REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

APPEAL CASE NO: A5030/2022
CASE NUMBER: 11752/2020
DATE OF APPEAL: 27 July 2022

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

2022/08/04
DATE

SIGNATURE

In the matters between:

JAI HIND EMCC CC T/A EMMERENTIA CONVENIENCE CENTRE — **Appellant**

and

ENGEN PETROLEUM LIMITED SOUTH AFRICA — **Respondent**

In re:

ENGEN PETROLEUM LIMITED SOUTH AFRICA — **Applicant**

and

JAI HIND EMCC CC T/A EMMERENTIA CONVENIENCE CENTRE — **Respondent**

This judgment has been delivered by being uploaded to the caselines profile on 4 August 2022 at 10h00 and communicated to the parties by email.

JUDGMENT

Sutherland DJP (with whom Adams J and Thompson AJ concur):

Introduction

[1] This case is about an appeal against an order in terms of section 18(3) of the Superior Courts Act 10 of 2013 (SC act) to put into operation an order of court pending a potential appeal.[1] The following issues arise:

a. Whether or not a proper case has been made out to order the putting into operation of the initial order.

b. Whether the appeal is moot, and if so, what are the implications.[2]

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[1] Section 18:
Suspension of decision pending appeal
(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.
(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition 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.
(4) If a court orders otherwise, as contemplated in subsection (1)-
(i) the court must immediately record its reasons for doing so;
(ii) the aggrieved party has an automatic right of appeal to the next highest court;
(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
(iv) such order will be automatically suspended, pending the outcome of such appeal.
(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.

[2] At the time the appeal was heard, the Supreme Court of Appeal (SCA) had already, on 30 June 2022, refused leave to appeal. However, an application in terms of section 17(2)(f) of the SC act had thereafter been filed. Such an application is to the President of the SCA to cause a reconsideration of the refusal of leave to appeal.

c. What is the appropriate procedure to give effect to the injunction in section 18(4) (iii) that an appeal in terms of section 18(4) be heard 'as a matter of extreme urgency', more especially in relation to the applicability of Rule 49 (6) – (10) in relation to section 18(4) appeals? [3]

The Section 17(2)(f) procedure is however part of the appeal process. See: *State v Liesching & Others 2019 (4) SA 219 (CC)at para [60]); Cloete & another v S and Similar application 2019(4) SA 268 (CC) at para [33] and [64]*

[3] The relevant portions of Rule 49 of the Uniform Rules of Court read thus:

(6)*(a)* Within sixty days after delivery of a notice of appeal, an appellant shall make written application to the registrar of the division where the appeal is to be heard for a date for the hearing of such appeal and shall at the same time furnish him with his full residential address and the name and address of every other party to the appeal and if the appellant fails to do so a respondent may within ten days after the expiry of the said period of sixty days, as in the case of the appellant, apply for the set down of the appeal or cross-appeal which he may have noted. If no such application is made by either party the appeal and cross-appeal shall be deemed to have lapsed: Provided that a respondent shall have the right to apply for an order for his wasted costs. *(b)* The court to which the appeal is made may, on application of the appellant or cross-appellant, and upon good cause shown, reinstate an appeal or cross-appeal which has lapsed.

(7)*(a)* At the same time as the application for a date for the hearing of an appeal in terms of subrule (6)*(a)* of this rule the appellant shall file with the registrar three copies of the record on appeal and shall furnish two copies to the respondent. The registrar shall further be provided with a complete index and copies of all papers, documents and exhibits in the case, except formal and immaterial documents: Provided that such omissions shall be referred to in the said index. If the necessary copies of the record are not ready at that stage, the registrar may accept an application for a date of hearing without the necessary copies if—

(i) the application is accompanied by a written agreement between the parties that the copies of the record may be handed in late; or

(ii) failing such agreement, the appellant delivers an application together with an affidavit in which the reasons for his omission to hand in the copies of the record in time are set out and in which is indicated that an application for condonation of the omission will be made at the hearing of the appeal.

