REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No: 6795/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. NO

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SIGNATURE **DATE: 6/12/ 2022**

In matter between:

GTFOH (PTY) LTD	APPLICANT
and	
KYOSTAX (PTY) LTD	1st RESPONDENT
WARREN FRIEDLAND	2nd RESPONDENT
MONIQUE FRIEDLAND	3rd RESPONDENT
TAPIWA MATAVIRE	4th RESPONDENT
MAMANE MOEKETSANE	5th RESPONDENT

JUDGEMENT

MOOKI AJ

1 This judgement concerns whether the Court is to make an order granted in terms of section 18(3) of the Superior Court Act 10 of 2013 ("the Act") "final."

2 The material terms of the order in terms of section 18(3) application by the applicant were as follows:

> *4 It is ordered, in terms of section 18(3) of the Superior Court Act 10 of 2013, and pending the finalisation of the notice of leave to appeal lodged by the respondent and, pending any petition for leave to the Supreme Court of Appeal or to the full bench of this division, that:*
>
> *4.1 The respondent is ordered to restore possession of shop 17 Epsom Down Shopping Centre, Bryanston, Johannesburg, to the applicant forthwith.*
>
> *4.2 The respondent shall be entitled to evict the applicant on the respondent presenting a court order authorising such eviction.*
>
> *5 The respondent is ordered to pay the costs of the application in the application by the applicant in*

terms of section 18(3) of the Superior Court Act 10 of 2013.

Background

5 The applicant conducted business at premises leased from the first respondent ("the landlord"). The applicant instituted spoliation proceedings against the landlord. The landlord raised as one of its defences that the landlord had since concluded a lease agreement with the fourth and fifth respondents ("the new tenants") and that the applicant was obliged to have joined the new tenants as respondents.

6 The Court held that the applicant had shown that it had been spoliated. The Court, as part of its reasoning, found that the applicant was not obliged to have joined the new tenants because the rights or interests of parties are irrelevant in spoliation proceedings.

7 The landlord then brought an application for leave to appeal. The applicant in turn brought an application in terms of section 18 of the Act. Both applications were heard at the same time. The Court refused the application for leave to appeal and granted the application in terms of section 18 of the Act, ordering in part that:

> 4 *It is ordered, in terms of section 18(3) of the Superior Court Act 10 of 2013, and pending the finalisation of the notice of leave to appeal lodged by the respondent and, pending any petition for leave to the Supreme Court of Appeal or to the full bench of this division, that:*

4.1 The respondent is ordered to restore possession of shop 17 Epsom Down Shopping Centre, Bryanston, Johannesburg, to the applicant forthwith.

4.2 The respondent shall be entitled to evict the applicant on the respondent presenting a court order authorising such eviction.

5 The respondent is ordered to pay the costs of the application in the application by the applicant in terms of section 18(3) of the Superior Court Act 10 of 2013.

8 The landlord appealed to the Full Bench, pursuant to section 18(4)(2) of the Act. The Full Bench made the following order:

1 The appeal is upheld.

2 The order of his Lordship Mr Justice Mooki AJ granted on 29 July 2022, specifically, order 82.4 and subparagraphs and order 82.5 as it relates to costs of the Section 18(3) application is set aside.

3 The application is remitted for rehearing to the Court A quo in front of His Lordship Mr Justice Mooki.

4 A rule nisi is hereby ordered calling upon TAPIWA MATAVIRE and MAMANE MOEKETSANE to show cause at the rehearing of this application why an order in terms of the notice of motion in respect of the Section 18(3) application should not be granted.

5 *This court order and all pleadings filed of record in relation to the Section 18(3) application be served upon TAPIWA MATAVIRE and MAMANE MOEKETSANE within 2 days from the date of this order;*

6 *TAPIWA MATAVIRE and MAMANE MOEKETSANE are provided two days to enter a notice of intention to oppose..*

7 *TAPIWA MATAVIRE and MAMANE MOEKETSANE are provided 5 days to file an answering affidavit, if any.*

8 *Appellant shall pay costs.*

9 The Full Bench did not give reasons in relation to its order. Counsel submitted that the substance of the debate before the Full Bench concerned whether Tapiwa Matavire and Mamane Moeketsane should have been given an audience, by being joined to the proceedings.

