



**IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**Case No:39461/2020**

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| (1) | REPORTABLE: <del>YES</del> / NO                    |
| (2) | OF INTEREST TO OTHER JUDGES:<br><del>YES</del> /NO |
| (3) | REVISED: NO  |

In the matter between:

**ENGEN PETROLEUM LIMITED**

Applicant

And

**DAV DISTRIBUTION CC t/a WILLOWCREST**

Respondent

**CONVENIENCE CENTRE**

(registration No.: 1995/020132/23)

*In re:*

**ENGEN PETROLEUM LIMITED**

Applicant

**And**

**DAV DISTRIBUTION CC t/a WILLOWCREST  
CONVENIENCE CENTRE**

Respondent

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**JUDGMENT**

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**NOKO J**

*Introduction*

[1] The respondent launched an application for leave to appeal the judgment and order I granted for the eviction of the applicant from the applicant's immovable property, *to wit*, Erf 59, Cresta Ext 1 Township, situated at cnr Judges street and Republic Avenue, Cresta, Randburg. The applicant in turn launched an application in terms of section 18(3) of the Superior Court Practice Act ("*the Act*") to execute the eviction order pending leave to appeal and/or appeal.

[2] The respondent has subsequent to receiving section 18(3) application decided to withdraw its application for leave to appeal and tendered costs. As a result of the withdrawal the application in terms of section 18(3) of the Act becomes superfluous. The respondent refused to make a tender for legal costs in respect of the section 18(3) application and the parties appeared before me to argue the question of costs.

[3] The respondent contends that the application in terms of section 18(3) is about the creation of rights and not necessarily to exercise the existing rights. In such an instance, so the respondent's counsel continues, the applicant is therefore asking for an indulgence or condonation and such an applicant must as a matter of course make a tender for costs. The counsel contended further that the argument she is advancing is novel and is therefore precedent setting. Further that it is akin to application to uplift the bar in terms of rule 27 where a party is seeking an indulgence from court. The respondent argued that it would justifiably be mulcted with an order for costs where the court held that the application was opposed vexatiously or frivolously.<sup>1</sup>

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<sup>1</sup> The parties were requested, and they submitted written submission to guide the court with relevant authorities and respondent referred to *Mers v Abramson 1951 (3) SA 438 (C)* which confirmed cost would be ordered where opposition was frivolous.

[4] The applicant in retort contended that section 18(3) application was triggered by the respondent's application for leave to appeal. The applicant is now out of pocket and the respondent should be ordered to pay the legal costs associated with the application for section 18(3).<sup>2</sup> In addition, the withdrawal of the application for leave to appeal without any explanation being proffered is evidence of malice on the part of the respondent and a confirmation that the application for leave was without merits and only launched with the sole purpose of frustrating the applicant in executing the eviction order.

[5] The respondent's counsel contended that the section 18 (3) application just like the application for leave to appeal brought by the applicant creates procedural rights which must be exercised by a party who satisfies the requirements set out in the relevant rules. If the respondent can satisfy the court that the requirements set out in 18(3) are met, then the respondent would therefore be entitled to be exercise those rights.

[6] I struggled to fathom the *raison d'être* underpinning the contention that the provisions of section 18(3) of the Act do not provide for a procedural right<sup>3</sup> which a party would exercise if such a party satisfies the requirements. This applies to all other provisions of the rules which makes provision for a party to approach court for a specific remedy.

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<sup>2</sup> Applicant referred to *In re: Alluvial Create* 1929 CPD 532 and *Boost Sports v South African Breweries* 2015 (5) SA 38 (SCA) to buttress the argument that a party who is out of pocket should be allowed to recoup the loss.

<sup>3</sup> The word right is being used loosely.

[7] The respondent's argument could not be substantiated with any authority or the argument advanced could not lay good basis for me to conclude that the time has come that procedural rights established by section 18(3) of the Act should be viewed differently to other rights created by the rules.

[8] The arguments by the respondent are unsustainable and bound to fail.

#### *Costs*

[9] The applicant contends that the legal costs in terms of the lease agreement between the parties should be on attorney and client scale. There are no reasons presented to unsettle the general principle that the costs should follow the results.

#### *Order*

[10] In the premises I grant the following order:

*That respondent is ordered to pay the applicant's legal costs in respect of section 18(3) application on attorneys and client scale.*

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Mokate Victor Noko  
Judge of the High Court

This judgement was prepared and authored by Noko J is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **1 March 2024**.

Date of hearing:	15 February 2024
Written submissions	20 February 2024
Date of judgment:	1 March 2024

**Appearances**

For the Applicant:	Adv S Aucamp
Attorneys for the Applicant:	DM5 Incorporated Attorneys.

For the Respondent:	Adv JM Butler
Attorneys for the Respondent	Des and Naidoo Attorneys