(b) The two copies of the record to be served on the respondent shall be served at the same time as the filing of the aforementioned three copies with the registrar.

(c) After delivery of the copies of the record, the registrar of the court that is to hear the appeal or cross-appeal shall assign a date for the hearing of the appeal or for the application for condonation and appeal, as the case may be, and shall set the appeal down for hearing on the said date and shall give the parties at least twenty days' notice in writing of the date so assigned'.

(d) If the party who applied for a date for the hearing of the appeal neglects or fails to file or deliver the said copies of the record within 40 days after the acceptance by the registrar of the application for a date of hearing in terms of subrule (7)*(a)* the other party may approach the court for an order that the application has lapsed.

(8) *(a)* Copies referred to in subrule (7) shall be clearly typed on A.4 standard paper in double spacing, paginated and bound and in addition every tenth line on every page shall be numbered.

Relevant facts and background

[2] The appellant, Jai Hind CC has been, since 2008, a lessee of the respondent, Engen. On 25 May 2019 they concluded a settlement agreement of a dispute between them that had been referred to arbitration. The settlement was subsequently made an order of court on 16 October 2019. The settlement and order addressed various reciprocal obligations premised on Jai Hind vacating the premises by 31 March 2020. It reads thus:

> 1. Jai Hind CC (trading as Emmerentia Convenience Centre, previously, The Business Zone 1010 CC) (Jai Hind), having failed to conclude a sale agreement with a purchaser on or before 31 December 2019, in terms of the Court Order dated 16 October 2019 under case number 2019/31374 (incorporating a Settlement Agreement dated 23 May 2019) (the Court Order), is declared to be in unlawful occupation of the business premises situated at .....
>
> 2. As a result of Orca Investments (Pty) Ltd, having failed to lodge an application for a retail license with the Department of Energy on or before 31 December 2019, in terms of the Court Order, Jai Hind is declared to be in unlawful occupation of the premises.
>
> 3. Jai Hind is declared to be in breach of the Court Order and is directed to vacate the premises within 10 business days of this court's order.
>
> 4.Jai Hind is ordered in terms of clause 12 of the Court Order to pay a holding over penalty of an amount of R250,000.00 in respect of the month ending April 2020

(b) The left side of each page shall be provided with a margin of at least 35 mm that shall be left clear, except in the case of exhibits that are duplicated by photoprinting, where it is impossible to obtain a margin with the said dimensions. Where the margin of the said exhibits is so small that parts of the documents will be obscured by binding, such documents shall be mounted on sheets of A4 paper and folded back to ensure that the prescribed margin is provided.

(9) By consent of the parties, exhibits and annexures having no bearing on the point at issue in the appeal and immaterial portions of lengthy documents may be omitted. Such consent, setting out what documents or parts thereof have been omitted, shall be signed by the parties and shall be included in the record on appeal. The court hearing the appeal may order that the whole of the record be placed before it.

(10) When the decision of an appeal turns exclusively on a point of law, the parties may agree to submit such appeal to the court in the form of a special case, in which event copies shall be submitted of only such portions of the record as may be necessary for a proper decision of the appeal: Provided that the court hearing the appeal may require that the whole of the record of the case be placed before it.

and R250,000.00 (or part thereof) for each month thereafter (or part thereof) that it remains in unlawful occupation of the premises contrary to the Court Order.

5.Jai Hind is directed to pay the costs of the application, including the costs of two counsel, one being Senior Counsel.

[3] Insofar relevant in this appeal, the settlement and order provided that if Jai Hind did not vacate the premises on 31 March 2020, it would be liable to pay a holding over sum of R250,000 per month in addition to the rent and royalty payments provided for in the lease agreement. It is common cause that the terms of the agreement and order were not met, and Jai Hind remained in occupation after 31 March 2020.

