REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2021/55306

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

04 March 2022 **ROLAND SUTHERLAND DJP**

In the matter between:-

TUHF URBAN FINANCE (RF) LTD	**APPLICANT**
and	
THE HOUSE OF TANDOOR	**1ST RESPONDENT**
ERIC MTUYEDWA MPOBOLA	**2ND RESPONDENT**
MAHLOKO SIMON MOKHEMA	**3RD RESPONDENT**
GLORIA DINAR MOKEMA	**4TH RESPONDENT**
BUYISILE MRADU	**5TH RESPONDENT**

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JUDGMENT

SUTHERLAND DJP:

Introduction and background

[1] This matter consists of two applications relating to an order granted by Monama J in the urgent motion court on 7 December 2021 in favour of the applicant, TUHF Urban Finance (RF) Ltd (the bank), against the respondents, who are The House of Tandoor CC (Tandoor) and four individuals who are members of Tandoor and sureties for its indebtedness to the bank. The respondents seek leave to appeal. The bank seeks an order in terms of section 18 of the Superior Courts Act 10 of 2013, to put the order of Monama J into operation pending the outcome of the appeal process. Monama J granted the order only and was to give reasons later. Lamentably, before he could so, he passed away. Under those circumstances these two applications came before me.

[2] The matter that came before Monama J was an application for an interdict. The background must be sketched first to give coherence to the account of the litigation. The bank and Tandoor concluded an agreement in 2010 in terms of which money was lent to Tandoor to enable it to purchase a building situated at erf 44 Bellevue, Johannesburg. The sole business of Tandoor is

the letting of the building which consists of shops and flats. After some years, the bank invoked clause 14 of the bond agreement which entitled it, upon default of paying what was due, to intercept the revenue being derived from the letting of the building. Between February 2020 and August 2021, an agent of the bank duly collected the rentals as they fell due without demur. From August 2021 onwards, the four individual respondents have been taking the rentals and the revenue to which the bank claims an entitlement was diverted. Demands to cease were made, and on two occasions the attorney then acting for Tandoor, gave written undertakings that this conduct would cease. However, the conduct persisted. This is the conduct which precipitated the urgent application for an interdict which was granted by Monama J.

[3] However, in parallel with these events, the bank had had already in 2020, instituted proceedings under case number 2020/42518. This was a claim to obtain payment of arrear sums due, to foreclose on the bond and seek leave to execute on the property. This matter was heard on 19 November 2021by Tupaatlase AJ. Judgment was reserved and at the date of this hearing had not yet been delivered. The urgent application for the interdict was launched on 23 November 2021, three days after that hearing.

The application for leave to appeal

[4] An appeal lies against an order, not the reasons given for the decision. However, in a case where no reasons can, *ex post facto* to an order that was given, be given, such as in this case, an aggrieved litigant has nothing with which to engage in order to critique the order. This did not inhibit the respondents in this case, who filed a lengthy notice of application to appeal

without the benefit of reasons. I am of the view that it is inappropriate for a judge in the position in which I have become seized of the matter, to interrogate the order and the supposed reasons that might have been offered to support it. Such an exercise treads onto terrain that belongs exclusively to a court of appeal.

[5] In my view, the appropriate course of action in a case where no judgment is or can be forthcoming to substantiate the order given, is to grant leave to appeal. There was a philosophical acquiescence in this approach by counsel for the bank, which in the circumstances was appropriate and honourable. Accordingly, leave to appeal is granted. Plainly the nature of the controversy marks it as appropriate to be heard by a Full court of the Division.

The section 18 application

[6] The test is now well established. In *University of the Free state Afriforum 2018 (3) SA 428 (SCA)* Burton Fourie AJA summed up the approach to be applied:

> "[9] In embarking upon an analysis of the requirements of s 18, it is firstly necessary to consider whether, and, if so, to what extent, the legislature has interfered with the common-law principles articulated in South Cape Corporation, and the now repealed Uniform Rule 49(11). What is immediately discernible upon perusing s 18(1) and (3) is that the legislature has proceeded from the well-established premise of the common law that the granting of relief of this nature constitutes an extraordinary deviation from the norm that, pending an appeal, a judgment and its attendant orders are suspended. Section 18(1) thus states that an order implementing a judgment pending appeal shall only be granted 'under exceptional circumstances'. The exceptionality of an order to this effect is underscored by s 18(4), which provides that a court granting the order must immediately record its reasons; that the aggrieved party has an automatic right of appeal; that the appeal must be dealt with as a matter of extreme urgency; and that pending the outcome of the appeal the order is automatically suspended.

