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SCUTH ArXRICA

), WATLL FROVIKNCIAL DIVIS

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CASE KO : I 1720/82 X 1721/Â¢

PLETERAAKT

TIZBURG.

5th July 1982

THE GOVERllizNT IF KWA-2ULU

Aprlicant

THE GOVERILENT CF THE REFUBLIC CF SOUTH AFRICA First Respondent (12

PEE XINIST:ZR COF CO-OPERATION

N.J. BADENGORST
J- DG PR T

" â\200\224â\200\224 . o et 5 " Rt

LEON, J.: In view of the extreme urgency

letereses of the nour, the judgmect of the

is neceazsarily brief and the points wkich

AND DEVELOYYERT

Second Respondent
Third Respondent
Fourth Respcnient
Fifth Responden
of this matter end the
Court wkich follows

rave been raiszd in

argurent have not been dealt with fully but we have considered

all the arguments which were advanced on hoth sides and we intend

no cÃ©disrespeci to th

full and careful arguments of Counsel if we

have not dealt with the points fully nor have we dealt with all

the points which have been raised in argument but we have considered

eacn of thenm.

On the 30th June 1982 tre Ewe-Zulu

Applicant znd Mr. Ngubane, who

Government as First

was granted leave 10 join as Second

Applicant, sought end ovtained against the South African Government

and the Minister of Co-Cperaticn and Devel

rment an order from

th2 Â¥ull Bench of this Division declaring that Proclamation 121/12f7

˜do
published in Governmsarnt Gasette

nurl gnd void ond of no {ocree and effect.

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8297 dated 238ti:

June 1482 was {23
ThÂ« Reapondents were

erdered/...

- - : edu el
2d 1o pey tht costs of tret application including those of
tvo Councel. Ir groniing . that order tre Courst dismissed a pcint

tazen in lizine that the Uwo-Zulu Governmernt had no locuz standi

te brirng tre cpplicution by reason â\200\230of the fact that the Government

of Kwa-Zulu is itcelf an organ of State. 1In addition to the

â\200\230declaratory order thuat the proclamation was null and void the

Applicants elso sought an order interdicting the Second Respondert
fror edministerirng the ereas concerned in the district of Ingravunsa.
In dealing with that application the Court said :
"There seems no reason to believe that the Respondents (10
b ï¬\201ill not act in accordance with the declareatory order
’by the Court that the proclamation is null and void.
There is no reason to believe that the Respondents
will not hand back the adrinistration to the Kwa-Zulu
â\200\230Government. It is quite competent to do so without
prejudice in respect of eny right of appeal",
Accordingly the Court made no order on the application for an
interdict, save for giving leave to the Applicants to renew their
epplication on twenty-four hours’ notice to the Respondents, in
the event of the Respondents failing to give effect to the order(2C
granted. The Respondents have appealed against the judgment
of the Court and the State Attorney has, on behalf of the Respondent:
i%quested the Chief Justice to constitute a court of the Appellate
Division for the hearing of the appeel es a matter of urgency. To

date there has been no indication as to whether such an appeal

,’will be heard out of time as =z matter of urgency or not but the

Respondents have not handed back the administration of that pari

of Ingwavura with\which we ere concerned to the Kwa-Zulu Government,
with the result that the Applicants have now r2newod their applica-
tion for an interdict restraining the Secend Respondent frog (3Â¢

administering the ercees corc2rned in the district of Ingwavunma

woanda ne/ :

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JUGES TS
periipg the finel oulcore of this nutter in the Arpellate Divisicn.
]