[4] Engen thereupon brought an application against Jai Hind alleging a contempt of the court order and seeking an eviction and payment of the arrears holding over payments. On 14 October 2021, an order was granted by Keightley J directing Jai Hind to vacate and pay the holding over sums, calculated retrospectively from 1 April 2022, by then 19 months in arrear, and amounting to R 4,750,000. The order declared Jai Hind to be in breach of the order incorporating the settlement agreement but did not declare that Jai Hind was in contempt of that order.

[5] Jai Hind thereupon filed an application for leave to appeal. It was dismissed. Simultaneously with the application by Jai Hind for leave to appeal, Engen obtained an order, granted on 5 May 2022, putting the order of 18 October 2021 into operation. Jai Hind then, filed a notice of appeal against the section 18(3) order on 11 May 2022, and also applied to the SCA for leave to appeal. On 30 June 2022 the application to the SCA for leave to appeal was refused and on 20 July 2022, Jai Hind made an application in terms of Section 17(2)f) of SC act, to the President of the SCA for a reconsideration. The answer to that request was outstanding at the time the appeal was heard on 27 July 2022.

[6] On the day of appeal hearing, the representatives of the parties announced that they had reached an agreement that Jai Hind would vacate the premises on Saturday 30 July 2022, three days hence. The lease between the parties was, in any event, due to terminate, by effluxion of time, on Sunday 31 July 2022. They further agreed that an order to that effect should be made by consent. Such order was made. The view was taken that in consequence of that agreement that compliance with the eviction leg of the order had become moot. The arguments advanced in the appeal were therefore confined to whether or not the order directing payment for the holding over, put into operation in terms of section 18(3) order, should be upheld or dismissed. Self-evidently, assuming Jai Hind really did vacate the premises on 30 July, the only live controversy is about paying the arrear sums for holding over. However, despite the obvious mootness of the eviction order, as at the date of the appeal, the decision on the merits of the section 18(4) appeal still had to address the case that had been presented to Keightley J in May 2022 when the prospect of an indefinite occupation by Jai Hind until the appeal process had been exhausted, was the status quo. The order granted then was both *ad factum praestandum* and a money judgment. The assumption that the eviction order aspect can be unravelled from the holding over aspect is neither obvious or simple; the two aspects are intertwined facets of the order against which the appeal lies. In our view the whole of the order is moot, an aspect addressed hereafter.

The law about Section 18 of the SC act

[7] The requirements for an order in terms of Section 18 (3) disturbing the ordinary course of the appeal process is now well established. The position is comprehensively captured by Ponnan JA in *Ntlemeza v Helen Suzman Foundation* thus:[4]

> [28] The primary purpose of s 18(1) is to reiterate the common-law position in relation to the ordinary effect of appeal processes — the suspension of the order being appealed, not to nullify it. It was designed to protect the rights of litigants who find themselves in the position of General Ntlemeza, by ensuring that, in the ordinary course, the orders granted against them are suspended while they are in the process of attempting, by way of the appeal process, to have them overturned. The suspension contemplated in s 18(1) would thus continue to operate in the event of a further application for leave to appeal to this court and, in the event of that being successful, in relation to the outcome of a decision by this court in respect of the principal order. Section 18(1) also sets the basis for when the power to depart from the default position comes into play, namely, exceptional circumstances which must be read in conjunction with the further requirements set by s 18(3). As already stated and as will become clear later, the legislature has set the bar fairly high.
>
> [35] Section 18(1) entitles a court to order otherwise 'under exceptional circumstances'. Section 18(3) provides a further controlling measure, namely, a party seeking an order in terms of s 18(1) is required 'in addition', to prove 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.
>
> [36] In *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* 2014 (3) SA 189 (GJ) para 16, the court said the following about s 18:
> 'It seems to me that there is indeed a new dimension introduced to the test by the provisions of s 18. The test is twofold. The requirements are:
> - First, whether or not exceptional circumstances exist; and
> - Second, proof on a balance of probabilities by the applicant of —
>
> -the presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order; and
> -the absence of irreparable harm to the respondent/loser, who seeks leave to appeal.'
>
> [37] As to what would constitute exceptional circumstances, the court, in *Incubeta*, looked for guidance to an earlier decision (on admiralty law), namely *MV Ais Mamas: Seatrans Maritime v Owners, MV Ais Mamas, and Another* 2002 (6) SA 150 (C), where it was recognised that it was not possible to attempt to lay down precise rules as to what circumstances are to be

