REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No

1 October 2020 Vally J

Case No.: 14867/20

In the matter between:

Vumacam (Pty) Ltd	**Applicant**
and	
Johannesburg Roads Agency	**First Respondent**
City of Johannesburg Metropolitan Municipality	**Second Respondent**
The Right2Know Campaign	**First Amicus Curiae**
Gavin Dennis Borrageiro	**Second Amicus Curiae**

Judgment (Leave to Appeal and to Execute)

Vally J

[1] There are two applications before me: an application for leave to appeal by the Johannesburg Roads Agency (JRA) and the City of Johannesburg (City) (both of whom were respondents in the principal matter); and an application by Vumacam (the applicant in the principal matter) brought in terms of s 18(1) and (3) of the Superior Court Act, 10 of 2013 (the Act). I handed down a

judgment and simultaneously issued various orders on 20 August 2020. The order, material and relevant to the two applications, reads:

> '1 ...
>
> 2 The first respondent's decision to suspend the consideration of aerial and CCTV wayleave applications is declared to be unlawful and invalid and is set aside.
> 3 The first respondent is directed to proceed with the consideration and determination of aerial and CCTV wayleave applications.
> 4 The first respondent is directed to, within seven days of the date of this order, issue the applicant with a decision on the wayleave applications annexed to the Notice of Motion, together with reasons if the applications are, or if any individual one is, refused.
> 5 The first respondent is to pay the costs of the application.'

[2] The JRA seeks leave to appeal to the Supreme Court of Appeal (SCA) against the judgment and the order. Vumacam seeks to make the order, especially paragraph 4 thereof, operational pending the outcome of any application for leave to appeal that the JRA launches, or any appeal should the JRA succeed in its application for leave to appeal.

The application for leave to appeal

[3] While both the JRA and the City seek leave to appeal, it is really the JRA that is prosecuting the matter. This is understandable given that the complaint in the principal matter was against it, as were the orders quoted above. In fact, there is nothing for the City to appeal against as there are no orders against it.

[4] The JRA seeks leave to appeal against paragraphs 2 – 5 of the order quoted above. It claims that the judgment consists of a number of misdirections which resulted in an incorrect order. It seeks to have the order overturned, especially paragraph 4 thereof.

[5] A number of criticisms have been levelled by the JRA against the judgment, and in particular against paragraph 4 of the order. It is that paragraph that the JRA finds particularly problematic. This is because, it says, it has already considered Vumacam's wayleave applications, refused them,

and therefore should not be ordered to consider them again. In this sense it disagrees with my finding that it failed to consider the applications. The question of whether it had considered those application was a hotly contested one. To be more precise, it constituted the core of the dispute in the principal matter. In any event, the finding that it had failed to consider the wayleave applications is derived, largely but not entirely, from the JRA's admission that it had decided to suspend consideration of all aerial and CCTV wayleave applications.

[6] However, if we are to accept the JRA's contention that it had considered the wayleave applications of Vumacam, then there is no need for the appeal process to be engaged. All the JRA has to do is re-send the outcome of its determination to Vumacam. Put differently, all that is required of it is to provide Vumacam with what it says had already been provided before the order was granted, i.e. inform Vumacam, in writing with reasons, that each of its applications was unsuccessful. By so doing it would have complied with the order. There would then be no need for an application for leave to appeal as well as for the s (18)(1) and (3) application by Vumacam. For this reason the application for leave to appeal should be dismissed.

[7] Despite being made aware that its application for leave to appeal was stillborn if it maintained that it had already done what paragraph 4 of the order requires of it, the JRA indicated that it would persist with the application for leave to appeal. It contended that it was acting lawfully by suspending the consideration of wayleave applications for aerial and CCTV installations since there is a *lacuna* in the law in that it fails to attend to the right to privacy of individuals who use the roads where the CCTV cameras are installed. Leaving aside the fact that suspending the process of considering these wayleave applications is inconsistent with its claim that it had already determined the wayleave applications, which paragraph 4 of the order requires it to do, the fundamental difficulty it faces is that the law compels it to consider these applications. The act of suspending the consideration of these applications is simply unlawful. The JRA has no power to refuse to do that which the law compels it to do. The reasons for its refusal to perform what the law requires

of it, however benevolent (in its view), is of no assistance to it. They are frankly irrelevant. The JRA cannot overcome this legal hurdle. Its case has no merits. In the circumstances there is absolutely no prospects whatsoever of an appeal succeeding.

