REPUBLIC OF SOUTH AFRICA

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

Case No. 06579/2015

DELTE WHICHEVER IS NOT APPLICABLE

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

DATE: **SIGNATURE:**

In the matter between:

NYATHI, S [JS MADUMO] First Appellant

NGCOBO, B & OTHERS listed in Annexure A Second Appellants

And

TENITOR PROPERTIES (PTY) LTD Respondent

In re:

TENITOR PROPERTIES (PTY) LTD Applicant

And

NYATHI, S First Respondent
NGCOBO, B & OTHERS listed in Annexure A of the Notice of Motion Second Respondent
THE UNLAWFUL OCCUPIERS OF THE RIDGE HOTEL Third Respondent

JUDGMENT

WEINER J; VAN DER LINDE AJ; KLEIN AJ:

Introduction

1 This is an appeal under s.18(4)(iii) of the Superior Courts Act 10 of 2013 (the Act). That section provides for the appellants' automatic right of appeal to this court, as *"the next highest court"* against a judgment of Twala, AJ decided under s.18(3) of the Act on 28 April 2015. The order was in the following terms:

> *"It is ordered that:*
>
> 1. *The order of the Honourable Judge Wepener granted on 26 March 2015 is declared to be effective and enforceable pending finalisation of any application for leave to appeal, including the respondents' application for leave to appeal against the said order and if leave is granted pending finalisation of an application to the Constitutional Court for leave to appeal, if leave to appeal is refused and if leave to appeal is granted by the Constitutional Court, pending finalisation of the respondents' appeal.*
>
> 2. *The order in 1 above shall be executed 30 (thirty) days from the date of service of this order.*
>
> 3. *The respondents are to pay the costs of this application jointly and severally the one paying the other to be absolved."*

2 The order of Wepener, J was granted by him in favour of the respondent against the appellants in these terms:

> *"1.The respondents are evicted from the property at The Ridge Hotel, 8 Able Road, Berea, Johannesburg, and more fully described as Erven 187, 189 and 1411 Berea Township, Registration*

Division IR Gauteng (hereinafter referred to as 'the property').

2. *The respondents are ordered to vacate the property within 48 hours of the date of service of the court order herein.*

3. *In the event that the respondents do not vacate the property within 48 hours of the date of service of the court order herein, the sheriff of the court or his lawfully appointed deputy is authorised and directed to evict the respondents from the property.*

4. *The respondents are directed to pay the costs of this application, including the costs of the applications in terms of Part A of the notice of motion and in terms of s.4(2) of the PIE Act."*

3 On 30 March 2015 Wepener, J refused the appellants' application for leave to appeal against his judgment with costs as between attorney and client. It may be accepted for present purposes that the order of Wepener, J was not an interlocutory order as envisaged in s.18(2) of the Act, and that accordingly s.18(1) applies. After the dismissal of the application for leave to appeal, the appellants applied to the Supreme Court of Appeal for leave to appeal; that application is pending.

4 On 18 May 2015, the appellants filed their grounds of appeal against the judgment of Twala AJ, now before us. This appeal was thereafter set down by the respondent for hearing on Friday, 5 June 2015 as the appellants had failed to set it down. At the hearing, the appellants' counsel explained that he and his instructing attorney had received notice of the hearing date only late the previous evening. He

accordingly applied for a postponement to afford him an opportunity better to prepare the argument.

5 He explained that he had represented the appellants throughout; he had settled the answering affidavit in the main application before Wepener, J; he argued the matter before Wepener, J; he argued the application for leave to appeal before that court; he settled the answering affidavit in the rule 49(11) application; he argued the s.18 application before Twala, AJ; and he settled the grounds of appeal against the order of that court on 18 May 2015.

6 He has been aware, since 18 May, that the appeal could be set down at short notice. The section provides for the appeal to be heard as a matter of "e*xtreme urgency*". Although he stated that, if the court insisted, he could argue the matter then and there, he was concerned that he would not be able to give the court appropriate page references in the course of his submissions. He needed 48 hours to be able to prepare heads of argument to be able to do so.

7 After consideration, we resolved to stand the appeal down until Monday morning, 8 June 2015 at 09h00 to afford counsel that opportunity. We accordingly heard argument yesterday. This is our judgment.

