THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 402/2017

In the matter between:

MTHANDAZO BERNING NTLEMEZA **APPELLANT**

and

HELEN SUZMAN FOUNDATION **FIRST RESPONDENT**

FREEDOM UNDER LAW **SECOND RESPONDENT**

Neutral citation: *Ntlemeza v Helen Suzman Foundation* [2017] ZASCA 93 (9 June 2017)

Coram: Navsa, Ponnan, Majiedt, Dambuza, Mathopo JJA

Heard: 2 June 2017

Delivered: 9 June 2017

Summary: Application in terms of s 18 of the Superior Courts Act 10 of 2013 for execution order pending finalisation of an appeal process: whether refusal of an application for leave to appeal stultifies application for leave to execute notwithstanding that a further application for leave to appeal to next highest court envisaged: whether applicant for execution order proved existence of exceptional circumstances as contemplated in s 18(1): whether respondent, in terms of s 18(3), proved on balance of probabilities that it will suffer irreparable harm in the event of the execution order not being granted and that the appellant would not: provisions of s 18(4) discussed: requirement that court must 'immediately record' its reasons for granting execution order: meaning of 'next highest court' not entirely clear: whether two parallel appeal processes in the same appeal court in the same case desirable.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mabuse, Kollapen and Baqwa JJ sitting as court of first instance):

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

2 The appellant is ordered to pay the costs personally.

JUDGMENT

Navsa JA (Ponnan, Majiedt, Dambuza, Mathopo JJA concurring):

[1] This appeal is concerned with whether the appellant, Lieutenant-General Mthandazo Berning Ntlemeza (General Ntlemeza), ought to be permitted to continue in his post as National Head of the Directorate for Priority Crime Investigations (DPCI), pending the finalisation of an application for leave to appeal filed in this court. It might appear strange and perhaps even confusing that there are two parallel processes being conducted in an appeal court in one case, but that is on account of the provisions of s 18 of the Superior Courts Act 10 of 2013, which gives an aggrieved party an automatic right of appeal 'to the next highest court' against a decision of the high court ordering the execution of an earlier ruling issued by it, pending the finalization of an appeal or an application for leave to appeal. The background culminating in the present appeal appears hereafter.

[2] General Ntlemeza was appointed National Head of the DPCI on 10 September 2015 by the erstwhile Minister of Police, Mr Nkosinathi Phiwayinkosi Thamsanqa Nhleko.[1] Before his aforesaid permanent appointment, General Ntlemeza had served as acting National Head of the DPCI[2] for a period of approximately one year.

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[1] Minister Nhleko was subsequently removed from that position by the President of South Africa and appointed as Minister of Public Works. He was succeeded by the present Minister of Police, Mr Fikile Mbalula.

[2] From December 2014 to September 2015.

[3] At this early stage it is necessary to locate the DPCI in its constitutional and statutory setting. The South African Police Service Act 68 of 1995 (the Act), in terms of which the DPCI was established, has its genesis in s 205 of the Constitution, which provides that the National Police Service must be structured to function in the national, provincial and, where appropriate, local spheres of government. Section 205(2) of the Constitution provides:

'(2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.'

Section 205(3) sets out the objects of the Police Service, which are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of our country and their property and to uphold and enforce the law. The political responsibility for the South African Police Service, in terms of s 206 of the Constitution, vests in the Minister of Police. Moreover, the Minister is, in terms of that section, responsible for determining the national policing policy.

[4] The DPCI was established in terms of s 17C of the Act, which is in part the legislation contemplated by the Constitution. The material part of s 17C reads as follows:

'(1) The Directorate for Priority Crime Investigation is hereby established as a Directorate in the Service.

(1A) The Directorate comprises –

(a) the Office of the National Head of the Directorate at national level; and

(b) the Office of the Provincial Directorate in each province.

(2) The Directorate consists of –

(a) the National Head of the Directorate at national level, who shall manage and direct the Directorate and who shall be appointed by the Minister in concurrence with Cabinet;

….

For present purposes, we need not concern ourselves with the other personnel that comprise the directorate. The DPCI's functions are set out as follows in s 17D of the Act:

'(1) The functions of the Directorate are to prevent, combat and investigate –

(a) national priority offences, which in the opinion of the National Head of the Directorate need to be addressed by the Directorate . . .

