



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 21542/2020

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE 23 OCTOBER 2020

SIGNATURE

In the matter between:

REYNO DAWID DE BEER

First Applicant

LIBERTY FIGHTERS NETWORK

Second Applicant

HOLA BON RENAISSANCE FOUNDATION

Amicus Curiae

and

THE MINISTER OF COOPERATIVE

GOVERNANCE AND TRADITIONAL AFFAIRS

Respondent

J U D G M E N T (Leave to cross-appeal and Sec 18(3) application)

This matter has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020 and 11 May 2020. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

- 1.1 The Covid-19 disease caused by the novel Coronavirus has the world in its grip. The responses by governments have been as varied as there are nations on the planet. Many leaders even invoked battle terminology in their responses to the threat the virus poses. But, as many commentators have argued, the war should always have been and should still be against the virus and never against “the people”.

- 1.2 The perception that the latter was the case summed up the sentiments held by the applicants when this matter initially came before me in the urgent court on the same day that the change to Level 3 of the “lockdown regulations” were published by the respondent, being the Minister of Cooperative Governance and Traditional Affairs (the Minister) in terms of section 27(2) of the Disaster Management Act No 57 of 2002 (the DMA). These sentiments, in one form or another, are shared by numerous other parties and led to extensive and varied litigation, both in this court and others across the country. The Safflii database registers more than 90 instances where the virus features in judgments of this Division (Pretoria and Johannesburg) alone. These include decisions of full courts such as those led by the Judge President of this Division in One South Africa Movement and Another v President of the Republic of South Africa and others 2020(5) SA 576 (GP) and Fair-Trade Independent Tobacco Association v President of The Republic of South Africa and Another (21688/2020) [2020] ZAGPPHC 246 (26 June 2020).

- 1.3 Currently, there is an appeal pending against the judgment and orders which I gave in the urgent court, partly with this court’s leave and partly by leave of the Supreme Court of Appeal. I am now required to deal with

two further applications, namely an application for leave to cross-appeal as well as an application for the immediate implementation of the initial orders, despite the fact that the pending appeal processes have suspended those orders.

- 1.4 In the meantime, the factual landscape has changed (and is changing almost daily). The country currently operates under Level 1 of the lockdown regulations and even these regulations are being amended or “tweaked” from time to time. During the hearing of the current applications I remarked that the attempt at pinning down a factual position against which the application must be judged can be likened to attempting to hit a moving target.

[2] The nature of the current litigation

As aforementioned, there are two applications that now need this court’s adjudication:

- 2.1 The first is an application in terms of Section 18(3) of the Superior Courts Act 10 of 2013. In terms of section 18(1) of that Act, the order of a court is automatically suspended during the period wherein there are appeal processes pending against it. These processes include applications for leave to appeal and actual appeals. As also referred to above, that is the current situation pertaining to the orders granted on 2 June 2020. Section 18(1) further provides that such a suspension operates “*unless a court under exceptional circumstances orders otherwise*”. Section 18(3) of that Act allows a party to apply to court “*to order otherwise*” i.e. to order the immediate implementation of the orders which had become suspended due to the pending appeal processes. This sub-section requires a party applying for such implementation to prove, on a balance of probabilities, that it 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*”.

- 2.2 The second application, which is way out of time and therefore is accompanied by an application for condonation, is an application for leave to cross-appeal one of the orders granted in respect of the initial urgent application. The order against which leave to appeal is sought, is the finding that the declaration by the Minister of a National State of Disaster, was rational. This declaration is, of course, the source of the Minister’s powers to promulgate “lockdown regulations” because, once a National State of Disaster has been declared, the Minister may, subject to certain limitations, make regulations to augment existing legislation to deal with the disaster caused by the pandemic.

[3] Consideration of the section 18(3) application:

- 3.1 At the time the main application was launched, Level 4 of the lockdown regulations was still in place and the applicants’ application was based on an attack on those regulations. On the day of the hearing, the country moved into level 3 of the regulations, promulgated by the Minister on that day. All the parties urged me to consider the application in view of these latter regulations, which I did.
- 3.2 On 2 June 2020 this court delivered a judgment in which it was found that the promulgation of regulations by the Minister in terms of the DMA constitute the exercise of executive power. Such power is subject to the scrutiny of a court by applying the legality test. This involves considering whether the exercise of executive power was “rational”. This “rationality test” has recently been explained by the Supreme Court of Appeal in Airports Company SA v Imperial Group (Pty) Ltd 2020 (4) SA 17 (SCA)

as [30] follows: *“The principle of legality dictates that there must be a rational connection between the decision and the purpose for which the decision was taken. For a decision to be rational, there must be rationally objective basis justifying the impugned conduct. In the ordinary meaning of the term, a decision is “rationally” connected to the purpose for which it was taken if it is connected to that purpose by reason, as opposed to being arbitrary or capricious.”*