An order wo3a Â«lso scught by the Ewe-Zulu Governrerit tnet any

oe suuapended by the noting of the

Further Respondentis have now been joined. They are Mr. ven Zyl

â\200\230the Third Rcopondent, who has been appointed liegistrate of

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Ingwavuma by the First cr Second Respondent, MNr. Schnetler the
Fourth Recpondent who has been asppointed as Assistant llagistrate

end Iir. N.J. Badenhorst the Fifth Respondent who has been placed

˜in overall control of the districts of Xwe-Kgwane and Ingwavuma. (1C

"In his affigavit in support of the application Chief Buthelezi,
the ChiÃ©f Minister of the Government of Kwa-Zulu, has referred to |
the fact that cconsiderable confusion prevails in the Ingwavuma
area a2s to who is the legitimate authority. Details of thise
confusion ere set forth. On the one hand the Third, Fourth and
Fifth Respondents havÃ© been appointed to their respective positicns.
On the other hand the Kwa-Zulu Government has appointed Mr. Eric
Khlongo as magistrate for the Ingwavuma district. There is a
conflict as tÃ© which MagistrafÃ© should lawfully exercise authority
in the district. Such a megistrate performs functions on behalf(20
of other departmenis, including labour matters, population
registration, births, marriages -and deaths, appointments and
a&ministration of the offices of chiefs and indunas and also
deals with salaries of employees of the Applicant. The Applicant
employs approxiiately three thousand persons in the area. DMembers
of the staff of the Applicant are uncertain as-to.whether they
should continue their normal functions in view of the conflicting
presence of officials of the Second Respondent in the area, for
example, the Assistant Magistrate of Ingwavuma refused to hear an
apperl from the Chiefd Court.. In the Department of Works and (30
the Department of Agriculture & Forrontry the labiourers refused

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to zccept their calariss when they were offeced raym2nt by officiale of the Sccond Respondent siating thzt they would only accept s2laries frcxz the Anplicant. .There has been esome disruption in the Manguzi Hospital: the entire staff has threatened to resign if . the hospitzl dministration were to be assumed by the Second Respondent. Othef exanples of confusion are set out in the launching alffidavits and reference is made to the fact that at

one. stage the Kwe-Zulu flag was pulled down. The Chief MinisteÂ£ has el30 alleged that unless effect is given to the judgment of

- this Court the confusion that preveils will lead to an unpleasant{iC and Ã©ntagonistic situvation in which fhere is a likelihood of injury arnd harm being caused. The mood of the people is reflected by the allegation that on the 24th June 1982 the Third Respondent was threateï¬\201ed with violence and the Chief Minister acted to pfotect him from an angry crowd which was bitterly opposed to

the assumption of control of the area by the Second Respondent.

The first Applicant hes been in uninterrupted lawful control of that part of the Ingwavuma district concerned for ten years until approximately two and a half weeks ago. The Second ApplicanÂ® has associated himself with the Kwa-Zulu Government in the (" application. In addition, he hes referred to what he has alleged to be the change in temper and attitude of the people in the area since it became apparent that the officiels of the Second Respondent were not to relinquish control. He has also put up an affidavit by Mr. Khlongo, the magistrate of Ingwavuma. In that affiaavit _ he refers to the hand-written statement which he prepared at the request of the Kwa-Zulu Government and wherein he hes referred to the extremely fense atmosphere which presently prevails in the district.

Despite the judgment cf the Court the Fifth Reppondent, so (30 it is alleged, on the 2nd July 1982 cume to Mr. Mhlongo’s office

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L5 - Jucgment
er.d demancded tne xeye. iir. lniongo refused to hand them over
but therezfter the Fifth iespondent returned zrnd it is zlleged that
there were also presentâ\200\231a’large number of members of the South
Africen Folice force who were posted to various positions iï¬\201 the
building, AS & resuli¬\201 of this action Nr. Inlongo told the Third
Respondent that this action emounted to nothing other then .

intiridation and that the tension cculd lead to blocdshed. Amongst

other matters referred to in his hand-written statement, Mr. Mhlongr

hes referred to the fact that members of his staff have teen
thre?tened that they would be attacked by members of the public (10
if they continued to work using Hepublican forms.

