IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION,

JOHANNESBURG

CASE NO: 22436/2014

DATE: 2014.09.10

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED. YES
DATE **SIGNATURE**

10/09/2014 (revised 21/10/2014)

In the matter between

SHANIKE INVESTMENT Applicant

And

NDIMA S & OTHERS Respondent

JUDGMENT – LEAVE TO APPEAL

Ex tempore

SPILG J:

1. This is an application for leave to appeal an order I granted on 21 August 2014. My recollection is that I would have given the reasons on the 26th August 2014. An application for leave to appeal

was then brought. Unfortunately due to administrative processes this was not brought to the court's attention until my sister Weiner J requested the file because of an urgent application that was brought before her by the original respondents. It was then that I became aware of an application for leave to appeal the decision.

2. This court also secured that at least the *ex tempore* judgment could be transcribed. Unfortunately there were many typographical errors. Nonetheless it was handed down to the parties just before I heard the application for leave to appeal. It is effectively a draft, the bulk of which I went through after receiving it from the transcribers. I marked it as a draft. The substance will not change. There may be one or two other errors and a final version should be ready soon.

I proceed with the application for leave to appeal.

3. The order I granted in respect of which leave to appeal is sought comprises a number of parts.

4. The first part was that the matter be heard as one of urgency. An earlier court had in fact ruled that certain of the relief was urgent and interim relief was granted.

5. Interim relief was granted in terms of, what is now, the second order. The second order relates to interdicting the affected

respondents, being the first through to eighth respondents but excluding the second and sixth respondents.

6. Paragraph 2.1 of the order is of historic moment only because it was to interdict and restrain the blockading of the entrance to the complex on 1 August 2014. That date has passed and the order is of academic interest only. I accordingly do not see any basis upon which an appeal court would be seized of this matter, unless there was a costs issue.

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7. Moreover the only issue of concern is whether directly or indirectly the identified respondents should have been the subject of the interdict. For reasons given in the judgment I do not believe that another court might come to a different conclusion or as now required that there are reasonable prospects of success.

In regard to paragraphs 2.2, 2.3 and 3; they all relate to ensuring that no unlawful activity occurs. The orders in paragraphs 2.22 and 2.3 include and are directed at the respondents. Again I believe
20 that enough facts were placed before the court. More particularly, although there were denials by each of the respondents, a letter was written on their behalf by the 7th respondent in which the very acts that are now denying were regarded as justified; and in particular acts of violence because of what was said to be provocation. So too, the rent boycott was regarded as justified.

8. The failure to file papers on time was never explained. In my view

it cannot now be used as a basis on which an appeal can be founded: The rules are clear and every opportunity was made available for the respondents in the main case to at least have set out the very basics of any other defences they may have wished to raise to the allegations made. They did not. They sought to justify their conduct by reference to the entitlement to undertake a rent boycott based on a publication which was produced to the court. They also justified the basis of their conduct on a claim that there were issues still extant, but it was readily conceded that there were no unresolved issues in relation to the complex itself.

9. In so far as paragraph 2.3 is concerned that does not affect the respondents at all. It simply ensures that nobody would inhibit any tenant or official or agent from being prevented from entering and exiting the property. Once again while that may be of final effect I do not believe that another court might come to a different conclusion or that there are reasonable prospects of success.

10. Paragraph 4 is simply the means by which the orders can be enforced if the sheriff finds that he or she does not have the resources to ensure compliance; it is to entitle or enable them to approach either the JMPD or the police for assistance.

11. It is really paragraphs 5 and 6 which directly concern the first to sixth respondents, with the exclusion of the second respondent (in respect of whom there appears to have been some form of

settlement).

12. Paragraphs 5 and 6 of the order are clear and unambiguous. And section 5(1) of PIE is equally clear and unambiguous.

The order I made identifies who is to be evicted and those are the individual tenants who were identified and who the court found, on their own say-so, were implicated, or encouraged or had no difficulty in directly associating themselves with the acts of violence, or the threats of violence.

13. The order is effectively that the individual respondents are evicted from their respective units –

"Pending the outcome of proceedings for a final order evicting each of the said respondents which proceedings would be instituted by way of application under separate case number with leave to apply to court for a referral to evidence or trial should the matter not be capable of being determined by ordinary motion proceedings and that the first, third, fourth and fifth respondents are required to vacate by no later than Sunday 31 August 2014, failing which the sheriff is directed to secure the evictions by no later than 1 September 2014."

14. There has been no suggestion that these paragraphs do not comply with the provisions of section 5(1). It is argued that while couched in interim form they are of final affect. The Act specifically

enables this form of relief to be granted and identifies it as being of an interim nature and not of final effect.

This provision is to be read together with section 4(1) of PIE which provides for continued habitation by occupiers who fall within the definition to carry on occupying despite there being no other lawful basis to do so and our law has been well developed as to who does and who does not qualify. In the present case none of the respondents claim to have qualified for section 4(1) protection; quite the contrary.

15. The net effect is that section 5(1) must be construed by reference to section 4. Section 4 effectively balances the constitutional provisions relating to housing with a landowner's right to utilise its own property, whether for itself or for commercial or other reasons.

16. Section 5(1) therefore, within the context of PIE as a whole, is intended to alleviate a situation which might otherwise become intolerable. It does so on the basis of affording interim relief, which in its own terms is not of final effect. It is not an order having final effect nor was it intended to be. Section 5(1) can only be implemented and its purpose can only be fulfilled if it is understood, in its own terms, as not subject to appeal. Otherwise the very purpose of section 5(1) would be undone.

17. An appeal to the SCA, or thereafter pursuing constitutional points on its specific application in a case to the Constitutional Court, would undermine its very purpose. The provisions of section 5(1) place a very onerous and heavy responsibility on an applicant or landowner to satisfy a court that its provisions have been trigged, and have been trigged in respect of each individual occupier who the owner identifies.

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18. I am accordingly satisfied that paragraphs 5 and 6 are not appealable because they are not of final effect and section 5(1) is not intended to be read in any other way.

19. I therefore hold that the application for leave to appeal in relation to orders 5 and 6 is not competent in that the orders are interim in effect. Paragraphs 1, 2, 3 and 4 of the order are either academic or there is no reasonable prospect of success on appeal.

20 20. Finally it is noted that the applicants abandoned the costs order in para 7 and therefore any residual element that might be the subject matter of an appeal based on, or which hinges on the costs order, falls away.

21. Accordingly the application for leave to appeal is refused.

There will be no order as to costs.

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Spilg J

DATES OF HEARING:	10 September 2014
DATE OF JUDGMENT	10 September 2014
DATE OF RECEIPT OF DRAFT:	20 October 2014
REVISION:	21 October 2014

LEGAL REPRESENTATIVES:

FOR APPLICANTS:	Adv M Rip SC
	Adv A Pullinger
	Vermaak & Partners Inc
FOR RESPONDENTS:	Adv G Shumba
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