



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

REPUBLIC OF SOUTH AFRICA

CASE NO: 57252/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
(4)	DATE: 02 OCTOBER 2021
(5)	SIGNATURE: <i>ML SENYA</i>

In the matter between:

**CATERPILLAR FINANCIAL
SERVICES SOUTH AFRICA (PTY) LTD**

Applicant

And

ZERO AZANIA (PTY) LTD

Respondent

LEAVE APPEAL AND SECTION 18 (3) JUDGMENT

SENYATSI J

- [1] This Court is faced with two applications, namely, an application brought by Zero Azania (Pty) Ltd (“Zero”) against the vindicatory relief granted in favour of Caterpillar Financial Services South Africa (Pty) Ltd (“Caterpillar”), in the main application and an application in terms of section 18(3) of the Superior Courts Act, No: 10 of 2013 (“the Act”) for the execution of the repossession order pending the leave to appeal application and the section 18(3) brought by Caterpillar.

Leave to appeal.

- [2] Zero Azania criticised the judgment on eight grounds in respect of the findings made and argued that the Court erred. For instance, and without repeating the grounds in this judgment, it claims that the Court erred in allowing the condonation application; erred in finding that the jurisdictional requirements of *rei vindication* had been proven; that the Court erred in finding that ownership of the units had been proven and that the Court erred in finding that there was no new agreement concluded by the parties after January 2022.
- [3] It is a trite principle of our law that leave to appeal may only be given where the Judge or Judges concerned are of the opinion that the appeal would have a reasonable prospect of success or where there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.¹ The bar has been raised

¹ Section 17 (1)(a)(i) and (ii) of the Act.

regarding the application for leave to appeal and the applicant bears the onus to show that the appeal would have a reasonable prospect to succeed.²

[4] Counsel for Zero Azania, Adv B Smith, argued for instance that because the issue of ownership of the units had not been proved, as this is a matter of law, it must be allowed to be argued. I do not agree with the proposition. The Court was never called upon in the main application to determine ownership because it was never disputed.

[5] In dealing with the same contention, the Court in *Democratic Alliance v Brummer*³ said the following :-

“[15] Where the judgment does not deal expressly with an issue of fact or law said to have been determined by it, the judgment and order must be considered against the background of the case as presented to the court and in the light of the import and effect of the order. Careful attention must be paid to what the court was called upon to determine and what must necessarily have been determined, in order to come to the result pronounced by the court. The exercise is not a mere mechanical comparison of what the two cases were about and what the court stated as its reasons for the order made.⁴ In *Boshoff*, for instance, the plaintiff had sued for damages arising from an unlawful cancellation of a lease and ejectment. The defendant raised a plea of *res judicata* on the basis that the defendant had, in a prior action, obtained a judgment for ejectment. The prior order was obtained by default judgment. The court found that an order for ejectment could not have been granted unless the court had found

² *Acting National Director of Public Prosecutions and Others v Democratic Alliance v Acting National Director of Public Prosecutions and Others* (1957/09) [2016] ZAGPPHC 489 (24 June 2016).

³ (793/2021) [2022] ZASCA 151 (3 November 2022)

⁴ *Aon South Africa (Pty) Ltd v Van Den Heever NO and Others* [2017] ZASCA 66; 2018 (6) SA 38 (SCA) para 40

that the cancellation of the lease was lawful. The order that was granted was read against the backdrop of the case as pleaded.”⁵

- [6] The grounds of appeal have no legal and factual basis and must, for reasons given in the judgment, fail. This is so for instance if regard is had to the fact that no cogent reasons were advanced by Zero Azania justifying the continued possession of the units. It for instance claimed that it concluded a new agreement with Caterpillar through its attorney Miss Van Der Merwe. In any event, the so-called new agreement or rather payment of the arrear amount was rejected by Zero Azania through its attorney Mr Van Der Walt by way of an email to Caterpillar’s attorney Ms Van Der Merwe. There could, therefore, not have been any new agreement was not related to the units in possession of Zero Azania. Accordingly, the prospects of success of the appeal are significantly weak. For this reason and others, the application for leave to appeal must fail.