Lengthy affidavits have been filed on behalf of the
Respondents in which several points are made. There are a number
of disputes of fact which it is impossible to resolve on the â\200\230
affidavits but it is common cause that, until about two end a half
weeks ago, the Kwa-Zulu Government has been in unÃ©?errupted control
of the area in question for ten years. It is also conrmon cause
that sinÃ©evit became publicly and generally known that part of
Ingwavuma was to be excised and handed to Swaziland, that there
has been a gocd deal of tension and confusion in the area. What(20
is in dispute is the ceuse of such tension and confusion. In this
regard it is alleged by the ReSpSndenzs that the cause of such
tension and confusion is not the publication of any proclamation

or the decision by the South African Government to excise part of

Ingwavuna but the actions and conduct of certain people, including

the Chief Minister of Kwa-Zulu. We have not found it poeÃ©ible,

on the affidavits, to resolve this conflict.

Before I consider further the facts in this case, it is

" necessary to refer to Mr. de Villiers’ argument on behalf of the

Reapondents that this Court has no power in law to grant the (30

application. The sargument in this repgard was basced upon the fact

thzt the llecpordents have noted en appeal to the Appelliate Division against the decision of thc Full Eench. It wes rightly contended that %le noting of the appeal had the effect of suspending the operation &nd execution of the judgment and the Order of Court. There cen be no mpannsr of doubt that on the cases which are ï¬\201nanimouÃ© on the topic, that under the common law the effect of noting an eppeal is to suspend the operation and execution Ã©f the juidgment and it is clear that the general effect of the noting of an appeal is thaf thereafter no result can flow from that judgment which would place the parties in a position different from that (10

â\200\234which they enjoyed iï¬\201mediately before the judgrment was given.

Basing himself on that principle Iir, de Villiers contended that

the noting of the appeal in the instant case deprived the Full Bench's judgment of any effect which would bring about any change

in the status gquo ante. Developing this ergument Mr. de Villiers

contended that Proclamation R 121/1982 had full force and effect

as a lawv made by the State President and that, therefore, the

˜ Applicants neither had a clear right nor even a prima facie case â\200\230which would entitle them to the interdict which they seek and he

gubmitted further that this Court had no power to grant any (e

relief as to do so would heve the Ã©ffect of nullifying the

–

proclamation.
" The argument assumes that the noting of an appeel not only suspends the operation and execution of a judgment and that the

status guo ante must be restiored but that such status guo ante

– must have an gbiding validity which renders the Court powerless to intervene.

In our judgment this argument contains a fundamental fallacy. The courts are not powerless to intervene even though an appeal has bYeen noted. The argjument overlooks a settled principle of (30 law thit the court hus a diuvcrction, bOt-Wi")}llAit.â\200\231.llldi.â\200\231l{', the noti ng

MR

e Judgzent
ol & erp3aly .13 order tnut the. juldmient rey be put intoâ\200\235 execution;

See for exzmple Care Lew Society Vv Solcmon & Jackscn 1978(3) S.A.L.I

452 et 460 wrere Kanacnmeyer, J., ’said the following :
"Tne effect of noting this Ã©pheal is to stay the
operation of our order appealed against uvnless
we now orÃ©er otherwise. The Applicant accepts
that the onus is upon it to persuade us to do so
and craves for such relief in the alternative to
ite first ground for relief which I have already :
menticned." , ’ (10

The learned judge then refers to a judgment in the’Appellate

Division in South Cape Corporation (Pty.) Limited v Engineering

Services (Pty.) Limited 1977(3) S.A. 534 A at 544-545 where the

Court accepts that such a discretion exists and indicates the
circumstances to which the court will normelly have regard in
deciding whether or not to exercise such discretion. The existenc

of such discretion is, in our view, fetal to Mr. de Villiers’

argunent on the law.