(aA) selected offences not limited to offences referred to in Chapter 2 and section 34 of the Prevention and Combatting of Corrupt Activities Act 12 of 2004…'

As can be seen from all of the above, the National Head of the DPCI occupies a pivotal position within the statutory scheme.

[5] General Ntlemeza's appointment as National Head of the DPCI by Minister Nhleko was purportedly effected in terms of s 17CA(1) of the Act, read with s 17C(2)*(a)*. Section 17 CA(1) reads:

'(1) The Minister, with the concurrence of Cabinet, shall appoint a person who is –

(a) a South African citizen; and

(b) *a fit and proper person*,

with due regard to his or her experience, *conscientiousness and integrity*, to be entrusted with the responsibilities of the office concerned, as the National Head of the Directorate for a non-renewable fixed terms of not shorter than seven years and not exceeding 10 years.'

(My emphasis.)

[6] During March 2016 General Ntlemeza's appointment was challenged in the Gauteng Division of the High Court, Pretoria, by the first and second respondents, the Helen Suzman Foundation (HSF) and Freedom Under Law NPC (FUL), respectively. Both HSF and FUL are non-profit organisations concerned with promoting constitutional values and the rule of law. The application to review and set aside General Ntlemeza's appointment was brought in their own and the national interest.

[7] In its application, HSF and FUL noted that the DPCI is a premier law enforcement agency, integral to the battle against corruption and maladministration, which is why the Act requires the National Head to be a person of integrity. They contended that in appointing General Ntlemeza to that high office, Minister Nhleko acted irrationally and unlawfully and failed to fulfill his constitutional duty to protect the integrity and independence of the DPCI. The principal ground of review was that Minister Nhleko had not taken into account materially relevant considerations, more particularly, he failed to have proper regard to a judgment of the High Court, by Matojane J, in an earlier case in which General Ntlemeza's integrity was called into

question. The case was *Sibiya v Minister of Police & others* (GP) unreported case no 5203/15 (20 February 2015).

[8] *Sibiya* concerned the legality of General Ntlemeza's suspension of Major General Shadrack Sibiya, a Provincial Head of the DPCI, and the appointment, in his stead, of General Elias Dlamini, as acting Provincial Head of the DPCI. General Ntlemeza had accused General Sibiya of being involved in the illegal rendition of certain Zimbabwean citizens. In deciding the matter, Matojane J made adverse findings against General Ntlemeza. He stated that the decision to suspend General Sibiya 'was taken in bad faith and for reasons other than those given. It [was] arbitrary and not rationally connected to the purpose for which it was taken and accordingly, it [was] unlawful as it violate[d] applicant's constitutional right to an administrative action that is lawful, reasonable and procedurally fair'. Matojane J went on to make the following order:

'1. It is declared that the Notice to Suspension served on the applicant on 20 January 2015 is unlawful, unconstitutional and invalid; and

2. It is declared that the appointment of Major-General Elias Dlamini as the acting Provincial Head of DPCI Gauteng is unlawful, unconstitutional and invalid.

3. [The Office of the National Head Directorate for Priority Crime Investigations: Acting Nationals Head-Major General Berning Ntlemeza] is ordered to pay the costs of the applicant, which will include the costs of a senior and junior counsel.'

[9] Aggrieved, General Ntlemeza filed an application for leave to appeal but did not hasten to have it set down for hearing. Thereafter, General Sibiya filed an application under s 18 of the Superior Courts Act, seeking leave to execute the declaratory order referred to above. Matojane J, in his judgment dealing with the application for leave to appeal by General Ntlemeza and the application to execute by General Sibiya, had regard to correspondence sent to his registrar on behalf of General Ntlemeza, suggesting that he (Matojane J) had acted improperly in privately engaging with General Sibiya's legal representatives. Similar remarks were made in General Ntlemeza's affidavit filed in opposition to the application to execute, brought by HSF and FUL. In his assessment of the merits of the two applications, Matojane J once again made remarks calling into question General Ntlemeza's integrity. He accused General Ntlemeza of misleading the court by not informing it of a report by

the National Independent Police Directorate which exonerated General Sibiya. According to Matojane J, General Ntlemeza referred only to a prior report by the Provincial Independent Police Directorate, which incriminated General Sibiya. He went on to say: 'In my view, the conduct of [General Ntlemeza] shows that he is biased and dishonest. To further show that [General Ntlemeza was] dishonest and lack[ed] integrity and honour, he made false statements under oath'.