- 3.3 This court found that the regulations in force at that time were firstly so irrational or arbitrary that in many instances they did not even make sense. They were secondly found to be so irrational that they could not reasonably be linked to the Minister’s stated objectives for the exercise of her executive authority and thirdly, it was found that no evaluative exercise had been undertaken regarding the proportionality of infringements of Constitutional rights (this latter aspect also constitutes a lack of “process rationality” in addition to “substantive” rationality).
- 3.4 As a result, this court declared that the regulations were unconstitutional and to be set aside. The declaration of constitutional invalidity was suspended in order to afford the Minister an opportunity to remedy the situation. The Minister, as was her right, applied for leave to appeal this declaration.
- 3.5 On 30 June 2020 this court granted the Minister leave to appeal to the Supreme Court of Appeal against the “blanket” declaration of constitutional invalidity and refused leave to appeal against those specified individual regulations mentioned in the judgment of 2 June 2020.

- 3.6 On 11 September 2020, the Supreme Court of Appeal granted special leave to the Minister to appeal against the finding of unconstitutionality of the abovementioned specified individual regulations.
- 3.7 In the meantime, the applicants have launched an application in terms of section 18(3) of the Superior Courts Act. The thrust of the application in terms of section 18(3) is that this court should implement the declarations made on 2 June 2020, despite the fact that the correctness of that judgment is subject to the aforementioned pending appeal in the Supreme Court of Appeal. Should this court accede to this application, it would mean that the Level 3 regulations are immediately set aside. But in the meantime, the country has moved from Level 3 to Level 2 and again from Level 2 to Level 1 of the various regulations promulgated by the Minister from time to time.
- 3.8 The structure of the various levels of the regulations is that one builds on the other and that certain underlying regulations (containing prohibitions) are carried over from one level to the next. A blanket removal of the regulations as they were at Level 3 would, admittedly, impact on most and, possibly all of the consequential regulations at Level 1. But the fundamental difficulty is this: the primary three grounds for this court's judgement of 2 June 2020 were based on the formulation of the Level 3 regulations. The regulations in force at the time that the application in terms of section 18(3) was heard and the regulations which followed shortly thereafter but which were already envisaged at the time, being the current regulations, suffer from far fewer defects than their predecessors. In fact, it might be argued by the Minister, that the current regulations either suffer from none of these defects or that the remaining infringements of Constitutional rights are justified in view of the remaining and/or ongoing

threats that the pandemic still poses (or might pose afresh by way of the so-called possible “second wave”).

- 3.9 In addition hereto, it has been found by our courts that section 18(3) has brought with it a more stringent and onerous measure for the implementation of orders pending appeal than what was previously the position. The “exceptional circumstances” referred to in paragraph 2.1 above must be proven to exist on a “fact-specific” basis. See Incubeta Holdings (Pty) Ltd v Ellis 2014 (3) SA 198 (GJ).
- 3.10 Whilst the consequences of the pandemic itself caused worldwide exceptional circumstances and while those unprecedented restrictions imposed by the regulations themselves are also exceptional, the test is whether the circumstances of the specific case is such that the default position brought about by the suspension of the orders by the pending appeal should be upset. A full court of this division has recently, in considering this question, held that a stricter rather than liberal meaning should be followed when the term “exceptional circumstances” is evaluated in the context of Section 18(3). See Road Accident Fund v Mabunda Inc and Others (15876/2020; 17518/2020 and 18239/2020) on 18 August 2020 (unreported) with reference to MV Avi Mamas 2002 (6) SA 150 (C) at 156 I – 157C. I am bound by this decision and the applicants’ application must be approached from this angle.
- 3.11 Apart from the fact that the regulations in place at the time that the immediate implementation in terms of section 18(3) is to be considered are no longer those against which the order sought to be imposed was directed at, I find that the evidential burden required by the section has not been overcome. Put differently, there is insufficient corroborated evidence that

the current measures to stem the pandemic are so disconnected to the objectives sought to be achieved (as they may have been previously) that the consequences of the initial findings of invalidity should be imposed on the current regulations before the Supreme Court of Appeal has even dealt with the issue of the correctness of the initial findings.

3.12 Accordingly, the application in terms of Section 18(3) should fail.

[4] The consideration application

4.1 In terms of Rule 49(1)(b) of the Uniform Rules an application for leave to appeal a judgment of this court must be launched within 15 days from date of such judgment. The Minister had done so in respect of the orders she sought to attack on appeal. The applicants have failed to do the same.

4.2 Accordingly, when the matter previously came before me on 24 June 2020, only the Minister's application for leave to appeal was heard and argued and judgment only in respect of that application was delivered on 30 June 2020. It is customary that, should any application for leave to cross-appeal be sought by a party, it should have been dealt with at the same time. This, as I have set out, did not occur as a result of the applicants' failure.