The next question then is whether such discretion should be
exercised in favour of the Applicants. We accept that the onus (20
restc upon the Applicants, to satisfy the Court that it would be
Just and equitable in all the circurstances to grant the applicatin:
In considering this question we shall assume in favour of the
Respondents that they have a reasonable prospect of success on
appeal against the decision of the Full Bench of this Court and
that there is no question of such an appeal being.either frivolous
or vexatious. 1In considering this gquestion, we have taken into
account, to the best of our ability, all the arguments on the
facts which NMr. Buys advanced on behalf of the Respondents.

We hzve come to the conclvsion that the potentiality Ã©f Larm or (30

prejudice to the Applicanta being sulfcered if tue epplication were

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to. b2 refuced alk Juie eapdul cismisceq, would be.gredter than
the_poten:iality of suqh aar or prejuaice to the Resrondents if
the application ware to bÃ© granfed and the anpeal allowed. And
in particular we have ccie to the conclusion tha%t the granting of
the epplicction is in the best interests of all the people
.concefne&. Tre main considerations which have moved us to this
corclusion may be stated shortly as follows : â\200\230
1) "It is common cause that until a very short while ego the
Kwa-Zulu Government was in uninterrupted control of the area in
question for a considerable period of time,.namely, ten years. (10
2) Ã©hefprobabilities exerging from the affidavits as a whole show
thÃ©t such control was exercised in a proper menner and that during
such perioÃ© the area was_calm and not in a state of tension or
confusion.
"3) There is now a great deal of tension and confusicn in the area.
Trhe danger exists that such tension might lead to violence, if not
bloodshed., :
4) The proï¬\201abilities_on these affidavits show that the likelihood
is that.such tension will be significantly reduced if the status
guo ante is restored. The effect of the â\200\230order which we propcse (20
to grant is to restore the position to what it was before the
grant of the first proclamation: In reaching this conclusion we hax
not overlooked the number of points which have been made on behelf
of the Respondent, including the one that the granting of this
order will delay arrangements which the Government might wish to
makxe with the Government of Swezilend but such-arguments must,; in
our fiew, yield to the factors pointing the other way and to which
Y 7 bave referred.

The final question is whethef we should grunt the order which
wes wltimately sought. In this regard Nr. Shaw sought an orier (3C

which will bo referrecd to 2t the cnd. of this judgment. That order

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in effect secka not only gn interdict but alsos-a Ã©irection thet
the operction of the orÃ©er of the Full Senchk will not be suspended

notwithstending the noiing of an appeasl. Kr. de Villiers objected

o â\200\230this. His objectiog w8 not simply &n objection to the form
of the ordexr tui en ohjectior of eubstance. In this regard he
ieferrea'to Rule 6(1) of the Lppellate Division Rules which
provides -
â\200\234If the judgrent appealed from is carried into
execution by direction of the court eppealed from,

the RespondenÂ® shall, before such execution, enter (1C

.˜ into good and sufficient security de restituendo

end for the appellants' costs of appeal".
He submitted that we could not grant an order unless and until
we were setisfied that the Applicants could enter into good and

sufficient security de restituendo and he pointed to the fact thet

that question had not been dealt with at all by the Applicant

and that the Respondents had'therefgre not had any opportunity of
canvessing it. This argument assumes that the rule of the Appellatc
Division applies to this kind of case. In our view it doee not
because tkhe judgment which is the subjecs matter of these pro- (20
ceedings does not deal with a money claim or any otker claim

@pich could result in enything having 4o be restored and there ire,
accordingly, no scope for the introduction of security de

restituendo (See Roberts v Chairmen, Local Road Transportation

Board, Cape Town, and Another 1979(4) S.A.L.R. 604 at 609B-C) and

in this regard it is of interest to refer to the remarks of

Millin, J., in Mavromati v Union Exploration Import (Pty.) Limited

1947(1) S.A.L.R. 604 at 608 where the learned judge said this :

"Security de restitucndo in this rule admittedly means

the same thing cc security de restituernde in provisional(2C

scntence. It ic gecurity, not to mioke good to the debtor

â\200\231

i Gy T VSRR

ary loces he may svffer cs a result of his goods

being â\202¬0ld in execution, but to restore itc the

debtor with interest the roney the creditor

actually receives in satisfaction of the judgment.

