

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULUU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 5302/2021P

In the matter between:

THE SOUTH AFRICAN NATIONAL ROADS AGENCY

SOC LIMITED

APPLICANT

And

ARCHIWAYS SKYE (PTY) LTD

RESPONDENT

CAMRY TRADING ENTERPRISES (PTY) LTD

THIRD PARTY

JUDGMENT

P C BEZUIDENHOUT J:

[1] On 15 September 2022 an order was granted evicting Respondent from Applicant's property erf 3[...] Pietermaritzburg and costs. The order granted was in terms of paragraphs 1, 2 and 3 of the notice of application and the third party application brought by Respondent was dismissed with costs. An application for leave to appeal was brought by Respondent against the whole judgment which was refused with costs

including the costs of senior counsel where applicable on 26 January 2023. On or about 27 January 2023 Respondent brought a petition in the Supreme Court of Appeal for leave to appeal.

[2] On 11 May 2023 I received a copy of a letter addressed to the Registrar from Applicant's attorney and all other parties that Respondent's application for leave to appeal to the Supreme Court of Appeal was dismissed on 28 April 2023 and Respondent indicated it had instructions to apply for leave to appeal to the Constitutional Court. To date there has been no indication that such an application has been brought but it may well have been brought without notice thereof being given to me or the Registrar of this Division. Applicant indicated it persists with its application in terms of section 18 of the Superior Courts Act 10 of 2013. This application was heard on 9 May 2023 prior to the order of the Supreme Court of Appeal coming to the courts attention, although it had been made on 28 April 2023 and stamped by the Registrar of the Supreme Court of Appeal on 5 May 2023.

[3] During October 2021 an order was granted by Seegobin J that the monthly rental payable by certain of the occupants of the said property be paid to Applicant attorneys trust account and not Respondent. This was due to the fact that Respondent did not pay the rental in terms of the contract nor any rental received to Applicant. The relief which is now being sought is that pending finalisation of the appeal process the order granted on 15 September 2023 be put into operation. The application is opposed by Respondent.

[4] The third party is not opposing the relief sought and submitted that it was only protecting its own interests.

[5] Section 18 of the Superior Courts Act 10 of 2013 reads as follows:

- “(1) Subject to subsections 2 and 3, and unless a 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 a 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) The court may only order otherwise as contemplated in subsection 1 or 2, if a party who applied to a court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if a 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 would be automatically suspended pending the outcome of such appeal.
- (5) For the purposes of subsection (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 notice of appeal is lodged with the Registrar in terms of the Rules.”

[6] It was submitted on behalf of Applicant that Respondent is in occupation of the premises since July 2020 after its tender was successful. The premises comprises of an Engine Service Station and various other businesses as well as a KWIKSPAR (operated by the third party). Respondent concluded a sublease with the third party and collected rental from them on a monthly basis. However Respondent had not made any payments for the premises to Applicant as a result of which the contract was cancelled. The primary defence of Respondent is that it does not have full use and benefit of the premises and therefore is not obliged to pay rental. Respondent operates the Engen Garage. That was an issue which was dealt with in the application. In the application for leave to appeal a new ground was raised by Respondent that the judgment was based on the incorrect agreement. It should have accepted the tender document rather than the signed agreement.

[7] It was submitted that the test in terms of section 18 to determine exceptional circumstances is fact specific. Until an order was granted by Seegogin J. in 2021 Respondent collected rental but did not pay any rental over to Applicant. The monthly rental at present is the sum of R780 238-08 and none of this is being paid over. The

arear rental and holding over damages owing to Applicant amounts to over R 20 million. There is no security held by Applicant and it was submitted that Respondent continues with its unlawful occupation. Respondent is a close corporation only registered in 2018 and there is no indication that it has any assets. If any claim has to be instituted against it there is no indication that it would be able to pay a successful claim. It is submitted that the conduct of Respondent and the harm caused to Applicant makes the case exceptional. Respondent continues to trade and enjoy the benefit of a lucrative Engine Service Station while not paying any rental for its usage. Further the premises is in a state of disrepair. It is submitted that if the eviction is not allowed Respondent will not be prejudiced as any damages sustained would be recoverable as Applicant is in a strong financial position. There will accordingly be no irreparable harm that effects the consequences or are irreversible. It is further submitted that the prospects of success is a factor and that two judges of this division found Respondent's defences meritless. Since then such defences have also had no success in the Supreme Court of Appeal.