Section 18(3) application

- [7] On 8 September 2023, I granted an order in terms of which the respondent was ordered to deliver two Caterpillar Motor Graders, a Medium Excavator, and a Medium Track Type D6 (“the units”) to the applicant of which it is the owner. The order was served on the respondent on 11 September 2023. The respondent did not comply with the order by delivering the units in terms thereof to the applicant.
- [8] The units were electronically tracked and found at Four Seasons Hotel, Westcliff, in Johannesburg (“the premises”) in terms of the tracking devices that were attached thereon. The units were working on a renovation

⁵ Boshoff v Union Government 1932 TPD 345 at 350-351.

construction project at the premises and of course earning revenue for Zero Azania.

- [9] The sheriff attended at the premises on 14 September 2023 accompanied by the applicant's agent, Mr Meyer, with the intention to attach and remove the units. Upon arrival they were furnished with the application for leave to appeal against the judgment and order granted on 8 September 2023. This was the first time the applicant became aware of the application for leave to appeal the judgment.
- [10] The effect of an application for leave to appeal is the automatic suspension of the execution order in terms of section 18 of the Superior Courts Act-the Act unless there are exceptional circumstances in terms of section 18(3) thereof. Consequent upon becoming aware of the leave to appeal application, the applicant launched the section 18(3) application permitting the execution of the judgment to be carried out pending leave to appeal the judgment.
- [11] The issues for determination are whether the application is urgent and whether the applicant has shown that exceptional circumstances exist to entitle it to the order in terms of section 18(3) of the Act.
- [12] Section 18 of the Act provides as follows: -

“Suspension of decision pending appeal

(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.

(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 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.

(4) 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.

(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."

I will now deal with the principles on urgency and whether there are exceptional circumstances to warrant the hearing of the application as set out above.

Urgency

[13] The principles on urgency are trite. For the matter to be urgent, the applicant needs to demonstrate that the applicant will not obtain substantial redress in the ordinary course. It is a practice that the Court that gave an order being appealed against should preside over the hearing of the section 18(3) application and in the instant matter, both application for leave to appeal and the current section 18(3) application were heard together, during the Court recess.

[14] The relief sought in terms of section 18(3) of the Act, is by its nature, urgent. In *Downer v Zuma and Another*⁶ the Court stated as follows to restate the urgency nature of the application:

“[10] Section 18 applications are by their very nature urgent. This is borne out by the provisions of s 18(4) which provides that an appeal must be dealt with on an extremely urgent basis - see Trendy Greenies (Pty) Ltd t/a Sorbet George v De Bruyn and Others.⁷ The First Respondent has submitted that the applications are not urgent and will not prevent the Applicants from appearing in court on the 4th August 2023. The underlying reason for this submission is that in the event this court finds in favour of the Applicants, the First Respondent will immediately invoke his right of automatic appeal in terms of s 18(4) of the Act. This is contemptuous as it is pre-empting the judgment and reasoning of the judgment. However, as the s18 applications are inherently urgent, we are of the view that there is no merit in the First Respondent's point in limine.”

⁶ (12770/22P; 13062/22P) [2023] ZAKZPHC 75 (3 August 2023) at para 10.

⁷ *Trendy Greenies (Pty) Ltd t/a Sorbet George v De Bruyn and Others* (2021) 42 ILJ 1771 (LC)

- [15] Zero Azania contended that the application is not urgent because the applicant had more than sufficient time from 14 September 2023 to the date of hearing, 26 September 2023. It further contended that as the application for leave to appeal the order automatically suspends the execution of the judgment, the application should not be entertained. This contention in my view, is without merit. The finalization of the hearing of appeals takes time. The applicant will not obtain substantial redress if the process of appeal or petition of the order unfolds in the ordinary course. It is for that reason that the section 18(3) is by its very nature urgent.
- [16] Furthermore, the right of ownership of a thing is entrenched in our Constitutional dispensation and should be jealously protected⁸. This is more so when the title of the owner, as in this case, was not disputed in the main case. It should be remembered that steps were taken once it became known by Caterpillar that the order granted by this Court on 8 September 2023 was being appealed against when the order was executed. Although this much is disputed by Zero Azania who claimed that it had sent the notice for leave to appeal to Caterpillar by email, there is no ground to suggest that Caterpillar would have deliberately ignored the application and persisted with the execution of the judgment. Consequently, I am satisfied that the application is urgent and should be entertained.

The test for consideration of section 18(3) application.

