



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

CASE NO: 014395/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
DATE: 20 FEBRUARY 2023
SIGNATURE: ***ML SENYATSI***

In the matter between:

YG PROPERTY INVESTMENTS (PTY) LTD

Applicant

And

SELOTA

Respondent

BOSHOMANE, T & OTHERS LISTED ON ANNEXURE "A" Further Respondents

TO THE NOTICE OF MOTION

Delivered: By transmission to the parties via email and uploading onto Case Lines

the Judgment is deemed to be delivered. The date for hand-down is deemed to be 20 February 2023.

JUDGMENT

(Section 18(3) Application)

SENYATSI J:

- [1] This is a judgment in respect of a section 18(3) application brought by the applicant to execute the interim order pending the determination of the appeal.
- [2] On 26 August 2022, I granted an interim eviction order in favour of the applicant which was followed by reasons on 17 November 2022.
- [3] My brother, Wright J, on 1 November 2022, issued an interim order interdicting the eviction of the respondents from the immovable property pending the leave to appeal application.
- [4] The leave to appeal the interim order was filed and was refused. The suspension and execution of the judgment pending leave to appeal or appeal is regulated by section 18 of the Superior Courts Act 10 of 2018 which 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 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 court to order otherwise, in addition proves on the 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 saw order. “

[5] Section 18 (4) of the Act reads as follows:

“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.”**

[6] Section 18 (4) provides a safeguard against irreparable prejudice being occasioned as a result of a court granting an execution order when it should

not have done so. An appeal against an execution order is one of right and the party that obtained the execution order cannot object to it. If he/she wishes to sustain the execution order, he must oppose the appeal.¹

[7] The party seeking the execution of the judgment must show that exceptional circumstances exist in its favour for the judgment to be executed pending the appeal.²

[8] Prior to the commencement of section 18 of the Act, the common law position regarding this aspect was that once application for leave to appeal was noted, the execution of the judgment was suspended but that with leave of the court, execution of the judgment was possible. The common law position, was set out in *South Cape Corporation Pty Ltd v Engineering Management Services Pty Ltd*³ as follows:

“Whatever the true position may have been in the Dutch courts, and more particularly the court of Holland (as to which see *Ruby's Cash Store (Pty) Ltd v Estate Marks and Another, 1961(2) SA 118 (T) at pp120-3*) it is today accepted common law of practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal with the result that, pending the appeal the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make special application. (See generally *Olifants Tin “B” Syndicate v De Jager 1912 A.D. 377 at p.481; Reid and Another v Godart and Another, 1938 A.D.511 at*

¹ See *Knoop NO & Another v Gupta & Another (115/2020)[2020] ZASCA 149; [2021] 1 All SA 17 (SCA); 2021 (3) SA 135 (SCA) at para [20]*

² See *Ntlemeza v Helen Suzman Foundation & Another, (402/2017);[2017] ZASCA 93; [2017] 3 All SA 589 (SCA) 2017 (5) SA 402 (SCA) at para [10]*

³ 1977 (3) SA 534 (A) at 544 H -545G

p.513; *Gentiruco A.G v Firestone S.A. (Pty) Ltd*, 1972 (1) S.A.589 (A.D.) at p.746.). The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, either by under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from (*Reid's case supra* at p.513). The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised (see *Voet*, 49.7.3; *Ruby's Cash Store (Pty) Ltd .v Estate Mars and Another, supra* at p.127). This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments (*cf. Fisser v Thornton* 1929 A.D. 17 at p.19). In exercising this discretion the court should, in my view, determine what is just and equitable in all the circumstances and, in doing so, would normally have regard, *inter alia*, to the following factors:

- (1) **the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;**
- (2) **the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (the applicant in the application) if leave to execute were to be refused.;**
- (3) **the prospects of success on appeal, including more particularly, the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, e.g., to gain time or harass the other party; and**

- (4) **where there is the potentiality or irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.”**

[9] The order granting give to execute pending an appeal is purely interlocutory and is thus not appealable under common law.⁴ There are exceptions to the rule that purely interlocutory orders are not appealable for instance, an interlocutory appeal may be heard in the exercise of the appeal court's inherent jurisdiction in extraordinary cases where grave injustice is not otherwise preventable.⁵

[10] In *Philani-Ma-Africa and Others v Mailula and Others*⁶ the court considered the position where a high court had granted leave to execute an eviction order despite having granted leave to appeal and held that the under appropriate circumstance, such order may be executable in spite of the appeal. 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 a notice of appeal is lodged with the registrar in terms of the rules.