[10] Matojane J, in dealing with exceptional circumstances, which, as will be seen later, need to be established before an execution order can be granted, said the following:

'On the question whether exceptional circumstances exist [General Ntlemeza's] contemptuous attitude towards the rule of law and the principle of legality and transparency makes this case unique and exceptional.'

[11] Matojane J dismissed the application for leave to appeal and granted the application to execute. He ruled that the order he had issued, set out in para 8 above, 'shall operate and be executed in full until the final determination of all present and future appeals . . . The order will operate and be executed despite the delivery of any present or future applications for leave to appeal . . . and any noting of any appeal by any party'. The court stated that there was no need for General Sibiya to furnish security for the execution of the order.

[12] A full court (the high court) comprising three judges (Mabuse, Kollapen and Baqwa JJ) probably because of the national importance of the case, was constituted to hear the review application brought by HSF and FUL to have General Ntlemeza's appointment set aside. As Part A of that application, HSF and FUL sought an interim interdict preventing General Ntlemeza from exercising any power or discharging any function or duty as head of the DPCI, pending the final determination of the review application. The application for interim relief was dismissed by Tuchten J, whose judgment featured in the decision by the high court and in argument before us. It is an aspect to which I shall revert. A judgment by the high court in the review application (Mabuse J, with the other two judges concurring) was delivered on 17 March 2017.

[13] The high court held in favour of HSF and FUL. It reasoned as set out in this and the following two paragraphs. Section 17CA, referred to in para 5 above, requires an appointee as National Head of the DPCI to be a fit and proper person who is also conscientious and has integrity. The high court had regard to the decision of the Constitutional Court in *Democratic Alliance v President of the Republic of South Africa & others* [2012] ZACC 24; 2013 (1) SA 248 (CC) (the *Simelane* judgment), which involved the appointment of Mr Menzi Simelane as National Prosecuting Authority Head, and held that the Minister, like the President, had an obligation to ensure that there were no disqualifying factors impinging on the appointment of an individual as the Head of an important national constitutional institution.

[14] The high court found that the criteria set by the relevant provisions of the Act were objective and constituted essential jurisdictional facts on which General Ntlemeza's appointment had to be predicated. Mabuse J, with reference to the *Simelane* judgment, said the following (para 33):

'In the Simelane case, the Constitutional Court accepted the approach of the Supreme Court of Appeal. In paragraph [14] of the said case this is what the Constitutional Court had to say:

"The Supreme Court of Appeal concluded that the President's decision was irrational irrespective of whether the decision taken by the President was subjective or whether the criteria for appointment of the National Director were objective. It nevertheless concluded, for the purpose of giving guidance, that the requirement that the National Director must be a fit and proper person constituted a jurisdictional fact capable of objective ascertainment."

Accordingly, even where the relevant decision maker has, in terms of the law, a discretion relating to the person to be appointed, the person who is ultimately appointed must be a fit and proper person in the eyes of the Minister:

"Second, and as the Supreme Court of Appeal correctly points out, the Act itself does not say that the candidate for appointment as National Director should be fit and proper 'in the President's view'. The Legislature could easily have done so if the purpose was to leave it in the complete discretion of the President. Crucially, as the Supreme Court of Appeal again pointed out, the section 'is couched in imperative terms. The appointee "must" be a fit and proper person"'.

[15] The high court considered the judicial pronouncements by Matojane J referred to above, that reflected negatively on General Ntlemeza, to be crucial in the assessment of whether the criteria set by s 17CA of the Act had been satisfied for the appointment of General Ntlemeza. Mabuse J had regard to Minister Nhleko's affidavit filed in opposition to the application by HSF and FUL challenging General Ntlemeza's appointment, in which he stated that he had been aware of the remarks made in the judgments but took the view that they could be discounted. The high court held that the Minister was not entitled to ignore Matojane J's findings concerning General Ntlemeza's lack of honesty and integrity. It found that it was for the Minister to determine positively from the objective facts whether General Ntlemeza was a fit and proper person. It reasoned that Minister Nhleko failed to do so. In that regard it stated, at para 37 of its judgment:

'The judicial pronouncements made in both the main judgment and the judgment in the application for leave to appeal are directly relevant to and in fact dispositive of the question whether Major General Ntlemeza was fit and proper if one considers his conscientiousness and integrity. Absent these requirements Lieutenant General Ntlemeza is disqualified from being appointed the National Head of the DPCI.'