[8] It was submitted by Mr. Harpur SC that they were waiting for the decision of the Supreme Court of Appeal which as set out above has now been decided. It was submitted that it was only monetary prejudice and that there were no exceptional circumstances. He referred to the decision in *Knoop NO v Gupta* 2021 (3) SA 135 (SCA) that there were no exceptional circumstances. It was submitted that Applicant allowed occupation before the signature of the agreement and that this cannot now be taken into account. The KWIK SPAR is in unlawful occupation. It was further submitted that the cases dealing with irreparable harm such as that of *Multishare* referred to by Applicant was distinguishable. The parties would have to go into the tender process again. Further the right of access to court can also not be interfered with and that the *Plascon Evans* Rule applies.

[9] Engen was not sited but has an interest and therefore there was non joinder. It will be irreparable harm for Respondent and the damages cannot be recovered. It was

submitted that it was held in *Knoop NO v Gupta* at paragraph 22 that each and every one of the three requirements must be established by Applicant. It is not a balancing act between the requirements. It was further submitted that allowing a litigant to execute on a judgment while an appeal is pending can prematurely deprive the unsuccessful litigant of the opportunity to have a judgment reviewed and overturned on appeal. The monetary consequences are being dealt with in a separate action that has been instituted by Applicant. There is nothing exceptional about the eviction and Applicant should have launched the application for leave to execute to be heard simultaneously with Respondent's application for leave to appeal. It was submitted that there was no urgency and that period of approximately 4 months had passed. It is submitted that if the order is granted Applicant would have to follow a tender process to find a new tenant. It would therefore nonetheless suffer financial loss. There is no irreparable harm to SANRAL which justifies immediate execution. Further that SANRAL has failed to provide full occupation of the leased premises to Respondent and that there is irreparable harm to Respondent.

[10] The period of four months was however due to the request that the original counsel appear in the application and thus the delay.

[11] It was submitted on behalf of the third party that Respondent was given full occupation of the premises and that the third party was granted a lease by Respondent and Respondent accepted the rental in respect of occupation of the premises. In the premises Applicant was incapable of evicting the third party. Respondent could have attempted to evict the third party but would have been met with the fact that rental had been paid and accepted. It was submitted that the prospects of success is a factor which had to be taken into account.

[12] In *University of Free State v Afriforum and Another* 2018 (3) SA 428 (SCA) it was held that what was required was 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. Further that 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.

[13] It was held in paragraph 15 that the prospect of success on appeal are relevant in deciding whether or not to grant the exceptional relief.

[14] In *Multisure Corporation (Pty) Ltd v KGA Life Limited and Another* 2780/2021 (2022) ZAECQBHC and dated 30 August 2022 it was held in paragraph 30:

“The requirement for Multiserve to demonstrate that it will suffer irreparable harm if the relief it seeks is not granted is, in this instance, closely linked to the duration of exceptional circumstances. In *Premier for the Province of Gauteng and Others v the DA and Others* the Supreme Court of Appeal confirmed that there is no prohibition on the same set of facts giving rise to irreparable harm and exceptional circumstances. The ordinary meaning of harm is injury, damage or ill effect. For harm to be irreparable the effects or consequences must be irreversible or permanent. The financial harm occasioned to Multisure is continuous and serious as described. The business is losing money with each passing month. Multisure has downsized and being forced to rely on its savings and the sale of shares. The onus placed on immovable property on the market in order to raise further capital. It has established on a balance of probabilities that it will suffer irreparable harm if relief sought is not granted.”

[15] In *Toma and Another v Ranoshai and Others* (2021) ZAGPJHC 171 (14 May 2021) it was held in paragraph 18:

“It is now settled that the respondent’s prospects of success in the pending appeal is a relevant factor in considering whether the present application should be granted as stated by Justice Binsward on behalf of a Full Court in *Minister of Social Development Western Cape v Justice Alliance* quoted with approval in *University of the Free State v Agriforum and Another*. It follows that the less sanguine a court seized with an application in terms of section 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 section 18(3). The position is very much akin to that which pertains when interim interdictory relief pending judicial review is being considered.”

[16] In *Incubeta Holdings v Ellis* 2014 (3) SA 189 (GJ) it was held in paragraph 22:

“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.”

It held further that it was a deviation from the norm and that two distinct findings of fact must be made. In paragraph 27 it continued:

“The forfeiture of substantive relief because of procedural delays, even if not protracted in bad faith by a litigant, ought to be sufficient to cross the threshold of exceptional circumstances.”