[8] Furthermore, there is nothing compelling about this case that would warrant the attention of a higher court.

[9] For these reasons the application for leave to appeal should be dismissed. And so I hold.

The s 18(1) and (3) application

[10] Section 18(1) and (3) of the Act provides:

> '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.
> ...
> (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.'

[11] Vumacam seeks to uplift the automatic suspension of the order. It seeks to make the order, especially paragraph 4 thereof, operational pending any appeal process that the JRA may invoke.

[12] Vumacam claims that the application for leave to appeal has been brought purely for purposes of delaying compliance with the order and to frustrate its business. It says this because the application for leave to appeal was brought only after it launched a contempt application against the JRA for failing to comply with the order, especially paragraph 4 thereof. Incidentally, instead of responding to the contempt application with a simple statement that

it had already considered the wayleave applications before the order was made, and had therefore in effect complied with the order, it elected to respond by bringing the application for leave to appeal.

[13] It was further alleged by Vumacam that even if the JRA failed in this Court to secure leave to appeal, it (the JRA) would, as is clear from its conduct, persist in seeking leave to appeal. As long as that application – in whichever forum or form – remains pending Vumacam is irreparably harmed as the order, and in particular paragraph 4, would remain suspended. The JRA does not deny that it intends to pursue every possible legal avenue open to it to have the order, especially paragraph 4, set aside.

[14] As mentioned, at the hearing the JRA emphatically recorded that it would persist with the application for leave to appeal despite stating equally emphatically that it has already done what paragraph 4 of the order requires it to do. It remained adamant in this regard. Hence, the issue of whether Vumacam's wayleave applications have been considered remains unresolved. In practice it translates thus: Vumacam is told that its applications have been considered and refused, even though official written confirmation thereof has not been furnished. But should it insist on receiving written confirmation of this assertion (so that it can proceed with an application to review the decisions) it is met with a stern response stating that the matter is subject to the appeal process. Oblivious to the internal inconsistency of the approach the JRA in essence attempts to straddle two horses – each facing in the opposite direction. Vumacam complained that this situation is untenable as it effectively places Vumacam in a legal 'no man's land'.

[15] It is in this context that Vumacam brings the application. It is based on the understanding that the JRA has failed to attend to its wayleave applications. All it is asking is for the JRA to attend to them and to convey its decisions in writing, and with reasons if the applications, or any one of them, are refused. In my judgment, the approach adopted by Vumacam is perfectly rational and reasonable. The JRA is adamant that Vumacam's applications for wayleaves have been, or will be, rejected. In that case the JRA must convey

this message, together with reasons for its decisions. The JRA suffers no harm in doing so. Thus, the s 18(1) and (3) application has to be granted.

[16] Nevertheless, Vumacam is cognisant of the fact that it is required to make out a case in terms of the provisions of sub-sections (1) and (3) for the relief it seeks. In terms of sub-sections (1) and (3) it is required to show that: (a) there exists "exceptional circumstances" warranting the operation and execution of the judgment pending the outcome of the appeal; and, (b) on a balance of probabilities, (i) it suffers irreparable harm should the order not be made operational; and,(ii) there is no irreparable harm to the JRA, which may, if it prosecutes the appeal, succeed in overturning the judgment and order granted in the principal case.[1] While the statute requires a court to factor these issues into its consideration as to whether the order should be made operational pending any application for leave to appeal or appeal, the common law has iterated that prospects of success in the appeal remains a factor that has to be taken into consideration.[2]

Prospects of success of the appeal

[17] The prospects of success on appeal are non-existent. This makes for a compelling case to make the order effective pending the appeal process. It makes little sense to say that there are no prospects of the appeal succeeding but the order should remain suspended pending the appeal.

Irreparable harm to the parties

[18] Vumacam claims that it will suffer irreparable harm should the order not be made effective pending any application in pursuance of an appeal by the JRA. To meet its burden on showing irreparable harm it must show that there is 'a likelihood of it suffering irreparable harm'. It does not have to show that

---

[1] *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* 2014 (3) SA 189 (GJ)
[2] *University of the Free State v Afriforum and Another* 2018 (3) SA 428 (SCA) at [14] – [15]; *Minister of Social Development Western Cape and Others v Justice Alliance of South Africa and Another* [2016] ZAWCHC 34 at [27]

'there is a certainty that' it would suffer irreparable harm.[3] In addition, it says that the public and the parties which are looking towards Vumacam for providing the services Vumacam is obliged to provide in terms of the contracts, too, stand to suffer irreparable harm. This harm is not financial only.