The case as advanced in this hearing

10 The applicant and the new tenants exchanged pleadings pursuant to the order by the Full Bench. Each of the fourth and fifth respondents filed affidavits, to which the applicant replied.

11 The new tenants say they previously conducted business from premises close to those used by the applicant. The landlord approached them during the first week of July 2022, advising them that the shop right next to where the new tenants previously conducted business may become available and that the new tenants "would have to move fast if it became available."

12 The landlord subsequently informed the new tenants that the landlord had given the applicant notice and that the applicant would be vacating the shop on 14 July 2022.

13 The landlord advised the fourth and fifth respondents in the evening of 14 July 2022 that the shop was theirs and that they should meet a representative of the landlord on the morning of 15 July 2022. They met with a representative of the landlord on 15 July 2022. The representative advised them that the applicant had absconded or vacated the shop. The representative then gave them a lease to sign, which they did.

14 A representative of the landlord, after the signing of the lease, opened the shop for the fourth and fifth respondents; showed them around and gave them the keys. The fourth and fifth respondents, after being shown around, locked the restaurant and "have since been working tirelessly to open the restaurant in an upgraded form in the premises."

15 The fourth and fifth respondents say they made commitments and that it was impossible for them not to use the premises. Their previous premises were no longer available. They have started moving their things across from their previous premises. They had drawings prepared for how the new restaurant would look. They used a small portion of the premises for Uber Eats.

16 The fourth and fifth respondents say they were unaware of the dispute between the applicant and the landlord when they took occupation; they were in peaceful and undisturbed possession in terms of a valid lease; they put in vast amounts of money into the new shop; they would be in the

street if they have to leave; the landlord could not unilaterally cancel the lease, and that they did not breach the lease and could not abandon the lease because it would result in their financial ruin.

17 The applicant replied to averments by the fourth and fifth respondents as follows: the applicant denied giving the landlord any indication that the applicant would be vacating the premises mid-July; occupation by the fourth and fifth respondents was not bona fide; the fourth and fifth respondents were aware, before 27 July 2022, that the applicant did not leave the premises voluntarily; they were aware, as early as 27 July 2022, of the court order that the landlord restore occupation to the applicant; they were aware on 27 July 2022 that the premises were in the same condition as on 15 July 2022. The fourth and fifth respondents were aware of the dispute between the applicant and the landlord.

18 The applicant points out that the fourth and fifth respondents, had they viewed the premises, would have noticed that the applicant had not removed any of its business goods from the premises; the fourth respondent and the director of the applicant were known to each other; their respective businesses were adjacent to each other; the fourth respondent's failure to contact the applicant about business goods in the premises was indicative that the fourth respondent knew that the applicant had been spoliated and that the fourth respondent sought to capitalise on that event.

19 The applicant further contended that prejudice to the fourth and fifth respondents "is not a feature of a section 18 (3) application"; there was no specificity to the contention by the fourth and fifth respondents that they

had been working tirelessly to open the restaurant. The applicant contends that the fourth and fifth respondents incurred expenditure at their own peril because they acted in bad faith.

Submissions on behalf of the parties

20 Mr. Venter submitted that the Court had to consider whether implementing the order would cause each of the landlord, the fourth, and fifth respondents irreparable harm. He submitted that the fourth and fifth respondents will be evicted; cannot return to their previous premises; had done work on the premises; had not breached the lease and would be put on the street and their business would close if the order is implemented.

21 He further submitted that the fourth and fifth respondents had taken steps to use the premises and that they could not be expected to accomplish everything overnight. They did not have a long lead time, because they were offered the premises on 14 July 2022 and moved in on 15 July 2022.

22 He submitted that it was not the case that the fourth and fifth respondents acted in bad faith. That was because they were informed on the evening of 14 July 2022 that the applicant had absconded. They moved in on 15 July 2022. The fourth and fifth respondents were not to take sides in the dispute between the applicant and the landlord.

23 Mr. Venter submitted that the fourth and fifth respondents had presented the court with new facts, which the court ought to consider regarding the issue of irreparable harm as it pertained to the landlord. He submitted that it was clear that the landlord could not restore the applicant; and that the landlord would have to evict the fourth and fifth respondents if the

landlord were to restore the applicant. He further submitted that the applicant had not discharged the burden in section 18(3) of the Act by not showing the absence of irreparable harm both to the landlord and the fourth and fifth respondents.