[17] In Knoop NO and Another v Gupta (execution 2021(3) SA 135 (SCA) it was held in paragraph 48 that it was not a balancing exercise between the two as set out in the judgment of University of the Free State v Agriforum but must both be established on a balance of probabilities. If the applicant cannot show that the respondent will not suffer irreparable harm by the grant of the execution order that is fatal.

[18] In the case Knoop it was held that the Full Court suspension order was invalid as no such order was asked for in the application for leave to execute and none of the parties were called to address the court on the specific issue. It was therefore granted without granting the appellants a hearing on that issue. Section 18(4) specifically states that the operation of an execution order was suspended pending the urgent appeal under section 18(4).

[19] In Ntlemeza v Helen Suzman Foundation 2017 (5) SA 402 (SCA) it was held at paragraph 43:

“It concluded that the findings by Matojane J which reflected negatively on General Ntlemeza were a major obstacle for him to overcome and held that his prospects of success were severely limited.”

It held at 418F:

“I may add that General Ntlemeza sought to appeal against the judgment of Matojane J but his petition to this Court failed. In the result the findings by Matojane J are no longer susceptible to reconsideration.”

[20] It must be considered if there are exceptional circumstances and whether on a balance of probabilities there will be irreparable harm to Applicant and none to Respondent. To do so the facts of this case must be considered.

[21] To decide the issue of exceptional circumstances the facts of the case must be considered. The tender was awarded to Respondent who took occupation of the premises during July 2020. All the other tenants were already in occupation of the other premises except the filling station which Respondent started trading from and is still so doing. Respondent received rental from all the other tenants but did not pay any rental due to Applicant and is still not paying any rental. Due to Respondent not paying any rental to Applicant an order was obtained on 27 October 2021 that all the other tenants pay their rental to Applicant's attorneys trust account. Although Respondent knew the other tenants occupied premises it took occupation of the filling station and collected rent from KWIK Spar. The monthly rental payable at present in terms of Respondent's tender is the sum of R708 238-08 and the outstanding rental amounts to R20 202 319-92. Respondent now tenders to pay rental of R142 635-00 per month to Applicant pending finalisation of the matter. Respondent does not set out or even make an allegation that it has assets or the funds to pay any successful claim that may be instituted against it. Applicant has no relationship or agreement with Engen and it was therefore not necessary to site them.

[22] As set out in *Premier for the Province of Gauteng and Others v DA and Others* the Supreme court of Appeal held as referred to in *Multisure Corporation (Pty) Ltd* above that there is no prohibition on the same set of facts giving rise to irreparable harm and exceptional circumstances.

[23] These factors and as mentioned *inter alia* in *Ntlemza v Helen Suzman Foundation* above in my view amounts to exceptional circumstances.

[24] Applicant is an institution with considerable assets and means and will be in a position to pay any claim which can be proved against it. It is suffering severe financial prejudice as set out above which was also found to be a factor in the Multisure Corporation (Pty) Ltd Case. Respondent will not suffer any prejudice as it has operated the filling station since 2020 without paying any rent to Applicant. It further has not shown or even alleged what assets it has and was only incorporated in 2018. It has in my view therefore been proved on a balance of probabilities that Applicant will suffer irreparable harm but Respondent not. Further Respondent's prospects of success on further appeal are not good as leave to appeal has already been refused by the Supreme Court of Appeal.

The following order is therefore made:

1. The order made in this matter on 15 September 2022 is operative with immediate effect.
2. Respondent is to pay Applicant's costs.

P C BEZUIDENHOUT J.

JUDGMENT RESERVED:

9 MAY 2023

JUDGMENT HANDED DOWN:

15 JUNE 2023

COUNSEL FOR APPLICANT:

K GOUNDEN

Instructed by:

Venns Attorneys

Pietermaritzburg

Tel: 033 355 3131

Ref: M H Motala/TH/13238392

COUNSEL FOR RESPONDENT:

HARPUR SC

Instructed by:

De Villiers, Evans & Petit Attorneys

Ref: Mr C Petit/oj/01R029015

c/o: Stowell & Co.

Tel: 031 207 1515

Pietermaritzburg

Ref: P Firmin/Zelda

THIRD PARTY COUNSEL:

DICKSON SC

Instructed by:

Mason Incorporated

Pietermaritzburg

Tel: 033 3454230

Ref: P Coetzee/Nisha