The court concluded that Minister Nhleko failed to take into account relevant factors such as the findings by Matojane J, and thus acted irrationally and unlawfully. It made the following order:

'1. The decision of the Minister of 10 September 2015 in terms of which Major General Ntlemeza was appointed the National Head of the Directorate of Priority Crimes Investigations is hereby reviewed and set aside.

2. The first and second respondents, in their official capacities, are hereby ordered to pay the applicant's costs, including the costs consequent upon the employment of two counsel, the one paying the other to be absolved.'

[16] Subsequently, General Ntlemeza applied to the high court for leave to appeal that order (the principal order). HSF and FUL, in turn, filed a 'counter-application', in terms of which they sought, inter alia, as a matter of urgency, 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. That court dismissed General Ntlemeza's application for leave to appeal, upheld the counter-application and made an order in the following terms:

'…

2. The operation and execution of the order granted by this court under case no. 23199/16 on 17 March 2017 is not suspended and will continue to be operational and executed in full whether or not there are any applications for leave to appeal and appeals or whether or not there is any petition for leave to appeal against the said order.

3. The second respondent in the counter-application is hereby ordered to pay the costs of this counter-application.'

It is against that order (the execution order) and the conclusions on which it was based, that the present appeal, in terms of s 18 of the Superior Courts Act, is directed. Since s 18(4)(ii) gives a person against whom an execution order was granted an automatic right of appeal, it was not necessary for leave to appeal to have been sought.

[17] In heads of argument filed in this court and at the outset of oral argument before us, counsel on behalf of General Ntlemeza relied on a jurisdictional point which they submitted, was dispositive of the appeal. The proposition was framed as follows:

In terms of s 18(1), a pending decision on an application for leave to appeal or an appeal was a jurisdictional requirement before a court considering an application to enforce an order was empowered to make an execution order of the kind set out in the preceding paragraph. It was contended that sequentially the application for leave to appeal by General Ntlemeza had been refused before FUL's counter-application was upheld and thus the high court was precluded from considering HSF and FUL's counter-application, because the jurisdictional fact of a pending decision in relation to an appeal or an application for leave to appeal was absent.

[18] It is necessary to consider whether that contention is well-founded. To that end, I propose to first consider the position at common law in relation to such applications before the enactment of s 18 of the Superior Courts Act. In the event of it being held that the preliminary point is without substance, I propose to deal with the further provisions of s 18 to determine whether HSF and FUL satisfied its requirements thereby justifying the grant of the execution order.

[19] This court, in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty)* 1977 (3) SA 534 (A) at 544H-545G, set out the common law position as follows:

'Whatever the true position may have been in the Dutch Courts, and more particularly the Court of Holland . . . it is today the accepted common law rule of practice . . . 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. To obtain such leave the party in whose favour the judgment was given must make special application . . . The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from . . . The court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised . . . In exercising this discretion the court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, inter alia, to the following factors:

(1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;

(2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) 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, eg, to gain time or harass the other party; and

(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.' (Authorities omitted.)

[20] In *South Cape* this court held that in an application for leave to execute the onus rests on the applicant to show that he or she is entitled to such an order.[3] The court went on to hold that an order granting leave to execute pending an appeal was one that had to be classified as being purely interlocutory and was thus not appealable. There were exceptions to the rule that purely interlocutory orders were

[3] At 548C-D.

not appealable. It is necessary to point out that a number of judgments of this court relaxed this rule on the basis that an appeal may be heard in the exercise of the court's inherent jurisdiction in extraordinary cases where grave injustice was not otherwise preventable. In *Philani-Ma-Afrika & others v Mailula & others* [2009] ZASCA 115; 2010 (2) SA 573 (SCA) this court considered the position where a high court had granted leave to execute an eviction order despite having granted leave to appeal. It held the execution order to be appealable in the interests of justice.[4] It must also be borne in mind that before the advent of s 18, the position at common law was that the court had a wide general discretion to grant or refuse an execution order on the basis of what was just and equitable whilst appreciating that the remedy was one beyond the norm.

[21] Until its repeal on 22 May 2015, Rule 49(11) of the Uniform Rules, read as follows:

'Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary 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 or application, unless the court which gave such order, on the application of a party, otherwise directs.'

This was a restatement of the common law and formed the basis on which applications of this kind were determined.