24 Ms. Lipshitz submitted that section 18(3) did not concern prejudice to the fourth and fifth respondents. She further submitted that there was no irreparable harm in relation to the fourth and fifth respondents; including that they could sue for damages and that they had not started trading. She pointed out that the fourth and fifth respondents had pleaded tersely regarding what they had done concerning the premises.

25 Ms. Lipshitz further submitted that the fourth and fifth respondents did not say what they had done or when they started in relation to the premises, apart from referencing the use of a small portion of the premises for Uber Eats. She pointed out that there were no changes to the premises on 27 July 2022; with the applicant having been denied access since 15 July 2022. The fourth and fifth respondents were aware on 27 July 2022 of the dispute between the applicant and the landlord, and acted at their own peril. She further submitted that there had been no meaningful occupation by the fourth and fifth respondents on 27 July 2022, by when they were aware of the court order in favour of the applicant.

26 She further submitted that the fourth respondent knew that the applicant was the tenant. The fourth and fifth respondents would have seen that the applicant still had its goods in the shop. This was known because the fourth and fifth respondents conducted their business adjacent to the premises then occupied by the applicant. She continued that the fourth and fifth

respondents were not *bona fide* because they knew on 15 July 2022 that the applicant still had its goods in the shop. They never enquired with the applicant about those goods. She contended that the lease agreement relied upon by the fourth and fifth respondents was concluded to frustrate a potential spoliation.

Analysis

27 The Full Bench did not explain why the circumstances of the fourth and fifth respondents had to be considered for purposes of a section 18(3) application. This is more so because the applicant sought relief for being spoliated.

28 Mr. Venter submitted that the applicant was obliged to show that the fourth and fifth respondents will not suffer irreparable harm and that the applicant would suffer such harm, which the applicant failed to do. He submitted that the application be dismissed on this account.

29 Section 18(1) of the Act deals with the suspension of a decision pending an application for leave to appeal or pending an appeal. Section 18(3) prescribes the conditions under which a court may order that a decision be implemented notwithstanding an application for leave to appeal or an appeal.

30 This Court has already determined that the applicant met the requirements in section 18(3) in relation to the landlord's application for leave to appeal. The current proceedings do not revisit that finding. I conclude, in any event, that there are no new facts that warrant the Court revisiting its prior finding that the applicant met the requirements for relief in terms of

section 18(3) of the Act. For example, the Court took into consideration that the fourth and fifth respondents made it known to the landlord that they were holding the landlord to the lease agreement.

31 Section 18(1) and section 18(3) apply as between a party that seeks leave to appeal, a party that has been permitted to appeal, and a party in which favour a decision was made. The sections do not consider persons outside this relationship.

32 The fourth and fifth respondents are not parties to the application for leave to appeal by the landlord. I agree with the submission by Ms. Lipshitz that section 18(3) of the Act does not pertain to the fourth and fifth respondents. This appears from the language of the section.

33 Section 18(3) requires a party that seeks to implement an order pending an application for leave to appeal or pending an appeal to "…, in addition [prove] on a balance of probabilities that [the party] 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."

34 Section 18(3) does not operate as between persons who are not parties to an order that is the subject of an application for leave to appeal or an appeal. The fourth and fifth respondents are not parties to the landlord's application for leave to appeal; or any similar process.

35 I find that there is no basis in law for the fourth and fifth respondents to be entertained in relation to an order made pursuant to section 18(3) of the Act, in that the fourth and fifth respondents were not parties to the application for leave to appeal by the landlord.

36 I also find, in the event that the above finding be in error, that the fourth and fifth respondents have not, in any event, made out a case why the relief referred to in paragraph four of the order by the Full Bench should not be granted.

37 My overall impression is that the fourth and fifth respondents acted in concert with the landlord regarding the premises.

38 The landlord did not, in the various affidavits on its behalf, say that it approached the fourth and fifth respondents, telling them that the premises might become available during the first week of July 2022, that the fourth and fifth respondents would have to move fast if the premises became available; that it told the fourth and fifth respondents that it gave the applicant notice; that it approached the fourth and fifth respondents “late” on 14 July 2022 that the premises were theirs if they wanted them.

39 The fourth and fifth respondents say they signed a lease with a representative of the landlord on 15 July 2022; after which they were shown the premises, which they then locked. The fourth and fifth respondents are then saying that they signed the lease without first having inspected the premises. This is absurd.