[4] *Ntlemeza v Helen Suzman Foundation* 2017 (5) SA 402 (SCA) at paras [28] and [35] – [37]. See too: *Knoop NO v Gupta (Execution) 2021 (3) SA 135 (SCA) at paras [44] – [48].*

regarded as exceptional and that each case has to be decided on its own facts. However, at 156H – 157C, the court said the following:

'What does emerge from an examination of the authorities, however, seems to me to be the following:

1. What is ordinarily contemplated by the words exceptional circumstances is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; besonder, seldsaam, uitsonderlik, or in hoë mate ongewoon.
2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.
3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.
4. Depending on the context in which it is used, the word exceptional has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.
5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.'

[8] Accordingly, the exercise is to locate exceptionality and thereafter determine whether, as a fact, irreparable harm shall be suffered by Engen and thereafter determine, as a fact, whether irreparable harm shall be suffered by Jai Hind if the order is implemented at once. It was incumbent on Engen to prove exceptionality and that it would suffer irreparable harm if the order was not implemented at once. If it proved that, it had still to prove that if Jai Hind succeeded in the appeal, sometime in the future, it would suffer no irreparable harm if it complied with the order implemented at once.

What is the predicament experienced by Engen that evidences 'exceptional circumstances' and 'irreparable harm'?

[9] As reflected in the order granted in October 2021, Engen's essential case is that it has a clear right to possession of the property from 1 April 2020 and if Jai Hind does not

vacate then it has an entitlement to a monthly holding over payment made contemporaneously with the improper occupation by Jai Hind. Keightley J endorsed that perspective in the section 18(3) judgment, thus:

> "[26] I cannot ignore Engen's predicament that unless granted relief under s 18(3) it faces the prospect of an unwanted tenant, with no right of occupation, possibly beyond the termination date of the pre-existing lease agreement. The court orders obtained by [Engen] directing Jai Hind would be rendered vacuous in these circumstances."

[10] There is a further leg to Engen's plight, which critically informs the bargain the parties struck in the settlement agreement. If Engen does not get possession on due date and also does not get paid the holding over sums and must wait indefinitely for relief, will it be able to get the arrear holding over payments at an uncertain later date? Engen's deponent states that a search for ancillary assets possessed by Jai Hind turned up nothing. What Jai Hind says about its own predicament re-enforces Engen's predicament. Jai Hind's principal rationale for resisting the section 18 order to pay the holding over sums, as it agreed to do in the settlement agreement, is that were it to do so, the effect on its cash-flow would cause it to cease trading, which it describes as its 'irreparable harm'. Because of the peculiarities of the regulatory regime for the retail sale of fuel, the opportunity to trade is site-specific and Jai Hind cannot simply move its business to other premises and carry on. The revelation by Jai Hind that it cannot meet the holding over obligation that it took upon itself suggests, if true, that it acted mala fide when submitting to that obligation to settle the arbitration. In Jai Hind's papers this impecuniosity is ventilated by bald allegations without any corroborating substantiation. Notwithstanding that deficiency in disclosure, it cannot be concluded that the allegation is implausible because the common cause facts are that the business of Jai Hind is solely the sale of fuel and its sole revenue stream.

[11] Unquestionably, the prospects of Engen getting paid the arrear holding over sums after the exhaustion of the appeal process, totalling 28 months (April 2020 to July 2022) in the sum of R7 million are probably zero. The real question, however, is whether this vulnerability is relevant as a factor within the contemplation of the species of exceptionality catered for by section18 (3), warranting immediate compliance by Jai Hind.