[22] Section 18 of the Superior Courts Act introduced on 23 August 2013[5] 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.

(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 an final judgment, which is the subject of an application for leave

[4] See also *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Services* 1996 (3) SA 1 (A*); S v Western Areas Ltd & others* 2005 (5) 214 (SCA), and *Nova Property Group Holdings Ltd & others v Cobbett & another* [2016] ZASCA 63; 2016 (4) SA 317 (SCA).

[5] Issued in terms of GN R36, *GG* 36774, 22 August 2013.

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.'

[23] As can be seen, s 18(4)(ii) has made orders to execute appealable, fundamentally altering the general position that such being purely interlocutory orders, they were not appealable. Moreover, it granted to a party against whom such an order was made, an automatic right of appeal. In addition s 18(3) requires an applicant for an execution order to prove on a balance of probabilities that he or she 'will' suffer irreparable harm if the order is not granted and that the other party 'will not' suffer such harm.

[24] Since a court of three judges was constituted to hear the matter, this court, so it was submitted, was 'the next highest court' envisaged in s 18(4)(ii). It is on that basis that the present appeal came to be set down on an expedited basis before this court, because s 18(4)(iii) directed that the appeal had to be dealt with as a matter of extreme urgency. 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. Nor, is it necessary to determine whether the next highest court could, as well, be the full court of the high court in circumstances where the execution order was

issued by a single Judge.[6] Whatever else, this matter, which is properly before this court, requires the consideration of a novel statutory provision and it would be in the interests of justice for us to do so.

[25] In order to embark on a determination of whether the preliminary jurisdictional point raised on behalf of General Ntlemeza, set out in para 17 above, has substance, it is necessary to consider the provisions of s 18(1) and (2). These sections provide for two situations. First, a judgment (the principal order) that is final in effect, as contemplated in s 18(1): In such a case the default position is that the operation and execution of the principal order is suspended pending 'the decision of the application for leave to appeal or appeal'. Second, in terms of s 18(2), an interlocutory order that does not have the effect of a final judgment: The default position (a diametrically opposite one to that contemplated in s 18(1)) is that the principal order is not suspended pending the decision of the application for leave to appeal or appeal. This might at first blush appear to be a somewhat peculiar provision as, ordinarily, such a decision is not appealable. However, this subsection appears to have been inserted to deal with the line of cases in which the ordinary rule was relaxed referred to in para 20 above.

[26] Both sections empower a court, assuming the presence of certain jurisdictional facts, to depart from the default position. It is uncontested that the high court's judgment on the merits of General Ntlemeza's appointment is one final in effect and therefore s 18(1) applies. This section provides that the operation and execution of a decision that is the 'subject of an application for leave to appeal or appeal' is suspended pending the decision of either of those two processes. Section 18(5) defines what the words 'subject of an application for leave to appeal or appeal' mean: '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.'

[27] When the high court made its decision on the merits of General Ntlemeza's appointment on 17 March 2017, that order immediately came into operation and

[6] This court might in future face a growing number of appeals against execution orders, particularly because the right to appeal is automatic, which might clog its roll.

could be executed. When General Ntlemeza, on 23 March 2017, filed his application for leave to appeal, the order (the principal order) of that court was suspended pending a decision on that application. HSF and FUL's 'counter-application', seeking the execution order, was thus well within the parameters of s 18(1). Did the dismissal of General Ntlemeza's application for leave to appeal prior to a decision on the execution application remove the jurisdictional underpinning for an execution order? The short answer is no. The reasons for that conclusion are set out hereafter.

[28] The primary purpose of s 18(1) is to re-iterate the common law position in relation to the ordinary effect of appeal processes – the suspension of the order being appealed – not to nullify it. It was designed to protect the rights of litigants who find themselves in the position of General Ntlemeza, by ensuring, that in the ordinary course, the orders granted against them are suspended whilst they are in the process of attempting, by way of the appeal process, to have them overturned. The suspension contemplated in s 18(1) would thus continue to operate in the event of a further application for leave to appeal to this court and in the event of that being successful, in relation to the outcome of a decision by this court in respect of the principal order. Section 18(1) also sets the basis for when the power to depart from the default position comes into play, namely, exceptional circumstances which must be read in conjunction with the further requirements set by s18(3). As already stated and as will become clear later, the Legislature has set the bar fairly high.