8 We have only the order of Twala, AJ and not his reasons. In consequence, even if we should have approached the facts differently as a court of appeal, we cannot do so in this matter. Our approach is therefore to assess the matter afresh. Since this approach favours the appellants, we consider that there cannot be any prejudice.

Background

9 We commence by setting out the relevant background and then deal with the grounds of appeal and the reasons advanced by the appellants.

10 The respondent asserts that it is the owner of a building known as The Ridge Hotel in Berea, Johannesburg. It is a block of residential flats. The respondent puts up a title deed to prove its ownership. It says it acquired the building from the liquidator of Win Win Training Specialists (Pty) Ltd (in liquidation), the previous owner of the building. The acquisition occurred on 28 June 2010 and the building was registered in the respondent's name on 25 May 2011.

11 After the respondent became owner, the occupants of the building continued paying the rental as they had done before to the previous owners. However, during 2014, the atmosphere at the building became increasingly tense with rental collections declining, causing the respondent substantial cash-flow problems. The respondent's

bondholders were compelled to become more actively involved in order to ensure stability of the property.

12 A meeting took place in December 2014 between the respondent, the bondholders, and some of the occupiers, including the first appellant. At this meeting he said that the SACP Youth League had a mandate to investigate inner city buildings to ensure that the owners thereof were paying their obligations to the City of Johannesburg; and that unless the respondent was co-operative he, the first appellant, would ensure that the City attached the property.

13 It is not disputed that, at this meeting, the respondent was given a memorandum authored by the Mzansi Progressive Movement. The memorandum says that illegal evictions of indigenous people were taking place on a daily basis in Berea, Hillbrow and Yeoville.

14 The memorandum suggests that property owners of hijacked buildings should be integrated into a reconstruction and development plan to allow voters to have ownership through subsidised housing schemes. It is proposed that private security firms be employed at buildings or streets that were said to be *"problematic"*, *"in order to monitor and bring control"*. These private security firms are to *"monitor all illegal evictions."*

15 The meeting did not resolve the conflicts, as the following events will show. The respondent had resolved to change its managing agent and its security company with effect from the 1st of January 2015. When the respondent's new security company attempted to relieve the previous security company, they were met with violent resistance. The deputy-sheriff was denied access to the building when he attempted to deliver letters on the 6th of January 2015.

16 A security firm known as FASA Protection had, on the instructions of the occupants, taken control of security issues at the building. The papers include what appears to be a resolution by the occupants whereby they appoint their own security firm for the building. The appellants' counsel was not able to address any argument on the document, because it had not been included in his brief. He was given a copy, but had no instructions in relation to the document. The respondent, however, submitted that the resolution was attached to the applicants' answering affidavit in the eviction application.

17 Be that as it may, the respondents applied urgently to court for relief, and on 8 January 2015 Coppin, J issued an order, the effect of which was to evict FASA Protection from the building. This firm was also interdicted from installing guards on the property; from purporting to conduct any kind of security function at the property; from interfering with the respondent's officers, employees or agents in the legitimate

conduct of their business at the property; and from being within ten metres of the building.

18 This was to no avail. When the deputy-sheriff attempted on 14 January 2015 to serve the order with the assistance of the SAPS, a group of approximately 400 people physically ejected the respondent's security firm again. This group of people broke down the security gate, forced access into the property, and tore down the respondent's security devices at the property, including security cameras.

19 Since that date, the respondent has not controlled the building. It is controlled by the appellants and a security company acting under their directions. Since the beginning of February 2015, no rental at all has been paid to the respondent. In fact, the events of February 2015 and thereafter bear a striking resemblance to the strategy referred to both in the resolution and in the memorandum referred to above.

20 Thereafter on 6 February 2015, Mashile, J heard an application by the respondent to commit the present appellants for contempt of court for failing to have complied with the order of Coppin, J. Such an order was granted but since the appellants have given notice of an intention to apply for leave to appeal against that order, it has not been executed.

21 The urgent application before Wepener, J followed, and thereafter, the events described earlier in this judgment.

22 The essential picture that emerges from the affidavits is one of a typical hijack of an inner-city block of flats. The respondent's predecessors had let the flats to occupiers, and the respondent's immediate predecessor was ultimately liquidated. The appellants and the other occupiers of the flats are quite unequivocal that they are not paying the rental, because they dispute that the respondent is the owner of the building. The rental boycott is accompanied by violence and vandalism. It is not effectively disputed that persons unknown to the respondent took up occupation within the building during and after a violent takeover of the building.

