

DISPUTE RESOLUTION ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

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How 'appealing' is an automatic right of appeal to the *next highest court*?

An appeal involves an application to a higher court for the reversal of a decision of a lower court. For a court's decision to be suspended pending the outcome of an automatic appeal, it is important to know which court is competent to hear the appeal and overrule the current decision of the court, and which would thereby be known as the *next highest court*.



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The court in *City of Tshwane Metropolitan Municipality v Vresthena (Pty) Ltd and Others* (1124/2022) [2023] ZASCA 104 (22 June 2023) has recently provided us with some clarity on the interpretation of the "next highest court" mentioned in section 18(4) of the Superior Courts Act 10 of 2013 (Act), applicable to automatic appeals. This is a welcome clarification, as the last court decision concerning this subject, in *Ntlemeza v Helen Suzman Foundation* [2017] ZASCA 93, held that the meaning of the term "next highest court" was not entirely clear.

The "next highest court" in terms of legislation

Prior to the Act, the common law practice in our courts was that the execution of a judgment was automatically suspended upon an appeal. Pending the appeal, the result was that the judgment could not be carried out and no effect could be given thereto, except with the leave of the court which granted the judgment.

Now, section 18 of the Act provides for the suspension of a decision pending an appeal.

- Section 18(1) to (3) of the Act generally suspends the operation and execution of a decision that is the subject of an application for leave to appeal or of an appeal, pending the decision of the application or appeal. However, this does not apply to interlocutory orders that do not have the effect of a final judgment. In these cases, the operation and execution of the decision is not suspended **unless the court orders otherwise.** A court may only order otherwise if the party who applied to the court to order otherwise 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.



**Dispute Resolution
2023 Rankings**

**Dispute Resolution practice is ranked
in Tier 1.**

Leading Individuals:
Tim Fletcher

Recommended Lawyers:
Jackwell Feris | Anja Hofmeyr | Corné Lewis
Rishaban Moodley | Mongezi Mpahlwa
Kgosi Nkaiseng Lucinde Rhodie
Clive Rumsey | Tim Smit

Next Generation Lawyers:
Kgosi Nkaiseng | Tim Smit

How 'appealing' is an automatic right of appeal to the next highest court?

CONTINUED

- Section 18(4) then states that **if the court orders otherwise**:
 - the court must immediately record its reasons for doing so;
 - **the aggrieved party has an automatic right of appeal to the next highest court**;
 - the court hearing such an appeal must deal with it as a matter of extreme urgency; and
 - the order will be automatically suspended, pending the outcome of the appeal.

Section 18(4)(ii) of the Act thus provides for an automatic right of appeal to the next highest court against a section 18(3) order. It is thus important that the term "*next highest court*" be clear, and that the uncertainty as per the judgment in *Ntlemeza* be clarified.

Summary of the facts

The first respondent, Vresthena Proprietary Limited (Vresthena), owns six units in the Zambesi Retail Park shopping centre, whereby various lessees all share a single electricity point, which is provided by the appellant, the City of Tshwane Metropolitan Municipality (Municipality). After the tenants and occupiers failed to pay for their electricity and other services used, the Municipality issued disconnection notices. Vresthena filed an urgent application requesting the court to compel the Municipality to accept and review its application for a separate electricity connection for the tenants, and sought an order to restore its electricity and water supply.

The Gauteng Division of the High Court in Pretoria (the court *a quo*) granted an interim order on an urgent basis, ordering the Municipality to restore electricity and water supply to

the property that it turned off, within 14 days of the order. The Municipality thereafter delivered an application for leave to appeal. Vresthena then sought a declaratory order in terms of section 18(3), stating that the order issued by the court *a quo* should not be suspended while the Municipality's application for leave to appeal was being considered. The court *a quo* granted the Municipality leave to appeal the judgment, and ordered that the order to restore the electricity and water supply be put into effect and carried out while the appeal decision was pending.

The Municipality proceeded to exercise its automatic right of appeal under section 18(4) by filing an appeal to the full bench of the High Court against the execution order. The High Court rejected the section 18(4) appeal and issued an order allowing the main order to be implemented while the appeal decision was pending.

How 'appealing' is an automatic right of appeal to the *next highest court*?

CONTINUED

The legal question considers whether section 18(4)(ii) of the Act allows for a second automatic right to appeal to the "*next highest court*" under section 18(4), against an order granted under section 18(3) of the Act, with further appeals being possible.

The Municipality asserted that the phrase "*next highest court*" in section 18(4) of the Act should be interpreted in a less restrictive manner, to include more than one court of appeal. It argued that if it were interpreted more restrictively, injustices would occur, and that multiple appeals are necessary to ensure fairness.

Vresthena, on the other hand, contended that section 18(4) allows for only one appeal to the court immediately above the lower court.

The court's interpretation of the "*next highest court*"

The court agreed with the ruling in *Ntlemeza* that only one appeal to the next highest court is permissible and held that that section 18(4) of the Act specifically allows for a single automatic right of appeal, indicating that multiple appeals are not permitted under this section.

The court emphasised that words in legislation must be understood in their normal sense, otherwise it would lead to an "*absurd result*". The court further elaborated on this and held that statutes should be interpreted purposively, properly contextualised and construed in line with the Constitution.

The court continued by explaining that the language of section 18(4)(ii) should be interpreted in its normal sense, and emphasised the well-known ruling of *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA), where it was held that "*the inevitable point of departure is the language of the provision itself*". The court found that the provision in plain language states that a party who is aggrieved has an automatic right of appeal to the "*next highest court*" and that the use of the words "*an*" and "*court*" implies a singular meaning, indicating a restriction on further appeals. The court indicated that when considering the language, context, and purpose of the provision, the clear wording did not support a broader interpretation to sustain the Municipality's interpretation.

How 'appealing' is an automatic right of appeal to the next highest court?

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Court ruling

The court stated that section 18(4)(ii) changes the general appeal process, as such orders (interlocutory in nature) are generally not appealable and leave to appeal must first be obtained before an appeal can be lodged. Section 18(4) establishes a mechanism for a single appeal that will be concluded in an expedited process, as evidenced by the absence of provisions for appealing the decision of the next highest court. In essence, the decision made by the "next highest court" in the appeal process is final and cannot be appealed any further.

The court ultimately agreed with Vresthena and held that the application delivered by the Municipality was irregular and void, and that no proper appeal was served. This judgment makes it clear that an appellant does not have a second right to an automatic appeal to approach the next highest court in terms of section 18(4) where the full court has **already heard an appeal**.

Lucinde Rhoodie, Kara Meiring, Luke Kleinsmidt and Caitlin Freddy (Vacation Student)



Cliffe Dekker Hofmeyr

2023 RESULTS

Chambers Global 2022 - 2023 ranked our Dispute Resolution practice in **Band 2: Dispute Resolution**.

Chambers Global 2018–2023 ranked us in **Band 2** for Restructuring/Insolvency.

Tim Fletcher ranked by **Chambers Global 2022 - 2023** in **Band 2: Dispute Resolution**.

Clive Rumsey ranked by **Chambers Global 2019 - 2023** in **Band 4: Dispute Resolution**.

Tobie Jordaan ranked by **Chambers Global 2022 - 2023** in **Band 4: Restructuring/Insolvency**.

Lucinde Rhoodie ranked by **Chambers Global 2023** in **Band 4: Dispute Resolution**.

Jackwell Feris ranked by **Chambers Global 2023** as an upcoming dispute resolution lawyer.

Kylene Weyers ranked by **Chambers Global 2023** as an upcoming restructuring/insolvency lawyer.

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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