40 It is equally absurd of the fourth and fifth respondents to say that they were shown around the premises whereafter they locked the premises and started their preparation to operate a restaurant from the premises. The fourth and fifth respondents do not dispute that the applicant had its work equipment in the premises on 15 July 2022. The fourth and fifth respondents could not have inspected the premises without remarking

about that equipment. This is more so because the fourth respondent and the director of the applicant know each other.

41 The fourth and fifth respondents could not have been unaware from 15 July 2022 onwards of the dispute between the landlord and the applicant regarding the premises. They could not have failed to ask why the premises were locked and what had happened to the applicant. This is more so because the fourth and fifth respondent conducted their business at premises adjacent to premises used by the applicant.

42 The fourth and fifth respondents, on the evidence, did nothing regarding the premises as between 15 July 2022 and 27 July 2022. That is because the premises were in the same condition on 27 July 2022 as on 15 July 2022. The fourth and fifth respondents did not dispute that an employee of the applicant inspected the premises on 27 July 2022 and that nothing had changed since 15 July 2022.

43 I do not accept that the fourth and fifth respondents "worked tirelessly", since 15 July 2022, to open a restaurant in an upgraded form at the premises. For example, nothing was done in relation to the premises at least between 15 July 2022 and 27 July 2022. The fourth and fifth respondents could not have worked on the premises whilst the goods of the applicant remained on the premises. The fourth and fifth respondents are silent in relation to these goods. The goods would have been an obvious hindrance to their use of the premises. The fourth respondent would have been expected to have raised the subject with the director of the applicant.

44 The fourth and fifth respondents, if they were in occupation as they say, failed to explain why they kept silent regarding the goods of the applicant as between 15 July 2022 and 27 July 2022. The fourth respondent, at a minimum, would have been expected to have enquired with the director of the applicant about goods left in the premises. That did not happen. This is inconsistent with a tenant who had concluded a lease on a sought-after lot and who intended to improve that lot as a restaurant.

45 The fourth and fifth respondents say they have spent money on the premises. There was no evidence to support this claim. There was no proof that the premises were being used. Their best case in this regard is that they were using a small portion of the premises for Uber Eats.

46 I am persuaded that the fourth and fifth respondents knew of the court order, on 27 July 2022, that the landlord restore the premises to the applicant. Nothing had been done in relation to the premises as at that date. The fourth and fifth respondents, such knowledge notwithstanding, did nothing to protect their interests. They made no enquiries with the applicant. They knew at that time, if not much earlier, that they were at risk in relation to the premises. They did nothing other than to assert a binding lease agreement with the landlord. Their assertion, given the circumstances, was consistent with the landlord having locked the applicant out of the premises. Their respective interests coincided; hence the Court referencing an accommodation between them and the landlord.

47 The fourth and fifth respondents adopted a supine approach despite being aware, early on, of the dispute between the applicant and the landlord. I do not accept the submission by Mr. Venter that the fourth and fifth

respondents had a binding lease and that they were not to take sides in the dispute between the applicant and the landlord.

48 The Court has previously set-out the respects in which the applicant will suffer irreparable harm in relation to the landlord. The contentions by the fourth and fifth respondents do not alter that finding.

49 The applicant has shown, as between the applicant and the fourth and fifth respondents, that the applicant will suffer irreparable harm, unlike the fourth and fifth respondents, should the order that the landlord restore the premises to the applicant not be implemented. This is on account of the same considerations as those in relation to the landlord.

50 The landlord told the fourth and fifth respondents that the applicant had absconded from the premises. The landlord was aware of the falsity of this representation. The fourth and fifth respondents ought to look to the landlord for recourse, should the fourth and fifth respondents be aggrieved at their having acted pursuant to a representation made to them by the landlord.

51 I conclude that the order as referred to in paragraph 4 of the order by the Full Bench be granted.

52 I make the following order:

(a) The order in terms of the notice of motion in respect of the Section 18(3) application is granted.

(b) The fourth and fifth respondents, jointly and severally, are ordered to pay the costs associated with the hearing on 11 November 2022.

Omphemetse Mooki

Judge of the High Court (Acting)

Heard on: 11 November 2022

Delivered on: 6 December 2022

For the Applicant: T Lipshitz

Instructed by: Preshnee Govender Attorneys

For the Fourth and Fifth Respondents: A J Venter

Instructed by: Witz Inc. Attorneys