23 Two salient, juxtaposed, points stand out. The first is that the appellants do not appear to assert any legal entitlement vis-à-vis anyone to their continued occupation of this private building. They deny that any lease agreement exists between them and the respondent. Secondly, the respondent has provided the original title deed of the property and it reflects that the respondent is its owner.

The appellants' grounds of appeal

24 For the respondent to have been successful before Twala, AJ, the court had to be persuaded of the presence of three requirements: firstly, the presence of exceptional circumstances; secondly, that

suspension of the order would result in irreparable harm to the respondent; and thirdly that non-suspension/execution would not result in irreparable harm for the appellants.

25 The appellants have set out grounds and reasons on which their appeal is based. These traverse the three requirements set out above. In addition, there are further grounds, which, when distilled to the essence of the points made, mean that there are really five points to be addressed in this appeal. Apart from the three statutory requirements, the two further points are whether the respondent has shown that it is the owner of the building and therefore entitled to an eviction order; and the issue of the non-existence of the lease agreements. We address these five issues in turn.

"Exceptional circumstances"

26 S.18(1) and (3) of the Act provide as follows (our emphasis):

> *"18. Suspension of decision pending appeal*
>
> *(1) Subjection to sub-sections (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.*
>
> *(2) …*

> *(3) A court may only order otherwise as contemplated in sub-section (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a 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 so orders."*

27 Under s.18(4)(i) of the Act, if a court orders that the initial decision will not be suspended, *"…the court must immediately record its reasons for doing so"*; and under s.18(4)(ii), *"…the aggrieved party has an automatic right of appeal to the next highest court."* Under s.18(4)(iii), *"…the court hearing such an appeal must deal with it as a matter of extreme urgency."*

28 There is no shortage of hits in the South African law reports response to a Jutastat search for the linked words, *"exceptional circumstances"*. The concept features often in legislation, but also in the *ratio decidendi* of judgments. It would be ambitious here to try to capture its meaning in a definition, because self-evidently the context determines the application; but there is no doubt that the courts consider it to set the bar at a high level. Compare Chevron Engineering (Pty) Ltd v Nkambule and Others, 2004 (3) SA 495 (SCA) at [42].

29 In the context of the present matter we approach the concept of *"exceptional circumstances"* in the following way.

30 First, by definition, these words have a wide berth. Second, that notwithstanding, it would be wrong to approach the assessment of the concept on the basis that the appeal has or does not have a prospect of success, one way or the other, because all appeals will either succeed or fail. Put differently, the fact that an appeal has a weak prospect of success cannot be exceptional; that happens all the time.

31 Third, it follows that the circumstances, for them to be exceptional, must as far as possible be neutral in relation to the success prospects. Fourth, since the words have a wide reach, the potential harm that each side will suffer, if the suspension issue goes against that side, is a relevant factor.

32 Against this background, we consider the following circumstances as being pertinent. The first consideration is that the occupants are not paying for their occupation, nor is anyone else paying for it; while the respondent is availing the building for their occupation. This fact represents an economical aberration for which there is, objectively, no justification. Even if the occupants' worst suspicions were true, they ought to have been paying some compensation for the services and the roofs over their heads.

33 Second, the scale on which such conduct is occurring is significant. One is not dealing with a single occupant in a block of flats. That scenario might, depending on the circumstances, have been manageable. Here a whole building is involved.

34 Third, the fact that the appellants' continued occupation is maintained by violence is relevant. This represents a degree of anarchy which is fundamentally incompatible with the founding value of s.1(c) of the Constitution, which is the supremacy of the Constitution and the rule of law (emphasis added).

Irreparable harm

35 The next issue concerns that of the respective potential harm that each side will suffer if the suspension order goes against it. Sutherland, J in Incubeta Holdings (Pty) Ltd and Another v Ellis and Another, 2014 (3) SA 189 (GJ), held that these are two distinct enquiries; not as before, in terms of Rule 49(11), when there was a weighing up of the relative positions of the two sides in assessing a balance of convenience.

36 The appellants say that they will be destitute if they are evicted. In his publication, *"Essential Judicial Reasoning"*, BR Southwood (LexisNexis 2015), a retired judge of considerable experience, cautions (at p.28, para 4.6) that to decide whether the affidavits

disclose real, genuine or bona fide disputes of fact, a court must carefully scrutinise them.