[11] It is evident that the new provisions of section 18(4)(ii) have made orders to execute appealable. It therefore alters the common law position that such being a purely interlocutory order, they were not appealable. Moreover, it grants to a party against whom such an order is made, an automatic right of appeal. As already stated, section 18(3) requires an applicant for an execution order to

⁴ See South Cape (supra)

⁵ See Ntlemeza (supra) at para 20

⁶ [2009] ZASCA 115; 2010 (2) SA 573

prove on a balance of probabilities that he or she will suffer irreparable harm if the order is not granted, and that the other party will not suffer such harm.⁷

[12] The applicant in the section 18(3) application, contends that the order and the judgment appealed against, gave the respondents an opportunity to regularise their relationship with the applicant and avoid eviction. Almost half of the respondents did so and the others did not.

[13] It contends that once the period for making payment passed, it was only then that eviction was sought for those who did not regularise their relationship with the applicant.

[14] The applicant's irreparable harm is said to be that since the reinstatement into the property, the applicant has been prevented from repairing any damage caused to the property as a result of the extensive acts of violence. The public order unit of the South African Police Services has not been able to assist to bring order to the situation. More importantly, those residents who are paying their rental are subjected to acts of intimidation to join the rent boycott and it has become difficult for them to continue living in an environment of chaos occasioned by the respondent's refusal to pay rent.

[15] The applicant further contends that for as long as the acts of violence and intimidation persist due to the sustained rental boycott, it will continue to suffer irreparable losses in that it will not be able to keep the rent paying tenants and will fail to meet its 95% rental collection in order to comply with the requirements of the State Housing subsidy for its property. It further contends

⁷ See Ntlemeza (supra) at para [23]

that after because after conducting income assessments and it found that the respondents earned the monthly income of between R6 000 and R 22 000 and that the continued rental boycott would lead to the collapse of the housing scheme.

[16] It contends furthermore that the respondents will not suffer irreparable harm because with the income they earn, the respondent will be able to secure alternative accommodation elsewhere.

[17] The respondents oppose the reasons raised by the applicant for the order to be executed pending the appeal. They contend, *inter alia*, that if evicted, they will become homeless.

[18] They deny that there is damage to the property and contend that the applicant can embark on rental recovery steps against them.

[19] The respondents state that the loss of rental by the applicant does not justify their eviction and that the order should not be executed.

[20] Having considered the harm to be suffered by the parties, I hold the view that it is the applicant to stands to suffer irreparable harm. This is so due to the acts of violence and intimidation directed to its personnel and property suffered at the hands of the respondents. It is irrelevant that the applicant has not pointed out on the papers as to how each respondent contributed to the conduct of the alleged violence and intimidation complained of. It is not permissible that the owner of the property cannot be able to carry out repair and maintenance of the property owing the continued acts of the attempted property high jack.

[21] I have no doubt that due to the chaotic circumstances prevailing at the property, there is more possibility that the applicant potentially stands to lose the rental paying tenants who feel threatened by the chaos that is taking place of the property. It is proper that the court should intervene and come to the aid of the applicant pending the part B of the application as well as the determination of the appeal.

[23] Accordingly, the applicant has succeeded on a balance of probabilities to show that it will suffer irreparable harm if the execution of the order is refused.

ORDER

[24] The following order is made:

- (a) The order I issued on 26 August 2022 under case number 2022/014395. is operative and executable pending the finalisation of the respondent's application for leave to appeal and pending any further applications for leave to appeal or petition to any other court;
 - (b) The 1st to 155th respondents are directed to the extent that they have not regularised their relationship with the applicant, to pay the costs of this application, jointly and severally the one paying the other to be absolved.
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**ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

DATE JUDGMENT RESERVED: 10 February 2023

DATE JUDGMENT DELIVERED: 20 February 2023

APPEARANCES

Counsel for the Applicant: Adv C van der Merwe

Instructed by: Vermaak Marshall Well Beloved Inc.

Counsel for the Respondents: Adv M Lepaku

Instructed by: ET Paile Attorneys

Counsel for the Respondents: Mr AJ Masiye

Instructed by: AJ Masiye Attorneys