If it is the amount the creditor receives which

˜has {0 be lookxed to, Rule 7(1) cannot contemplate,

ong would think the cxaction of security before this

amount becomes capable of assessment.â\200\235
I would like to return to what I said at the beginning of this judgment, namrely, that the very short reasons which we have (1C givÃ©ï¬\201â\200\230for the conclusion of this Couft_are necessarily so, both because of the urgency of the situation as well as the lateness of the hour but we are most indebtes to all Counsel for their hglpful erguments,

We’grant the following order:
â\200\2301) It is directed that the operation of paragraph 1 of the order granted by this Court on the 30th June 1982 in Case No. 3978/82 (which reads as follows "That it be and is hereby declared that Proclamation No. R 121/1582 contaired in Government Gazette Ko. 8297 dated the 28th June 1982 is null and void and of no force (20 end effect) is not suspended by the noting of an appeal against tpat order.
2) An order is granted interdicting and restraining the Second Respondent from
(i) assuming thÃ© administration of, or

(i) interfering with the First Applicant, that is the Goverrment of Kwa-Zulu, in the administration of the areas referred to in Section 25(1) of the Black Administration Act 1927 (Act 38 of 1927) read with Section 21(1) of the Development Trust and Land Act 1936 (Act 18 of 1936) which form part of the arsa of a (2c

trival or community authority established in terms of the

provigsions/...

e e Juigrent
provisiocns of tne Elack Authorities Act 1951 (Act â\202¬8 of 1351)
in the dictricet of Ingvavumas :
3) Th t the said interdict e=hall operate tc interdict theASecond
Respondent or any of the Respondents from acting as there set
forth eith2r themselves or through their servants or agents and
'furtherto interdict Third, Fourth and Fifth Respondents from
acting as there set forth. -
4) â\200\230It is directed that the operation of the interdict granted
in paragraphs 2 and 3 hereof shall not be suspended by the noting
of an appeal eagainst this order. (10
5) iï¬\201e_Respondents are ordered jointly and severally to pay the
costs of the First end Second Applicants in the present aepplication.
including the costs resulting from the employment of each of the

Applicants of two Counsel.

/â\200\2354/:/â\200\2341Â«_\

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JUDGMENT ON APPLICATION FCR LSAVE TO APPEAL

LEON, J.: This is an application for leave to appeal to the

Appellate Division against a judgment of the Full Court which has

just been delivered. The application is.opposed by Counsel on (20

behalf of the Respondents.

; v In our view there are no reasonable prospects of success

that ano%her court will take a view different from the view which

this Court took either on the law or with regard to the exercise

of our discretioï¬\201 and in any event, we are of the opinion that

the balance of convenience is against the granting of this

application. We say this because the order which we have granted

is not a final order but an interlocutory order in effect pending

the final decision by the Appellate Division on the judgment of

the f#ull Bench of this division. (3Â¢
In thece circumatance2 it seems to us to be ï¬\201nlikcly that V

theloi.

. Leave

˜the Appellinte Division wculd hear an appeal from this decision beforeâ\200\230hcaring an gppeal in the main application. Ir these circumstunces it is our view, firstly, that there are no recsonable procspects of success on appeal and,.secondly, that the balance of

copvenience is against granting the application.

In the result, it is our view that the application for leave

to eppeel must be refused and it is ordered accordingly.

th/414;˜;˜__,
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APEEAAANCES:

FCE THE APPLICANT Â¢ lR. D.J. SHAW (.C. and Mit. M. PILLEMER.
FOR THE RESPONDENTS MR. I.W.B. DE VILLIERS, S.C., MR. P. BUYS S.C.
MR. S.B. MANN and MR. S.J. MYNHARDT.