[12] Why is this dire scenario sketched here not an ordinary risk that any creditor runs, in business itself, or in commercial litigation? In every case where a creditor has a money judgment, and even with a cohort of angels in train, the insolvency of the debtor will defeat the attempt to obtain satisfaction of the order. That is why businesses procure various forms of real or personal securities. The harm of not being paid in accordance with the agreement, ie whilst Jai Hind was trading and earning, is indeed 'irreparable' if Hai Hind will not be able to pay later. It is probably because precisely that outcome was foreseeable, that the holding over obligation was put into the settlement agreement. Yet, if this irreparable harm is not 'exceptional' in the course of litigation, no section 18 relief is available. This is a critical dimension of the factual matrix.

[13] The question posed brings sharply into focus the anterior question of exactly what is it that one is in search of in order to conclude that a given fact-specific set of circumstances clears the threshold of exceptionality. It must be recognised that 'exceptionality' is a value judgment. The examples in the caselaw illustrate a range of such judgment calls.

[14] Both *Incubeta Holdings (Pty) Ltd v Ellis & Another*[5] and *Shoprite Checkers (Pty) Ltd v Jansen & Another* [6] were about restraints of trade agreements. The self-evident exceptionality was that the only time that the order could be given effect to was immediately and, thus, to wait for an appeal outcome made a mockery of the legal process. These examples illustrate the primacy of the *finite period within which the order can be effective,* as triggering the exceptionality. *University of the Free State v Afriforum & Another* [7] was about the implementation of a language policy. The University's policy had been interdicted from implementation. It then sought a section 18(3) order to proceed to implement it pending an appeal, based on the logistics of admitting novice students and the disruption that would occur if not implemented during the period that the appeal process would take. This application was dismissed but succeeded on appeal in the SCA. In *Ntlemeza v Helen Suzman Foundation* the section 18 order was sought to prevent a police general from continuing in office from which he had been suspended on grounds of gross misconduct, pending an appeal.[8] The section 18(3) order was premised on a need to safeguard the reputation of the Hawks unit and an immediate and ongoing need to safeguard public confidence in the police while the appeal process was in progress. The section 18(4) appeal was dismissed.

[15] None of these cases involved the payment of money. Are 'money orders' outside the ring-fence of exceptionality? The answer is no. First, the fact-specific attribute of the test means there are no general guidelines or principles. An example of a pure money order satisfying the test could be an order requiring a parent to pay maintenance for a

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[5] *2014 (4) SA 189 (GJ)*
[6] *(2018) 39 ILJ 2751 (LC)*
[7] *2018 (3) SA 428 (SCA)*
[8] *2017 (5) SA 402 (SCA)*

child where not to do so would result in destitution or starvation. Public interest factors could impinge on otherwise private circumstances too; eg, compelling payment to release medicines needed to save lives. Second, in any event, the order by Keightley J in favour of Engen was not a pure money order and the money aspect cannot be divorced from the order ad factum praestandum to vacate the premises.

[16] These peculiarities of Engen's case qualify it for exceptionality and take out of the broad range of ordinary perils of litigation:

a. The initial settlement agreement was made to settle a dispute.
b. The settlement included express provisions to secure Engen's interests if Jai Hind defaulted by not vacating the premises on 31 March 2020.
c. The provision for a holding over payment anticipated the risk of a loss of a remedy if not paid contemporaneously with the holding over.
d. No other security was held to cover the holding over payments if Jai Hind did not vacate on due date.
e. On the probabilities, as evidenced from the evidence adduced, payment for holding over cannot be recovered ex post facto.
f. The consequences were that without immediate compliance by Jai Hind, the relief is valueless.
g. The fact that Jai Hind was in breach of a court order, in terms agreed to by it, exacerbates the default.

[17] Plainly, the irreparable harm caused to Engen is self-evident from the attributes that make the case exceptional.

Is the predicament of Jai Hind one of irreparable harm?

