable harm to one party, and no harm to the other, are proven. It is thus incumbent on an applicant seeking leave to execute pending the determination of an application for leave to appeal, to establish that

exceptional circumstances exist, and to prove on a balance of probabilities that it will suffer irreparable harm if leave to execute is not granted, and that the other party will not suffer irreparable harm if the court so orders. Once these jurisdictional facts are established, the court may exercise its wide discretion to grant leave to execute, or not to grant leave.

- [6] In the present instance, the applicant avers that there are exceptional circumstances present, that there is a likelihood of irreparable harm to government and that the union and its members are not likely to suffer irreparable harm. The applicant avers further that the strike will affect all public services, including education, health, police, home affairs, social development, and correctional services. Further, the applicant submits that the appeal has no prospects of success given that the collective agreement that the union seeks to compel the applicant to conclude would be contrary to regulate the measures in the form of Public Service Regulations, and that the strike would serve no sensible or lawful purpose given that the current financial year expires on 31 March 2023 and that the union seeks to cripple the public sector and the provision of public services to force the applicant to afford them increases in the current financial year in circumstances where no allocation of public funds has been made and where negotiations for the next financial year have already commenced. In relation to the harm that will be suffered by those employees who choose not to strike, the applicant expresses its concern that access to buildings will be impeded. Indeed, in the replying affidavit, the applicant records that the union commenced a strike on the night of 5 March 2023, barricading entrances to the department's premises, preventing security officers from entering the premises, and also reports of burning tires, barricades and faeces at the entrance to the Department of Education in Kimberley and the Leratong Hospital in the West Rand.

- [7] 'Exceptional circumstances' may often be difficult to articulate, and their existence or otherwise is primarily a factual enquiry. As the court observed in *Rand Water Soc Ltd v SAMWU obo members and Others* (2021) 42 ILJ 1753 (LC), in a matter where the court has already considered the basis of a strike and declared the strike to be unprotected, if interim enforcement is not granted the respondents will be allowed to engage in unprotected strike, the applicant

would have no remedy. Put another way, the court considered that where the respondent's intent to engage in a strike in direct defiance of an order interdicting the strike, this patently raises exceptional circumstances that warrant interim enforcement. At paragraph 13 of the judgment, the court said the following:

[13] It is further apparent that failure to grant the interim enforcement would undermine the credibility understanding of the court order and would send a message that approaching this court for interdicting unprotected strikes is of no consequence given that the application for leave to appeal can be used as a tool to allow workers and trade unions to participate in unprotected strike action all the while avoiding the consequences of contempt proceedings or possibly dismissal, given that at the time of the strike the order declaring the strike unprotected, was suspended.

[8] In the present instance, the union statement issued after service of the application for leave to appeal indicates in no uncertain terms that this is precisely the union's intention.

[9] In relation to irreparable harm, the case made by the applicant that it will suffer irreparable harm should the order not be granted, as will members of the public who seek to access a variety of public services, is not seriously disputed. On the other hand, the only harm that the union contends it will suffer relates to the costs of the strike. The union does not elaborate on this issue, nor is there any attempt to quantify this 'substantive expenditure'. It is difficult to imagine, where the union's pleaded loss is an unquantified sum of money occasioned by what may amount to a postponement of any strike, how it can be said that the union will suffer irreparable harm if the court grants the order sought.

[10] In summary, I am satisfied that the jurisdictional requirements established by section 18 have been established, and that the applicant is entitled to the order that it seeks.

[11] In relation to costs, the court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness. In a dispute between collective bargaining partners, however fraught

their relationship might be, this court is ordinarily reluctant to make an order for costs on account of the potential prejudice to that relationship. In the present case falls within that category and the requirements of the law and fairness are best served by each party bearing its own costs.

I make the following order:

1. The applicant is granted leave to execute the order issued by Tlhotlhemaje J on 4 March 2023.



André van Niekerk  
Judge of the Labour Court of South Africa

Appearances:

For the applicant: Adv T Bruinders SC

Instructed by: CN Phukubje Inc. Attorneys

For the respondent: WP Scholtz, Scholtz Attorneys