SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 27 October 2020

STATUS Immediate

The Premier for the Province of Gauteng and Others v Democratic Alliance and Others (Case no 394/2020) [2020] ZASCA 136 (27 October 2020)

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Today the Supreme Court of Appeal (the SCA) dismissed the appeal of the appellants, the Premier for the Province of Gauteng (the Premier), the Executive Council for the Province of Gauteng (the Gauteng EC) and the MEC for Co-operative Governance and Traditional Affairs (the MEC), against the decision of the Gauteng Division of the High Court, Pretoria (the high court) to grant an order enforcing the order granted by the full court on 29 April 2020 pending finalisation of the appeal processes.

The appellants brought an urgent appeal against an order in terms of s 18(3) of the Superior Courts Act 10 of 2013 (the Act). It arises from a decision (the dissolution decision) of the Gauteng EC to dissolve the Council of the City of Tshwane Metropolitan Municipality (the Tshwane Council) and appoint an administrator to run its affairs in terms of s 139(1)*(c)* of the Constitution, which order was suspended until after the level 5 national lockdown was lifted. The dissolution decision was taken after the Tshwane Council reached a dead-lock in that it was unable to convene and run council meetings in order to discharge its responsibilities, as a direct consequence of the disruption of its meetings due to the walkout by ANC and EFF councillors thus depriving the municipal council of the necessary quorum.

The first respondent, the Democratic Alliance (the DA), approached the high court on an urgent basis to seek an order for the dissolution decision to be reviewed, declared invalid and set aside. The full court was constituted to hear the application and on 29 April 2020 it granted the application. Subsequently, the Premier, the Gauteng EC, the MEC and the Economic Freedom Fighters launched a conditional application for leave to appeal to this Court, pending the application for direct access to the Constitutional Court. As a result, the DA launched an application in terms of s 18(3) of the Act in the high court, to implement the full court's decision pending the appeal process, which order was granted. The high court held that the DA had satisfied the requirements of s 18 (3) of the Act and granted interim enforcement order.

The issue before this Court was whether the high court's finding that the DA had satisfied the requirements of s 18 of the Act for interim enforcement of a judgment pending an appeal, was correct. The SCA held that the default position in terms of s 18(1) is that the noting of an appeal suspends the operation and execution of the order pending the decision of the appeal or application for leave to appeal. Section 18(3) is an exception to this general rule and a party who requires the court to 'order

otherwise' is required to prove 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.

The SCA held that the test in terms of s 18 requires that 'exceptional circumstances' must exist, which involves two factual findings: (1) that the applicant for leave to appeal would not suffer irreparable harm if the order was put into operation; and (2) that the party seeking leave to execute the order would suffer irreparable harm if the order remains suspended.

The SCA noted the findings of the high court that (1) the dissolution decision would have the effect of undoing the votes of the residents of Tshwane and force fresh elections, which was extraordinary from a constitutional standpoint; and (2) that an administrator who already has extraordinary powers would, as a result of the convoluted appeal and the effects of the coronavirus, be in total control of every function of the municipality for an indeterminate period of time which would extend far beyond the 90-day period contemplated by the Constitution. As regards to irreparable harm, the high court found that if the order was not put into operation pending the appeal the residents of Tshwane who voted for the DA would suffer irreparable harm and that the Gauteng EC would not suffer harm if the judgment were implemented for the simple reason that a municipality must be governed by its elected municipal council.

As regards irreparable harm requirement, the SCA upheld the reasoning of the high court that secs 1*(d)* and 152(1)*(a)* of the Constitution, from which it was clear that allowing the administrator to continue running the affairs beyond the 90-day prescribed by the Constitution, was anathema to the values upon which a democratic state was founded. On the facts of this case, it would constitute irreparable harm that the citizens of Tshwane, who had a fundamental constitutional right to be governed by those they had elected, would be denied this right.

As regards exceptionality requirement, the SCA held that the Constitution contemplates a limited 90-day period during which citizens may be deprived of governance by those whom they have democratically elected following the dissolution of a municipal council. On a proper construction of secs 139(1)*(c)* and 159(2) of the Constitution, an election must be held within 90 days of the date of the dissolution of a municipal council. The SCA further held that the circumstances of the present case were exceptional, given that they involved the infringement of peremptory provisions of the Constitution; and that the DA had therefore made out a proper case under s 18(3) of the Act. In the circumstances, the appeal was dismissed with costs.