[18] Jai Hind's case for irreparable harm in thinly described in the answering affidavit. Largely it traverses its viewpoint about the initial disputes and its grievances about Engen's conduct. Its principal ground of resistance is that if it vacates, it will lose the chance to trade and will lose a chance to sell the business, baldly alleged to be worth R17 million. For good measure it throws in the allegation that the holding over payments are unconscionable penalties, a premise not raised in the main case. What is visibly omitted is any treatment of the embarrassing fact that it agreed to these very terms to settle earlier litigation and an account of why, were it to comply, it cannot recover from Engen, the sums paid for holding over, if it wins the appeal, in the fullness of time. Thus the essential premise of the case advanced by Jai Hind is that the business would become extinct if it complied with the order before the appeal process was exhausted.

[19] The business of Jai Hind as a service station was time bound, as best, to the duration of the lease until 31 July 2022. Had Jai Hind paid the holding over sums to Engen until the end if the lease there is no doubt that it could have recovered the sums, if entitled to, when the appeal process had been exhausted. It is not a proven fact that Jai Hind, the entity, as distinct from Jai Hind's service station business, is or will become extinct.

[20] Were the extinction of the business, indeed to be a consequence of compliance with the order before the appeal process is complete, and that outcome could be properly described by the phrase 'irreparable harm' is that a species of irreparable harm catered for by section 18(3)? Ought not the requisite 'irreparable harm' derive from being unable to recover the performance made to comply with the order? If the harm derives

from another cause, such as insolvency, is that not immaterial because such a risk is an ordinary incidence of litigation? Conceptually, the proffering of insolvency as a defence to complying with a court order is stillborn on policy grounds. Moreover, the settlement agreement contemplated the extinction of the service station business in the hands of Jai Hind. By the time that any ordinary appeal process is exhausted the business would, in any event, be extinct. The stance of Jai Hind cannot be endorsed. It suffers no irreparable harm as contemplated by section 18(3).

Mootness of the appeal

[21] On the peculiar facts in this case, to belabour the obvious, as at the date of the appeal hearing, assuming Jai Hind honours its obligation to vacate in three days' time, there can be no ongoing holding-over sums payable. The status quo, as at the date of appeal, means that the money aspect of the order has now, as regards the arrears, morphed into a damages claim for a failure to pay them when due. But that was not the position on 5 May 2022 when Keightley J made the order appealed against. Putting the eviction order into operation was wholly appropriate to address the exceptionality of the case, along with the obligation to pay for holding over both the arrears and the prospective payments when they fell due, if Jai Hind remained in occupation.

[22] The case is therefore moot. However, it is appropriate that the appeal be decided notwithstanding that fact. The Court has a discretion to deal with a matter, even if moot, if a proper reason exists to do so to address a 'legal issue of importance'[9] or in the 'interests of justice'.[10]

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[9] *Capitec bank Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd and others 2022 (1) SA 100 (SCA) at para [19]*

[10] *Bwanya v The Master of the High Court 2022 (3) SA 250 (SCA) at para [15].*

[23] This case ventilates controversies in an area of law that has had, as yet, only a little jurisprudential scrutiny. Few examples of the application of section 18(4) are reported. The facts in this case call for an elaborate examination which illuminates the nuances in the application of section 18 both substantively and procedurally.

[24] In addition, the advent of the status of mootness came about on the eve of the appeal when the parties had already incurred considerable costs which call for an appropriate order.

The appropriate procedure to prosecute a section 18 appeal

[25] When the section 18(4) appeal process was commenced by Jai Hind, its attorney set about following the prescripts of rule 49. This was construed by Engen as a deliberate piece of gamesmanship designed to spin out the process and delay the appeal. That approach certainly had precisely that effect. It is not necessary to decide whether mala fides motivated the attorney because it is plain that the process that ought to be followed is obscure. Section 18 does not prescribe a procedure. What is an attorney expected to do?

[26] In our view, it is plain that to prosecute an appeal under the conditions prescribed by section 18(4) (iii), ie, as a matter of extreme urgency, the provisions of rule 49 are inapplicable. Rule 49 is about setting time periods for the obvious steps to be taken, of which, as one example, 60 days is prescribed to file a record. The procedure in rule 49 (6) – (10) is incompatible with urgency.