[29] The preliminary point on behalf of General Ntlemeza referred to in para 17 above does not accord with the plain meaning of s 18(1). As pointed out on behalf of HSF and FUL, and following on 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.

[30] Moreover, contextually, the power granted to courts by s 18 must be seen against the general inherent power of courts to regulate their own process. This inherent jurisdiction is now enshrined in s 173 of the Constitution which provides:

'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

[31] A further application for leave to appeal the principal order was filed in this court on 21 April 2017. This was always highly likely and always in prospect. The nature of the contestation in the high court, including the negative aspersions concerning the character of the head of a leading crime-fighting unit of the South African Police Service, leads to that compelling conclusion. So too, one would imagine, whatever this court decides it is unlikely to be the final word on the matter. The execution order by the high court reasonably anticipated further appeal processes. This was in any event what was sought by HSF and FUL in their counter application. In their notice of motion, they sought an order that the operation and execution of the principal order not be suspended 'by any application for leave to appeal or any appeal, and the order continues to be operational and enforceable and operate … until the final determination of all present and future leave to appeal applications and appeals…' A court charged with the adjudication of an application for an execution order would be astute to avoid a multiplicity of applications.

[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 slow to avoid a to-ing and fro-ing of litigants.[7] 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 crystallize the position but also to anticipate further appeal processes. For all the reasons aforesaid there is no merit in the preliminary point.

[7] In *Copthall Stores Ltd. v Willoughby's Consolidated Co. Ltd.* (1)1913 AD 305 at 308, this court stated that it has an inherent right to control its own judgments, and in the light of the circumstances of each case to say whether or not execution should be suspended pending an application for special leave to appeal. See also *Fismer v Thornton* 1929 AD 17 at 19.

[33] There is a further point taken on behalf of General Ntlemeza that requires only brief attention. The high court's order was handed down on 12 April 2017 and the reasons for the order were provided on 10 May 2017. It was submitted on behalf of General Ntlemeza that since s 18(4)(i) states that a court must immediately record its reasons for ordering 'otherwise', the high court by not doing so was in contravention of a peremptory provision, which must be seen in conjunction with the provisions of s18(4)(iii) that provides that the court hearing the automatic appeal must deal with it as a matter of extreme urgency. The consequence, so it was contended, was that General Ntlemeza was frustrated in asserting his constitutionally guaranteed right of access to court. It appears to be suggested that this somehow nullified the proceedings related to the application for leave to execute the principal order. It must be pointed out that General Ntlemeza filed his notice of appeal in this court a day after the order upholding the application for leave to execute was issued, on 13 April 2017. The application for leave to appeal in relation to the principal order was filed on 21 April 2017. General Ntlemeza's notice of appeal was amended on 11 May 2017, after the high court had provided its reasons. The present appeal was heard on 2 June 2017. Far from being frustrated, General Ntlemeza has had a speedy hearing. Furthermore, since the order to execute was suspended pending the finalisation of the present appeal, no prejudice appears to have been occasioned. Simply put, the purpose of s 18(4) namely, to ensure a speedy appeal, was achieved. That being said it would be a salutary practice to provide reasons *pari passu* with the order being issued.

[34] That leads us to a consideration of whether the high court in granting the order to execute had due regard to the relevant provisions of s 18 and applied them correctly.

[35] Section 18(1) entitles a court to order otherwise 'under exceptional circumstances'. Section 18(3) provides a further controlling measure, namely, a party seeking an order in terms of s 18(1) is required 'in addition', to prove 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.

[36] In *Incubeta Holdings & another v Ellis & another* 2014 (3) SA 189 (GJ) para 16, the court said the following about s 18:

'It seems to me that there is indeed a new dimension introduced to the test by the provisions of s 18. The test is twofold. The requirements are:

- First, whether or not "exceptional circumstances" exist; and
- Second, proof on a balance of probabilities by the applicant of –
    - the presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order; and
    - the absence of irreparable harm to the respondent/loser, who seeks leave to appeal.'

[37] As to what would constitute exceptional circumstances, the court, in *Incubeta*, looked for guidance to an earlier decision (on Admiralty law), namely, *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, & another* 2002 (6) SA 150 (C), where it was recognised that it was not possible to attempt to lay down precise rules as to what circumstances are to be regarded as exceptional and that each case has to be decided on its own facts. However, at 156H-157C, the court said the following:

'What does emerge from an examination of the authorities, however, seems to me to be the following:

1. What is ordinarily contemplated by the words "exceptional circumstances" is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; "besonder", "seldsaam", "uitsonderlik", or "in hoë mate ongewoon".
2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.
3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.
4. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.
5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.'

