

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN)**

[REPORTABLE]

CASE NO. 19618/2022

In the matter between:

VARNARDO INVESTMENTS (PTY) LTD

First Applicant

SHIREEN LEEMAN

Second Applicant

VS

K2012150042 (SOUTH AFRICA (PROPRIETARY) LTD

Respondent

REASONS FOR JUDGEMENT

INTRODUCTION

1. The Applicants brought an urgent application to stay the execution of an order granted by the Honourable Justice Mangcu-Lockwood inter alia confirming the cancellation of a lease agreement between the First Applicant and the Respondent with effect from 1 November 2021 and ordering the ejectment of First Respondent from the leased premises. They also prayed for relief restoring access and possession of the leased premises to them including all keys and access cards thereto with immediate effect.

2. On 21 November 2022 I granted an order for the stay of execution of the order granted by Mangcu-Lockwood J and ordered that access and possession of the leased premises be restored to the Applicants including all keys and access

cards thereto with immediate effect. This was done after court hours, and I gave a short *ex tempore* judgement.

3. The Respondent applied for leave to appeal against the order and requested me to give reasons for my order. I give my reasons herewith.

4. It is appropriate to start with a short history of the case.

5. The Respondent brought an action against First and Second Applicants in this court for the cancellation of a lease agreement (“the lease agreement”) between the First Applicant and Respondent for business premises situated at warehouses 7[...], 7[...] and 8[...], P[...] I[...] Park, corner of M[...] Drive and R[...] Road, M[...] G[...] , Cape Town (“the premises”) as well as the ejectment of the First Applicant and all others who occupy it from the premises.

6. They also claimed arrear rental and/or holding over damages with interest from the Applicants as well as damages arising from the cancellation of the lease.

7. The claims against Second Applicant are based on a suretyship agreement entered into with Second Applicant for all amounts due by First Applicant in terms of the lease agreement. She is a director of the First Applicant.

8. The Applicants defended the action and delivered a plea. The Respondent then brought an application for summary judgement before Mangcu-Lockwood J.

9. The Applicants did not oppose the application for summary judgement or file an opposing affidavit but on the day of the hearing of the application they applied for a postponement.

10. Mangcu-Lockwood J dismissed the application for postponement and granted summary judgement on 18 October 2022 for the following relief, I use the description of the parties as in the application before me:

10.1 The Applicants’ application for postponement is dismissed;

10.2 Cancellation of the lease concluded between the Respondent and First Applicant on or about 28 October 2020 is hereby confirmed with effect from 1 November 2021;

10.3 An order of ejectment is made against the First Applicant and all those who occupy warehouses 7[...], 7[...] and 8[...] P[...] I[...] Park, Corner M[...] Drive and R[...] Road, M[...] G[...] , Cape Town, through the First Applicant from the said premises;

10.4 The First and Second Applicants, jointly and severally, the one paying the other to be absolved shall make payment to the Respondent in the sum of R9,236,245.53;

10.5 The First and Second Applicants, jointly and severally, the one paying the other to be absolved shall make payment of interest on the aforesaid amount of R9,236,245.53 at the rate of 2% per month from 2 November 2021 to date of payment;

10.6 The First and Second Applicants, jointly and severally, the one paying the other to be absolved, shall pay the costs of suit to date hereof and the costs of the summary judgment application on the attorney and client scale;

11.7 The Respondent is entitled to pursue its claim for damages arising from the cancellation of the lease from 2 November 2021 and the Applicants are granted leave to defend such claim.

11. The Applicants delivered an application for leave to appeal the granting of summary judgement and on 18 November 2022 Mangcu-Lockwood J gave an order dismissing the application for leave to appeal. She did not give a judgement.

12. The Applicants wished to take the matter further and wished to petition The Supreme Court of Appeal for leave to appeal.

13. The Respondent urgently wished to proceed with the execution of the Mangcu-Lockwood J order and obtained a warrant of ejectment, they also appear to have obtained a writ of execution, but that writ was not attached to the papers by the parties. The Sheriff proceeded to execute the order on 18 November 2022 by ejecting the First Applicant from the leased premises, changing the locks and making an inventory of the goods on the premises.

14. This led to the urgent application being brought late Friday afternoon on 18 November 2022. The application was opposed, and I postponed the matter to Monday 21 November 2022 for the parties to file further papers and hearing of the application.