[27] Extreme urgency means just that. The rationale is imbedded in the premise of section 18; ie, the immediate implementation of an order to ensure its efficacy and concomitantly, the need to resolve any dispute about whether that should happen extremely quickly.

[28] In this case the matter was resolved when Engen, aggrieved by the delay sought judicial intervention by approaching the office of the Deputy Judge president to speed things up. That intervention did accelerate the process, but the major delay had already occurred. Ultimately, despite that intervention, three months elapsed from the date of the section 18(3) order and the appeal hearing, an unacceptable period if section 18(4)(iii) is to be honoured.

[29] The default procedure when section 18(4) is invoked must be to approach the head of court at once. In the Gauteng Division, because of the use of a digital platform for all civil cases, it is very simple to expedite a section 18(4) appeal with genuine 'extreme urgency' in any case where oral evidence was not received, of which this case is an example. A record for the appeal can be produced by doing no more than adding an additional index to the caselines file of all the documentation relevant for the appeal, and excluding what is irrelevant. That can be done on the same day the notice of appeal is filed. No compiling and printing and copying of a record is needed. All that remains to make the matter ripe to be heard is the fling of heads of argument, if needed. A further ad hoc directive, after a meeting with the Deputy Judge President to set a date, completes the process. It is conceivable that a hearing can take place within no more than 20-25 court days at most.[11]

[11] This judgment does not address the appropriate procedure where a record of orally received evidence might be required. What can however be noted is that even in a case where orally evidence is adduced, it is not axiomatic that such evidence is required for an effective adjudication of the issues raised by section 18 (3). Even when that oral evidence is relevant, it is not self-evident that the whole record is required, nor indeed, required

[30] What is appropriate is that a directive be issued by the Judge president to cater for the absence of rules. Until that occurs, the procedure to follow is as follows:

a. File a notice of appeal and appeal index in the same digital file as soon as reasonably possible after the section 18 (3) order was made.
b. Simultaneously approach the Deputy Judge President for directions about heads of argument and a date for a hearing.

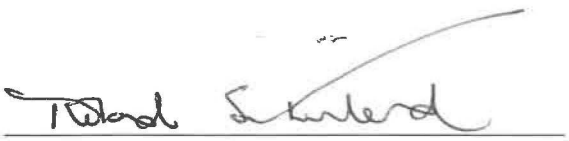
Costs

[31] There is no reason why costs should not follow the result. The matter was plainly of importance to both parties who both employed senior counsel.

The order

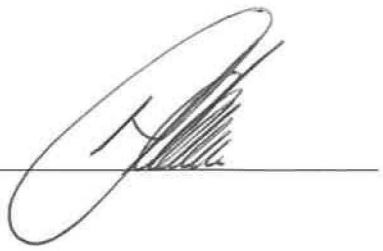
(1) The appeal is dismissed.

(2) The appellant shall bear the respondents costs including the costs of two counsel.



Sutherland DJP

I agree.



Adams J

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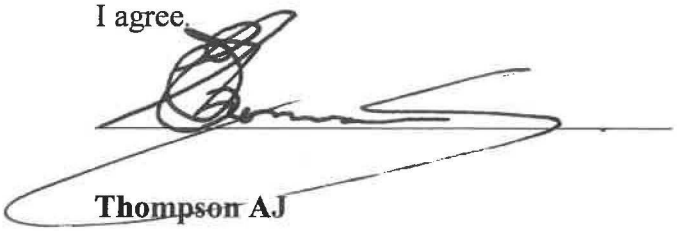
at all, if the initial judgment traverses it in appropriate detail. The section 18 controversy might well be capable of adjudication with no record at all, as has been recognised by the SCA; see *Knoop v Gupta* (supra), per Wallis JA at paras [49] and [50].

I agree.



Thompson AJ

Heard: 27 July 2022

Judgment: 4 August 2022.

For the Appellant (Jai Hind)

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