[10] It is further apparent that the requirements introduced by s 18(1) and (3) are more onerous than those of the common law. Apart from the requirement of 'exceptional circumstances' in s 18(1), s 18(3) requires the applicant 'in addition' to prove on a balance of probabilities that he or she 'will' suffer irreparable harm if the order is not made, and that the other party 'will not' suffer irreparable harm if the order is made. The application of rule 49(11) required a weighing-up of the potentiality of irreparable harm or prejudice being sustained by the respective parties and, where there was a potentiality of harm or prejudice to both of the parties, a weighing-up of the balance of hardship or convenience, as the case may be, was required. Section 18(3), however, has introduced a higher threshold, namely proof on a balance of probabilities that the applicant will suffer irreparable harm if the order is not granted, and conversely that the respondent will not if the order is granted.

[11] In Incubeta Holdings supra [8] para 24 Sutherland J aptly commented as follows on s 18(3):

'A hierarchy of entitlement has been created, absent from the South Cape [Corporation] test. Two distinct findings of fact must now be made, rather than a weighing-up to discern a preponderance of equities.'

DE van Loggerenberg & E Bertelsmann Erasmus: Superior Court Practice vol I 2 ed (service issue 2) correctly conclude that s 18(3) 'is a novel provision and places a heavy onus on the applicant'. On a proper construction of s 18, it is clear that it does not merely purport to codify the common-law practice, but rather to introduce more onerous requirements. As submitted on behalf of the UFS, had the legislature intended the section to merely codify the common law, it would have followed the authoritative formulation by Corbett JA in South Cape Corporation.

[12] The concept of 'exceptional circumstances' introduced by s 18(1) was considered by Mpati P in Avnit v First Rand Bank Ltd [2014] ZASCA 132, in the context of s 17(2)(f) of the Act, which provides that in 'exceptional circumstances' the President of this court may refer a decision on an application for leave to appeal to the court for reconsideration. Mpati P held that, upon a proper construction of s 17(2)(f), the President will need to be satisfied that the circumstances are 'truly exceptional' before referring a matter for reconsideration.

[13] Whether or not 'exceptional circumstances' for the purposes of s 18(1) are present must necessarily depend on the peculiar facts of each case. In Incubeta Holdings supra [8] para 22 Sutherland J put it as follows:

'Necessarily, in my view, exceptionality must be fact-specific. The circumstances which are or may be exceptional must be derived from the actual predicaments in which the given litigants find themselves.'

I agree. Furthermore, I think, in evaluating the circumstances relied upon by an applicant, a court should bear in mind that what is sought is an extraordinary deviation from the norm, which, in turn, requires the existence of truly exceptional circumstances to justify the deviation.

[14] A question that arises in the context of an application under s 18 is whether the prospects of success in the pending appeal should play a role in this analysis. In Incubeta Holdings Sutherland J was of the view that the prospects of success in the appeal played no role at all. In Liviero Wilge Joint Venture supra [8] [para 30] Satchwell J, Moshidi J concurring, was of the same view. However, in Justice Alliance supra [8] para 27 Binns-

> Ward J (Fortuin and Boqwana JJ concurring) was of a different view, namely that the prospects of success in the appeal remain a relevant factor and therefore —
>
> 'the less sanguine a court seized of an application in terms of s 18(3) is about the prospects of the judgment at first instance being upheld on appeal, the less inclined it will be to grant the exceptional remedy of execution of that judgment pending the appeal. The same quite obviously applies in respect of a court dealing with an appeal against an order granted in terms of s 18(3).'
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> [15] I am in agreement with the approach of Binns-Ward J. In fact, Justice Alliance serves as a prime example why the prospects of success in the appeal are relevant in deciding whether or not to grant the exceptional relief. Binns-Ward J concluded that the prospects of success on appeal were so poor that they ought to have precluded a finding of a sufficient degree of exceptionality to justify an order in terms of s 18 of the Act. This conclusion was subsequently proven to be justified when this court upheld the main appeal in Justice Alliance. However, in the present appeal, the appeal record in the review application was not before us. The prospects of success shall therefore not feature in our consideration whether or not the order of the Full Court should be upheld."

[7] A peculiarity of this particular application is that the requirement that the prospects of success are a relevant factor presents a conundrum. In the absence of a judgment how might that assessment be made? When a pragmatic order to grant leave is a *fait accompli* can the prospects be measured without a *de facto* re-hearing of the entire initial matter? In *Afriforum* where the court did not have before the necessary material to consider prospects of success, it candidly acknowledged that the prospects of success played no role in the decision. Plainly, it must follow that although a *relevant* factor to consider, prospects of success is not a *necessary* factor.