15. The matter was heard in the late afternoon on 21 November 2022, and I granted the abovementioned order staying the execution of the Mangcu-Lockwood J order.

16. The Applicants argued that they had delivered to the Respondent's attorneys a copy of the application for leave to appeal stamped by the registrar of this High Court on 18 November 2022 by e-mail at 11h39 and by hand at 11h57, thus suspending the Mangcu-Lockwood J order, but that the Respondent's attorneys would not accept it and stated that execution will proceed.

17. The Respondent admit this but argue that what was handed to them was not a lodged application for leave to appeal because it did not bear the stamp of the Supreme Court of Appeal and did not bear a case number of the Supreme Court of Appeal.

18. The Respondent's case is that by the time that the urgent application for the stay of execution was brought the sheriff had already executed the order insofar as ejectment and attachment is concerned and it was thus too late to apply for a stay of execution of the ejectment and attachment. They attached the sheriff's return of service of the warrant of ejectment to their papers in which it is stated that the ejection of First Applicant from the leased premises had commenced at 12h17 and was completed by 14h09 on 18 November 2022.

19. The Applicants response was that the application for leave to appeal was also lodged with the registrar of the Supreme Court of Appeal on 18 November 2022 before the execution took place and that the execution of the order was automatically suspended by Section 18(1) of the Superior Courts Act, 10 of 2013 (“the Superior Courts Act”) despite the application for leave to appeal only being stamped by the registrar on 21 November 2022. As such the ejectment was unauthorised and the *status quo ante should be restored*.

20. The Applicants attached an email to their papers showing that the application for leave to appeal was presented by their correspondent attorneys to the registrar of The Supreme Court of Appeal in Bloemfontein at 12h00 on 18 November 2022.

21. This email was sent to the Applicant’s attorneys from the offices of Mayet & Associates, a firm of attorneys situated at 1[...] L[...] W[...] Street, D[...] P[...], Bloemfontein, at 12h23 on Monday 21 November 2022.

22. It explains what occurred at the office of the registrar of The Supreme Court of Appeal on 18 November 2022. It informs Applicant’s attorneys that Mayet and Associates attended at the Supreme Court of Appeal on Friday the 19th of November 2022 from 12h00 to 15h00 for the purpose of filing the application for leave to appeal. The date of 19 November 2022 is clearly a mistake, the Friday in question was the 18th of November 2022.

23. The email proceeds to explain that the application for leave to appeal was presented to the registrar by the Applicant’s correspondent attorneys. They explained to the registrar that because the order dismissing the application for leave to appeal was only given earlier that day and Mangcu-Lockwood J did not give a judgement in the application for leave to appeal, they could not provide the registrar with this judgement. The registrar directed them to obtain a letter from Manqcu-Lockwood confirming that the judgement is not available and would not “issue” the application for leave to appeal until such letter has been obtained and handed to the registrar.

24. The registrar's directive was provided to Applicant's attorneys on 18 November 2022 and on the same day at 13h09 they sent an email to the registrar of Mangcu-Lockwood J requesting confirmation that no judgement in the application for leave to appeal is available yet.

25. Mangcu-Lockwood J provided the requested confirmation on 21 November 2022, it was provided to the registrar of The Supreme Court of Appeal on the same day and the registrar stamped the application for leave to appeal on 21 November 2022.

26. No affidavit was obtained from the person attempting to lodge the application for leave to appeal at The Supreme Court of Appeal by the time that the matter was heard on Monday 21 November 2022, apparently due to time constraints.

27. Respondent did however not dispute what happened at the office of the registrar of The Supreme Court of Appeal in their opposing papers but stated that it comes as no surprise that the registrar would not allow the application for leave to appeal to be lodged because the judgement in the application for leave to appeal was not attached to it.

28. The crisp question is to be answered is, was the application for leave to appeal lodged when it was handed to the registrar on 18 November 2022 at 12h00 or when the registrar date-stamped it on 21 November 2021.

29. I will first set out the relevant subsection and rules of Court.

30. Section 18(1) of the Superior Courts Act, 10 of 2013 reads as follows:

"(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."

31. Subsections 18(2) and 18(3) deal with the Court ordering on application that the operation and execution of the decision is not suspended and are for the purposes of this case irrelevant.

32. The effect of Subsection 18(1) is that the operation and execution of a Court order against a party is automatically suspended when that party applies for leave to appeal against the order, this includes an application for leave to appeal to the Supreme Court of Appeal in the event of the High Court refusing an application for leave to appeal.