37 The author refers to the judgment in Wightman t/a JW Construction v Headfour (Pty) Ltd & another, 2008 (3) SA 371 (SCA). That judgment, in paragraphs 12 and 13, refers to the well-known judgments in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, 1984 (3) SA 623 (A) at 634E to 635C. It refers also to the analysis by Davis J, in Ripoll-Dausa v Middleton NO & others, 2005 (3) SA 141 (C) at 151A to 153C. These dicta stress the point that a respondent could so easily trip up the motion court process if it were permitted to create artificial disputes of fact.

38 Despite saying that they would be destitute, the appellants also say, several times, that they will pay the respondent for their occupation of the building if the respondent were to satisfy their particular demands for proof of ownership. This is stated repeatedly in the answering affidavit; see paragraphs 3.2, 27.2, 29.2, 32.6, and 37.2. In fact, the appellants say that they were prepared to pay the rental into the trust account of an attorney. They do not say that they won't pay because they can't pay. They allege that their earnings, in some instances, are R8000 pm. They are not indigent.

39 In these circumstances, it is not credible that the appellants will be destitute, if evicted. The appellants are willingly participating in a scenario where they have decided to pay rentals to their own leaders and not to the owner of the building. If they were evicted, they would be able to apply their rental payments to other accommodation.

40 Although we are not specifically told where they can rent alternative accommodation, they have not said that they won't be able to find any. They also raise the issue that children will be displaced and will not be able to go to school. No evidence of this was placed before any of the courts hearing this matter. If the appellants can afford alternative accommodation, there is no reason advanced by them why such accommodation cannot be found in proximity to transport and / or to the schools which the children presently attend. One's instinctive concern is really just that: a concern, but not supported by evidence. One cannot accept, therefore, that they will be destitute and displaced if the execution of the eviction order is granted. One must accept that they have the wherewithal to pay for occupation.

41 The respondent's expressed position is that it will not survive the rent boycott. It borrowed R25 634 593 from the Trust for Urban Housing Finance, and R12 000 000 from the Gauteng Partnership Fund, totalling more than R37 000 000. The interest alone on its loans approximates R400 000 per month and operational costs, including

electricity, water, rates, administrative fees and staff salaries exceed R216 000 per month.

42 The respondent explains that its only business is the rental of the building. Its damages escalate on a daily basis and it has no prospect of recovery. The shareholders of the respondent are all black South Africans and the respondent is driven by a pressing imperative to transform the complexion of inner-city land ownership patterns.

43 Clearly the building must have involved a capital outlay for which mortgage bonds were registered and clearly its continued operation involves running costs. There are also rates and taxes.

44 The appellants criticise the respondent for not proving its dark prediction. They question why letters of demand from the mortgage bond holders, or bank statements were not provided. However, common sense tells one that bond repayments and rates and taxes are, as the expression goes, like death, certain. And appeals, virtually as certain, take time. Financial ruin is not, we think, far-fetched. The previous owner was liquidated, and although one does not have hard facts about it, it does seem certain that the investment in the block of flats in Berea did not prevent the financial demise. The respondent has stated unequivocally that it has no other income; the income it derives from the rentals pays for the bond and rates and taxes and other

running costs. Without such payments, the respondent cannot meet its obligations.

45 One might not be able to say that these circumstances individually are *"exceptional"* within the meaning of s.18. But in our view, taken together, they are.

Ownership of The Ridge Hotel

46 The fourth issue concerns the ownership of the building. The appellants have throughout challenged the ownership of the building. Their case is that the previous owner of the building, a Dr Mabunda, sold it to a different juristic entity, Kaplan Estates, whose owner, Mr Easy Norvac (sic), passed away in 2010. They therefore attack the obligationary agreement. They do not provide any further proof or evidence relating to their suspicions that there is something untoward in the respondent's ownership.