[38] In *UFS v Afriforum & another* [2016] ZASCA 165 (17 November 2016), para 9, this court stated that it was immediately discernable from ss 18(1) and (3) that the Legislature proceeded from the well-established premise of the common law, that the granting of relief of this nature constituted an extraordinary deviation from the norm that, pending an appeal, a judgment and its attendant orders are suspended. It noted that the exceptionality is further underscored by the requirement of s 18(4)(i); that the court making such an order 'must immediately record its reasons for doing so'. I interpose to state that the reasons contemplated in s 18(4)(i) must relate to the court's entire reasoning for deciding 'otherwise' and must therefore also include its findings on irreparable harm as contemplated in s 18(3).

[39] In *UFS,* this court agreed that whether exceptional circumstances were present depended on the facts of each case. The circumstances must be such as to justify the deviation from the norm.[8] The high court, in deciding the application in terms of s 18(1), after referring to *Incubeta,* went on to consider the facts. It took into account that the DPCI was an essential component of South Africa's democracy and that given its functions, it was vital that the National Head had to be someone of integrity. In this regard it considered the judicial pronouncements of Matojane J to be crucial.

[40] Before the high court, counsel on behalf of General Ntlemeza had submitted that HSF, FUL and the high court itself had not taken into account the remarks of Tuchten J in his judgment declining to grant an interim interdict pending finalization of the application to have General Ntlemeza's appointment declared unlawful.[9] It was contended that those remarks had the effect of neutralizing the negative judicial pronouncements of Matojane J.

[41] It is apt at this stage to pause and consider the remarks made by Tuchten J. He considered Matojane's adverse comments, referred to in para 8 above, and the accusation that Matojane J had met privately with the legal representatives of one party. According to Tuchten J, these statements had 'distressed' Matojane J.[10] Tuchten J considered the further negative findings by Matojane J, referred to in

[8] *UFS v Afriforum & another* [2016] ZASCA 165 (17 November 2016) para 13.
[9] *Helen Suzman Foundation & another v Minister of Police & others* (GP) unreported case no 23199/15 (19 April 2016).
[10] Ibid, para 25.

paras 9 and 10 above, which were based on events related to the application for leave to appeal and the 'counter-application'. He said the following (para 27):

'It is difficult to understand how the conduct of [General Ntlemeza] in relation to the application to put the main judgment into force pending appeal could have a bearing on the ground of appeal.'

He went on to state (para 66):

'I do not think that in *Sibiya*, in relation to the application for leave to appeal and to put the order into operation pending the appeal, I would have judged [General Ntlemeza] as severely as did Matojane J. I think one must make some allowance for an aggrieved litigant. In addition the preposterous conclusion to which [General Ntlemeza] came regarding the probity of the learned judge was probably fueled by absurd legal advice. [General Ntlemeza] and probably one or more of his lawyers jumped to a wholly unjustified conclusion. But that, as I see it, does not necessarily, or even probably, prove a lack of integrity.'

[42] To the submissions by counsel on behalf of General Ntlemeza in relation to the remarks of Tuchten J, referred to in para 41 above, the high court responded as follows:

'[General] Ntlemeza and the Minister sought leave ... to appeal the *Sibiya* judgment and leave to appeal was refused. The Minister thereafter petitioned the Supreme Court of Appeal against Matojane's judgment in which he made remarks about General Ntlemeza. The Minister's application for leave to appeal was dismissed….'[11]

Later the court said:

'It is our considered view that those remarks which constituted the foundation upon which the applicants launched the main application themselves constitute exceptional circumstances as envisaged by s 18(1) of the Act.'[12]

[43] In adjudicating the application for leave to execute the principal order the high court considered General Ntlemeza's prospects of success on appeal in relation to the finding that his appointment was unlawful. It concluded that the findings by Matojane J which reflected negatively on General Ntlemeza were a major obstacle for him to overcome and held that his prospects of success were 'severely limited'.

[11] Para 14.
[12] Para 16.