33. Subsection 18(5) of the Superior Courts Act reads as follows:

“18(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.”

34. Supreme Court of Appeal Rule 4(1)(a) reads as follows:

“4 General powers and duties of registrar

Filing of documents

(1)(a) The registrar may refuse to accept any document tendered for lodging if, in the registrar’s opinion, it does not comply with these Rules: Provided that if proper copies of the rejected documents are resubmitted within 10 days of rejection such lodging shall not be deemed untimely.”

35. Supreme Court of Appeal Rules 6 reads as follows:

“6 Application for leave to appeal

Filing of an application

(1) In every matter where leave to appeal is by law required of the Court, an application therefor shall be lodged in triplicate with the registrar within the time limits prescribed by that law.

Annexures required

- (2) Every such application shall be accompanied by-
- (a) A copy of the order of the court *a quo* appealed against;
 - (b) Where leave to appeal has been refused by that court, a copy of that order;
 - (c) A copy of the judgement delivered by the court *a quo*; and
 - (d) Where leave to appeal has been refused by that court, a copy of the judgement refusing such leave:

Provided that the registrar may on written request, extend the period for the filing of a copy of the judgement or judgements for a period not exceeding one month."

36. In Rule 1 of the Supreme Court of Appeal Rules "apply" and "lodged" are defined as:

"apply" means apply on notice of motion on the prescribed form in the Annexure;"

"lodging of documents with the registrar" means the lodging of documents with the registrar through an attorney practising in Bloemfontein or, if a party is not represented by an attorney, by registered post or by that party after prior service of copies of such documents on any other party".

37. I pause here to mention that "lodge" is defined in the Concise Oxford Dictionary¹ as "present (a complaint, appeal etc) formally to the proper authorities", The Encyclopaedia Britannica provide a similar definition.

38. In the legal context the words "lodge" and "appeal" are often used interchangeably.

¹ Tenth Edition Revised

39. It is not disputed that the application for leave to appeal was handed to the registrar through an attorney practising in Bloemfontein as required by the definition of “lodging of documents with the registrar” in Rule 1 of the Supreme Court of Appeal Rules on 18 November 2022.

40. It is appropriate at this stage to refer to the decision in *Waikiwi Shipping Co Ltd v Thomas Barlow & Sons (Natal) Ltd*². In that case the Court dealt with the lodging of the record of proceedings in the Court of first instance with the registrar for the purpose of prosecuting an appeal in terms of the then AD Rule 5.

41. The Appellant had provided the Registrar with a record, but the registrar was not satisfied with the record because it was defective both as to form and content in several respects and refused to accept it. It was returned to the Appellant’s attorneys to be rectified.

42. The record was then rectified in certain respects and re-lodged with the registrar, but only after the time for the lodging of such record as specified in the AD Rules had expired, it appears that the Registrar accepted this record despite it still being defective in some respects.

43. In terms of the then AD Rule 5(4)(bis)(b) an appeal was deemed to be withdrawn if the Appellant failed to lodge the record with the Registrar within the prescribed time period without applying for an extension of the period.

44. In determining whether the appeal had been lodged when the defective record was provided to the registrar the Court had regard to the provisions of the then AD Rule 5(14), which provided that the registrar may refuse to accept copies, which in his opinion do not comply with Rule 5.

45. The Court did not find it necessary to decide “whether the appeal lapsed because of the appellant’s failure within the prescribed time to file a complete and

² 1981 (1) SA 1040 (AD)

acceptable record”³ because at the hearing of the appeal the Appellant applied for the postponement of the appeal to correct the still defective record.

46. The Court refused the application for postponement and struck it from the roll but remarked that in doing so the door of the Court had not necessarily been finally closed to the Appellant, it could apply for condonation of its failure to comply with the AD Rules and for re-instatement of the appeal on the roll.

47. Insofar as the Waikiwi Shipping case deals with the lodging of papers with the registrar, albeit the record of proceedings in the Court of first instance, it is relevant to the case before me.

48. It must be borne in mind that it does not deal with the lodging of an application for leave to appeal but with the lapsing or withdrawal of an appeal and was decided under the repealed AD Rules.

49. It is important to note that although the Court refer to the Appellants failure to file a complete and acceptable record timeously, it did not find that the record was not lodged or filed at all when the defective record was handed to the registrar, only that a proper record was not filed at that time.