47 The respondent handed the original title deed to Wepener, J during the hearing. It annexed a copy of the title deed certified for judicial purposes by the Registrar of Deeds, to its founding affidavit in the present matter. By virtue of s.16 of the Deeds Registries Act 47 of 1937, *"… the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the registrar…".*

48 In Legator McKenna Inc and Another v Shea and Others 2010 (1) SA 35 (SCA) the Supreme Court of Appeal held that, in our law, the abstract theory of transfer applies to immovable property as well. Brand JA, writing for a unanimous court, stated (para 22):

> *"In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery - which in the case of immovable property is effected by registration of transfer in the deeds office - coupled with a so-called real agreement or saaklike ooreenkoms. The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property (see eg Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein en 'n Ander 1980 (3) SA 917 (A) at 922E - F; Dreyer and Another NNO v AXZS Industries (Pty) Ltd supra at para 17). Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass - despite registration of transfer - if there is a defect in the real agreement (see eg Preller and Others v Jordaan 1956 (1) SA 483 (A) at 496; Klerck NO v Van Zyl and Maritz NNO supra at 274A - B; Silberberg and Schoeman op cit at 79 - 80)."*

49 In these circumstances, the challenge to the respondent's ownership cannot be accepted. The title deed establishes the ownership, and it is not sufficient simply to question its veracity; that does not raise a *bona fide* factual dispute. That applies particularly when one bears in mind that the appellants would have to show that not only the respondent

and the liquidator of Win Win Training, but the conveyancers, as well, were all party to a fraud; when they expressed their intention to transfer ownership, that would have had to have been false.

No rental agreements

50 Finally there is the argument raised by the appellants that the respondent has not proved rental agreements between it and them, and therefore there was no obligation to pay rental.

51 It is not in dispute that the appellants had concluded rental agreements with the respondent's predecessors. By virtue of the *huur gaat voor koop* rule, the respondent became their new landlord by operation of law. The respondent simply stepped into the shoes of the previous landlord. No further agreement was necessary; see Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd, 1995 (2) SA 926 (A).

52 In any event, as pointed out in the judgment of Wepener, J, the appellants kept paying rental after the respondent had become owner of the building in 2011. A tacit tenancy must have come into existence during that period.

53 It follows that the appellants have failed to persuade this court that Twala, AJ erred in granting the relief to the respondent. The respondent has satisfied the requirements of Section 18, in demonstrating exceptional circumstances, and that it will suffer irreparable harm if the order is suspended, whereas the appellants will not.

Costs

54 The appellants asked for a special costs order in two respects, should they be successful: that the costs be paid *de bonis propriis*, and on the scale as between attorney and client. The latter submission was based on the proposition that the appeal is an abuse, not *bona fide,* a deliberate strategy to force the respondent into liquidation, and by a litigant who does not shy away from self-help. The former was based on the submission that the appellants took no steps to prosecute the appeal. Also, the defences put up were said to be without substance.

55 These two ostensibly separate issues are really co-mixed. When does a legal representative begin to pay the price for advising on a case or defence that has no substance? And when does the client have to pay a special price for having abused court resources for a failed and ill-conceived defence that serves its own agenda?

56 On the issue of costs *de bonis propriis,* the appellants' counsel explained how much trouble he and his instructing attorney had taken to get the judgment from Twala, AJ and the appeal enrolled. Also, the advice may very well have been that the prospects of success on-appeal were poor. We do not think that the legal representatives should literally have to pay the price if that were so.

57 On the issue of costs on the scale as between attorney and client, the position is more complex. We have drawn attention to the fact that the appellants have not asserted any legal right of occupation against anyone, much less have they asserted a right to free occupation.

58 Instead, they appear to have subjected their willingness to pay for their occupation to their misguided belief that the respondent is obliged to produce documents that would supposedly prove the respondent's ownership. It is nonetheless an appeal against a judgment given on an application brought on motion proceedings. Affidavits may often obscure nuances that are pertinent. Hijacking of buildings in the inner-city by unscrupulous parties may have raised fears, even if ill-founded, of dishonest parties pretending to be landlords.

59 In these circumstances we prefer not to accede to a request that might have been legitimate were the affidavits prepared with more precision and circumspection and in less haste.

Conclusion

60 It follows that in our view the order of Twala, AJ was correctly made. We would dismiss the appeal, with costs, and it is so ordered.

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SE WEINER, J
JUDGE OF THE HIGH COURT
JOHANNESBURG

_____
WHG VAN DER LINDE, AJ
ACTING JUDGE OF THE HIGH COURT

_____
KLEIN, AJ
ACTING JUDGE OF THE HIGH COURT

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Instructed by:	Vermaak & Partners Inc.
Date argued:	8 June 2015
Date of judgment:	9 June 2015