[19] Vumacam's business primarily consists of building and maintaining a public space CCTV network which, in the words of the deponent to its founding affidavit, 'is utilised by, amongst others, private security companies, the South African Police Services, the Johannesburg Metropolitan Police Department and others in their fight against crime.' To justify the capital expenditure it has already expended it has concluded contracts with numerous parties, many of whom have threatened to cancel the contracts as Vumacam is unable to perform its obligations. It stands to lose millions of rands and is therefore not able to recoup its capital expenditure or expand its business. In a word, it faces ruin.

[20] The JRA denies that Vumacam faces ruin. It points out that Vumacam has not put up any substantive proof that there was or is a threat by any of its customers to cancel contracts already concluded. This is true. However, it cannot be gainsaid that as long as Vumacam is stifled by the suspension decision of the JRA from carrying out its primary business it loses revenue, which can never be recovered. At the same time, it is not disputed that other parties who rely on the services of Vumacam stand to suffer irreparable harm, which is non-financial. In my view Vumacam has met its burden as required of it in terms of s 18(3) of the Act.

[21] In its quest to show that it too would suffer irreparable harm the JRA claimed that, should the appeal be successful, it would have to bear the cost of removing the poles that Vumacam would have installed while the appeal was pending. To settle any dispute in this regard, Vumacam tendered to pay the full costs of removing the poles should the appeal succeed. This puts an end to the JRA's claim that it stands to suffer financial harm should it comply

---

[3] *Minister of Social Development Western Cape*, n 2 a t [25]

with paragraph 4 of the order. The JRA then claimed that it could face legal action by members of the public for breach of their privacy should Vumacam go ahead and set up the CCTV camera network on public roads. The contention bears no merit. Assuming there is a violation of the right to privacy by the installation and operation of the CCTV cameras, it would be Vumacam that would have to bear the consequence of that violation, not the JRA.

[22] Thus, in contrast to Vumacam, the JRA suffers no harm at all if the order is made effective pending the appeal process or the appeal.

Exceptional circumstances

[23] As with the issues of irreparable harm to the parties, the issue of exceptional circumstances is determined on a fact-specific basis.[4] It is settled that where prospects of success on appeal are very weak there is no need to find that the victorious party has demonstrated 'a sufficient degree of exceptionality to justify an order in terms of s 18 of the Act.'[5]

[24] In any event, Vumacam has shown that there is a sufficient degree of exceptionality to justify making the order effective pending the outcome of the appeal process.

[25] It is not unusual that the issues of exceptional circumstances and irreparable harm to an applicant - such as Vumacam in this case – overlap.

[26] Vumacam has no relief open to it while the appeal process is pending. It cannot take any defensive action to prevent or mitigate the harm that no doubt will ensue in the meantime.

[27] For the reasons set out above, the order should be made effective pending the appeal process or any appeal, should one eventuate.

---

[4] *Norwich Union Life Insurance Society v Dobbs* 1912 AD 395 at 399; *Incubeta*, n1 at [22]
[5] *University of the Free State*, n 2 at [15]

Costs

[28] Both parties agreed that costs should follow the result. I concur that it would be the only fair and just outcome. There was no claim for a punitive or special order of costs, accordingly they would have to be taxed on the party and party scale.

Order

[29] The following order is made:

1. The application for leave to appeal is dismissed.
2. Notwithstanding any application for leave to appeal or appeal by the first and second respondents in the principal matter and in the application brought in terms of s 18 (1) and (3) of the Superior Courts Act, (the Johannesburg Roads Agency and the City of Johannesburg respectively) against the order granted by this Court on 20 August 2020, and pending the outcome of any such application for leave to appeal or appeal, paragraphs 2, 3 and 4 of the order made by this Court on 20 August 2020 remain in operation and are to be given effect to by the first respondent.
3. The first respondent (the Johannesburg Roads Agency) is to pay the costs of the application for leave to appeal as well as the application brought in terms of s 18(1) and (3) of the Superior Courts Act, which costs are to include those of two counsel.

Vally J
Gauteng High Court, Johannesburg Local Division

Dates of hearing:	28 September 2020
Date of judgment:	1 October 2020
For the Applicant:	Steven Budlender SC with Ingrid Cloete
Instructed by:	Schindlers Attorneys
For the defendant:	Kennedy Tsatsawane SC with Naledi Mothapo
Instructed by:	Madhlopa & Thenga Inc
For both amici:	Michael Power with Avani Singh
Instructed by:	Power Singh Inc