[44] *In UFS,* this court, after considering that *Incubeta* had held that the prospects of success in the pending appeal played no part in deciding whether to grant the application, preferred the contrary approach of the court in *The Minister of Social Development Western Cape & others v Justice Alliance of South Africa & another* (WCC) unreported case no 20806/13 (1 April 2016). However, in *UFS*, in deciding the matter before it, this court recorded that the review record was not before it and thus had no regard to the prospects of success. We are in the same position in the present appeal. As in *UFS*, but more so, because of the application for leave to appeal the principal order pending in this case, before us the question of prospects of success recedes into the background. As stated at the commencement of this judgment, s 18 has now had as a consequence the curious and ostensibly undesirable position that there are two appeal processes in one appeal court in relation to the same case.

[45] Before us it was submitted that the appellants had failed to show exceptional circumstances and that the high court had erred in deciding the contrary. I disagree, for the reasons provided by that court, referred to above, and those submitted on behalf of HSF and FUL. I agree with the remarks of the high court in relation to the pronouncements by Tuchten J. In my view he misconceived his role. He was not sitting as a court of appeal or review. His remarks do not, as suggested by counsel for HSF and FUL, have a neutralising or any other effect of disturbing the findings of Matojane J. The proper functioning of the foremost corruption busting and crime fighting unit in our country dictates that it should be free of taint. It is a matter of great importance. The adverse prior crucial judicial pronouncements and the place that the South African Police Service maintains in the constitutional scheme as well as the vital role of the National Head of the DPCI and the public interests at play, are all factors that weighed with the court in its conclusion that there were exceptional circumstances in this case.

[46] The high court turned its attention to the requirements of s 18(3), namely the irreparable harm that would be suffered by either party. It took into account the submission on behalf of General Ntlemeza that removal from his office, ‘even if it is momentary’ would be a devastating blow to his ‘long and unblemished’ career. The high court held that the damage that had been done was not as a consequence of

the main application but because of the findings of Matojane J, and stated that it failed to see how the enforcement order would wreak the harm General Ntlemeza complained would be occasioned. It took into account that he continued to be paid his full salary and that he still had the possibility of vindication by way of an appeal, should it ensue as a result of a favourable outcome of his petition and a subsequent appeal to this court. Before us, counsel for General Ntlemeza appeared to restrict himself to the contention that General Ntlemeza was suffering reputational harm. But given the findings of Matojane J, the submission that being kept out of his office occasions him reputational harm does not withstand scrutiny. I may add that General Ntlemeza sought to appeal against the judgment of Matojane J, but his petition to this court failed. In the result, the findings by Matojane J are no longer susceptible to reconsideration.

[47] Insofar as the requirements of s 18(3) are concerned the high court cannot be faulted for its approach in respect of the question of irreparable harm to General Ntlemeza. On the other side of the coin there is the public interest and the crucial place that the DPCI enjoys in our young democracy as set out above.[13]In my view the high court cannot be criticized for concluding that HSF and FUL had proved, on a balance of probabilities, that the public will suffer irreparable harm if the court does not grant the order, and that General Ntlemeza will not suffer irreparable harm in light thereof.

[48] For completeness, it is necessary to record that Minister Nhleko, the decision-maker in relation to General Ntlemeza's appointment, made common cause with him in his opposition to the challenge by HSF and FUL. The Minister of Police and General Ntlemeza applied for leave to appeal the judgment. On 11 April 2017 Minister Nhleko's successor, Minister Mbalula, withdrew the application for leave to appeal and tendered costs. The present Minister played no part in this appeal. Simply put, the present Minister did not seek to defend Minister's Nhleko's decision to appoint General Ntlemeza.

[13] *Helen Suzman Foundation & another v Minister of Police & others* (GP) unreported case no 23199/15 (19 April 2016) para 30.

[49] Even though the present appeal is being pursued by General Ntlemeza in his personal capacity, it became apparent towards the end of proceedings before us that his case was funded by the State. The propriety of that course is beyond our scrutiny. There is of course no reason in the present case for a costs order to attach in any other way than personally.

[50] It must by now be apparent that the appeal is bound to fail. The effect of the order that follows is that the high court's execution order set out in para 16 above remains extant with the consequence that General Ntlemeza is unable to return to his post pending the final determination of the present application for leave to appeal and/or any further appeal processes in relation to the merits of his appointment.

[51] For all the reasons aforesaid the following order is made:

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

2 The appellant is ordered to pay the costs personally.

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M S Navsa

Judge of Appeal

APPEARANCES:

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