50. The current Supreme Court of Appeal Rule 4 contain the general powers and duties of the registrar which include the power to refuse to accept any document tendered for lodging if, in the registrar’s opinion, it does not comply with the Rules.

51. Supreme Court of Appeal Rule 6, which deals specifically with applications for leave to appeal, contains its own provisions for the lodging of applications for leave to appeal, including the power of the registrar, on written request, to extend the period for the filing of a copy of the judgement or judgements for a period not exceeding one month provided in Rule 6(2).

52. In my view this would amount to the lodging of the incomplete application for leave to appeal pending the filing of the missing orders or judgements thus causing

³ p1049D

the application to be lodged already when the incomplete application is presented to the registrar.

53. Significantly, Supreme Court of Appeal Rule 6(8) further provide as follows:

“Failure to comply

(8) If the party concerned fails to comply with a direction by the registrar or fails to cure the defects in the application within the period directed, the application shall lapse.”

54. As stated above the registrar did not require an application for an extension of time regarding the filing of the judgement as provided for in Rule 6(2) but directed in terms of Rule 6(8) that confirmation by letter from Mangcu-Lockwood J be furnished to the registrar that the judgement refusing leave to appeal was not yet available.

55. The wording of Rule 6(8) leads me to the conclusion that the application for leave to appeal was indeed lodged with the registrar when the incomplete application was presented to the registrar and the registrar gave the directive, despite it being defective in that it was not accompanied by the judgement and despite it not being stamped by the registrar.

56. Rule 6(8) provides that if the defect is cured as directed by the registrar, which it was, the application for leave to appeal shall not lapse.

57. If an application for leave to appeal is not lodged there is no application to lapse.

58. The fact that the registrar refused to stamp the application for leave to appeal when it was presented on 18 November 2022 does not mean that it was not lodged at that time.

59. In view of the above the application for leave to appeal was lodged with the registrar of the Supreme court of Appeal at 12h00 on 18 November 2022, before the sheriff ejected the First Applicant from the premises at 12h17.

60. The execution of the order made by Mangcu-Lockwood J was automatically suspended by the lodging of the application for leave to appeal in terms of Section 18(1) of the Superior Courts Act and the ejectment was not authorised, was to be set aside and the *status quo ante* restored.

61. In view of the above finding, I do not have to decide whether the registrar may refuse to accept an incomplete or defective application for leave to appeal without extending the period for filing missing annexures or giving directions to cure the defects therein or whether an application for leave to appeal is lodged despite the registrar's refusal to accept such applications for leave to appeal and failing to extend the mentioned time period or to give the mentioned directions. I however wish to state the following.

62. It may have grave consequences for the applicant/appellant if the execution of the court order is not suspended by presenting of an application for leave to appeal to the registrar.

63. If the applicant/appellant had obtained all the required accompanying documents possible to obtain and presented it to the registrar with the application for leave to appeal for lodging, he/she should not be punished for failing to attach documents which he/she could not obtain through no fault of his/her own. In such case it would seem unfair to deprive him/her from the automatic protection of Section 18(1) of the Superior Courts Act.

64. In the premise I made the following order:

a) The execution of the order or any orders so granted under the main action /application held under case number 19788/21 is stayed, pending the outcome of the Applicant's petition application to the Supreme Court of Appeal.

b) The Respondents are directed to restore complete and unfettered access and possession of the premises, including all keys and access cards, situated at

Warehouses 7[...], 7[...] and 8[...], P[...] I[...] Park, M[...] G[...] , Cape Town, to the Applicants forthwith and with immediate effect.

c) The Respondent is directed, if necessary, to provide instructions to the Sheriff vested with the necessary jurisdiction to give effect to this order.

d) The Respondent is directed to pay the costs of this application on a party and party scale.

GROBBELAAR AJ
WESTERN CAPE HIGH COURT

In the High Court of South Africa
(Western Cape Division, Cape Town)

[Reportable]
Case No: 19618/2022

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VARNARDO INVESTMENTS (PTY) LTD

First Applicant

SHIREEN LEEMAN

Second Applicant

vs

K2012150042(SOUTH AFRICA (PTY) LTD

Respondent

Coram:

GROBBELAAR, AJ

Judgment by:

GROBBELAAR, AJ

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Date (s) of Hearing:

21 November 2022

Reasons Delivered on:

09 FEBRUARY 2023