4.3 Eventually, the application for leave to cross-appeal was delivered on 22 July 2020 together with an application for condonation.

4.4 It is trite that condonation for non-compliance with the rules of this Court is not merely for the asking. This applies even more so in respect of appellant litigation. See inter alia Unitrans Fuel and Chemical (Pty) Ltd v Dove-Co Carries CC 2020 (5) SA 340 (GSJ) and Van Wyk v Unitas Hospital 2008 (2) SA 472 (CC).

- 4.5 A party applying for condonation must thoroughly explain the entire period of delay, the reasons for non-compliance and show good cause why condonation should be granted. The prospects of success on appeal are also relevant factors to be considered in deciding whether it would be in the interests of justice to grant condonation despite a lack of other grounds.
- 4.6 In casu, the principal reason advanced why leave to cross-appeal was not sought, was that the applicants have adopted a “wait and see” attitude regarding the outcome of other litigation ongoing at the time in various courts. Whilst the regulations, due to their nature or composition have sparked extensive litigation, this attitude does not constitute sufficient reason for the delay. A party must either decide that a judgment is incorrect or not and, if it so believes, then take steps to correct it. To wait and see what others do in respect of their own cases and based on their own facts, will not only be disruptive of the proper functioning of the administration of justice, as it has been in this instance, but would undermine the whole scheme of appeals which is designed to provide a procedure whereby a party can seek to correct a perceived incorrect judgment granted in a case in which that party was involved.
- 4.7 In order to determine whether, despite the abovementioned lack of merit in the condonation application, condonation should in any event be granted, one needs to examine the issue of prospects of success of the application for leave to appeal, for this purpose, the starting point is the finding against which leave to cross-appeal will be sought.
- 4.8 In the initial judgment, I have found that, on the papers then before me, the Minister had acted rationally in declaring a National State of Disaster pursuant to an assessment of the potential magnitude and severity of the

Covid 19 pandemic by the Head of the National Disaster Management Centre and its classification as a national disaster in South Africa.

- 4.9 In order to obtain leave to appeal a court's judgment, section 17(1)(a) of the Superior Courts Act prescribes that an applicant needs to satisfy the following requirements:

- “(i) the appeal would have a reasonable prospect of success or*
- (ii) there is some other compelling reason why the appeal should be heard ...”*

- 4.10 In the applicant's papers they averred that the declaration of a National Disaster was not “necessary” and that there were other means by which the pandemic could be combated. Applying the rationality test referred to earlier in this judgment, the availability of alternative options, even (possibly) better ones, is not the issue. The question is whether the option chosen by the executive is rationally connected to the object sought to be achieved. In the present instance, judging on the facts in existence at the time the initial application came before court, it appeared that the measures taken in declaring State of National Disaster were rationally connected to the attempts at “flattening the curve” of infections and, by slowing down the rate of infection and spread of the disease, enable the healthcare system to ready itself and the country for the then impending onslaught (to continue with combatant phraseology). The rationality test was thereby satisfied.

- 4.11 I interpose to refer to the full court judgment of this Division in One South Africa Movement v The President (supra). In that matter, not only has the Minister furnished much more extensive evidence than the abbreviated

versions which served before me in this matter, but the issue of the validity of the declaration was accepted and left intact. Although the declaration was not attacked in that case as the applicants in this matter sought to do, the acceptance of the factual matrix seems to indicate a lack of prospect of success on appeal on this point. Of course, what facts may have been accepted by parties in another case, may not be binding in this case, but the factual findings made in that case also indicate a “rational connection” between the declaration and the stated objectives. Moreover, that decision indicate an absence of a compelling reason why an appeal against this finding should be heard. I therefore find that there is no reasonable prospect that another court would come to a different conclusion, irrespective of whether condonation is granted or not.

[5] Conclusions

The conclusions are that the immediate implementation of this court’s judgment and orders of 2 June 2020 should not be ordered pending finalization of the appeals and that the belated application for leave to cross-appeal should not be granted. In respect of costs, I take the fact that the applicants are litigating in person as well as the “Biowatch-principle” regarding constitutional litigation into account in determining in the exercise of my discretion that despite the lack of success, the interests of fairness and justice dictate that the applicants not be saddled with costs.

[6] Order:

1. The application in terms of section 18(3) of the Superior Courts Act, 10 of 2013, is refused.
2. Leave to cross-appeal is refused.
3. There shall be no order as to costs.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 26 August 2020

Judgment delivered: 23 October 2020

APPEARANCES:

For the First Applicant:	In person
For the Second Applicant:	Mr De Beer, with leave of the court
For the Amicus Curiae:	Mr B P Mothopeng
For the Respondent:	Adv W Trengove SC together with Adv M S Phaswane, Adv A Hassim and Adv I S Cloete
Attorney for Respondent:	The State Attorneys, Pretoria