The merits

[8] The enquiry into exceptional circumstances is the primary exercise and, in that context, the factual question of whether proof has been adduced of irreparable harm to one or other party can be determined.

[9] The argument was advanced on the part of the respondents that the predicament in which the bank finds itself is not exceptional. As a professional creditor and lender of money, the risk of bad debt is an occupational hazzard. Thus, runs the argument, if it cannot receive the current rental revenue stream, it does not face insolvency. It was also suggested in an affidavit filed on the morning of the hearing (and thus with no opportunity by the bank to reply) that the bank is insured against such a loss of rental revenue, a claim baldly made and, so I was told from the bar by counsel for the respondents, was alleged on the basis that, from a reading of the accounts of the bank which reflect a premium paid monthly to Bryte Insurance, such cover exists. This was an opportunistic allegation. The entry in the accounts that refers to Bryte Insurance does no more than record that there is insurance on the property, not cover for a failure to recover the rental revenue.

[10] The foundation for irreparable harm to the bank, advanced by it, is more nuanced than merely that of a creditor seeking to enforce payment, as the respondents would have it. The essence of its case is that, based on a contractual right to the revenue from the rentals, what revenue they do not succeed in collecting is totally irrecoverable later on, because the four individual respondents, who are alleged to be pocketing the money, are men of straw. The impecuniosity of these respondents is backed up by, inter alia, the hearsay evidence from a tenant who says he was told to pay over the rental to a respondent to fund the litigation, from which an inference could be drawn that they need to scratch for their pennies. As to other surrounding circumstances pertinent to this point, the respondents' papers are bereft of an allegation that they have a revenue stream other the rentals from Erf 44, or that they have the

means to pay over the money taken, if their appeal fails. Moreover, the City's accounts reflect that no payments of any current amounts due have been paid for a very long time, an objective indicator of inability to meet creditors entitlements.

[11] It is plain, therefore, that the proposition that no revenue taken by the respondents is capable of recovery from them in due course is well established. Does the fact that the respondents are indeed men of straw, constitute a valid foundation for the bank's case that it shall suffer irreparable harm, in the sense contemplated by section 18?

[12] The right of the bank that is being thwarted is the right to collect the rentals. This is a part of its security for the loan, along with the mortgage bond. Conceptually, the right to collect rentals could be understood as a form of security, in similar mould to the function performed by a notarial bond over goods. Where a notarial bind holder seeks to perfect its security by attachment, the bank, in this case, appropriates the revenue from the lessees. A bondholder can forfeit the benefit of the security if it dallies to perfect the bond where the debtor dissipates or misappropriates the goods. In similar vein, the bank's entitlement to seize the rental revenue is fraught with fragility.

[13] However, the correct question is pose is whether there is irreparable harm, not to specific benefits that flow from an exercise of the specific thwarted right, but, rather, to the person of the litigant alleging the irreparable harm. Not all litigants are equal for the purposes of this exercise; more especially when the harm is purely financial.

[14] A significant dimension of the conspectus of facts that require scrutiny, in this case, is whether the aggrieved litigant can overcome the harm being suffered by the stay of the order in its favour. If it can, the conclusion cannot be reached that the harm is irreparable. In my view this is such a case.

[15] I have already referred to the parallel proceedings by the bank to recover the debt. If the consequences of being prevented from receiving the rental revenue, pending the outcome of an order sought in the other proceedings, is considered, it does not follow that, ultimately, it cannot recover its investment, wholly or mainly, through execution on the mortgaged property. This remains so even if the appeal process is protracted.

[16] The enquiry need, therefore, go no further. The circumstances are not exceptional. It shall have to wait for what is due to it. It may not recover 100% of what is due. The bank shall not suffer irreparable harm if the ordinary rule applies to stay the order pending the appeal process. In due course it will obtain relief.

The Orders

[1] In the application for leave to appeal:

(i) leave is granted to the Full Court of the Gauteng Division, Johannesburg.

(ii) Costs shall be costs in the appeal.

[2] In the application to put the order of Monama J into operation pending the appeal process:

(i) The application is dismissed.

(ii) Costs shall be costs in the appeal.

ROLAND SUTHERLAND
DEPUTY JUDGE PRESIDENT
GAUTENG LDIVISION, JOHANNESBURG

Heard: 3 March 2022.
Judgment: 4 March 2022

For The Applicant:
Adv M Cooke,
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For Respondents:
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