- [17] The test for consideration of section 18(3) application is trite and has been stated by our Courts that factors to be considered are as follows⁹:-

⁸ Section 25(1) of the Constitution of South Africa : BLC Plant Company Pty Ltd v Maluti-A-Phofung Local Municipality 2018 JDR 1776 (FB) para 4; Given v Given 1979(2) SA 1114(T) 1120C; Oaklands Nominees (Pty) Ltd v Gelria Mining & Investments Co (Pty) Ltd 1976(1) SA 441 (A) at 452A.

⁹ Incubeta Holdings (Pty) Ltd v Ellis⁹ 2014 (3) SA 189 (GJ) para 16.

(a) First, whether ‘exceptional circumstances’ exist, and

(b) Second, proof on a balance of probabilities by the applicant of:-

(i) The presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order, and,

(ii) The absence of irreparable harm to the respondent/loser, who seeks leave to appeal.

[18] As to what constitutes exceptional circumstances, Courts have always eschewed any attempt to lay down a general rule as to what constitutes exceptional circumstances.¹⁰ The reason is that the enquiry is factual one.¹¹ The Court has no discretion to exercise, and the circumstances must justify the departure from the ordinary process pertaining to appeals.¹²

Irreparable Harm

[19] Caterpillar needs to show that it will suffer irreparable harm if the order is not executed. It does not need to show that there is certainty that it would suffer irreparable harm.¹³ Although it had been held in *Incubeta Holdings (Pty) Ltd v Ellis*¹⁴ that in considering the section 18(3) the merits on the prospect of success of the appeal were of no consequence, this judgment was overtaken by the Supreme Court of Appeal as will be shown below.

¹⁰ Norwich Union Life Insurance Society v Dobbs 1912 AD 395 at 399;

¹¹ S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat [1999] ZACC8; 1999(D4) SA 623 (CC) paras 75-77

¹² MV Ais Mamas; Seatrans Maritime v Owners MV Ais Mamas and Another 2006(2) SA 150 (C) 156 E-157; Liesching and Others v The State [2018] ZACC 25; 2019 (4) SA 219 (CC).

¹³ Minister of Social Development Western Cape and Others v Justice Alliance of South Africa and Another [2016] ZAWCHC 34 at para 25.

¹⁴ 2014 (3) SA 189 (GJ) para 16.

[20] The prospects of success of the appeal are of relevance. In *University of Free State v Afriforum*¹⁵ and Another, the Court said the following:-

“ [14] A question that arises in the context of an application under s 18, is whether the prospects of success in the pending appeal should play a role in this analysis. In *Incubeta Holdings Sutherland J* was of the view that the prospects of success in the appeal played no role at all. In *Liviero Wilge Joint Venture Satchwell J*, *Moshidi J* concurring, was of the same view. However, in *Justice Alliance Binns-Ward J* (*Fortuin and Boqwana JJ* concurring), was of a different view, namely that the prospects of success in the appeal remain a relevant factor and therefore ‘ . . . the less sanguine a court seized of an application in terms of s 18(3) is about the prospects of the judgment at first instance being upheld on appeal, the less inclined it will be to grant the exceptional remedy of execution of that judgment pending the appeal. The same quite obviously applies in respect of a court dealing with an appeal against an order granted in terms of s 18(3) ’.”

It is also settled that where the prospects of appeal are weak, there is no need to find that the victorious party has demonstrated “a sufficient degree of exceptionality to justify an order in terms of section 18(3)”.¹⁶

[21] Zero Azania contended that no irreparable harm will be suffered by the applicant as the units are secured by satellite tracking device; operational monitors; remote deactivation; insured comprehensively and maintained by the respondent. It did not state what irreparable harm it would suffer is the section 18(3) application is granted. Caterpillar submitted that no

¹⁵ [2017] ZACC 48; 2018 (2) SA 185 (CC); 2018 (4) BCLR 387 (CC) (29 December 2017)

¹⁶ *University of Free State* supra at para 15

irreparable harm would be suffered by Zero Azania because the units can be procured from the open market.

[22] This submission by Zero Azania misses the point that the units are the only form of security that Caterpillar has, regarding the funding accorded to it. The units will continue to depreciate as they are being utilized by Azania Money Growth. The argument furthermore fails to have regard to the fact that the units will be retained or preserved by Caterpillar and not be disposed of until the appeal processes are exhausted. This much is evident from the papers.

[23] Having regard to the papers and the submissions made before me, I am of the view that Caterpillar will suffer irreparable harm and that Zero Azania will suffer no harm if the order is executed despite the appeal.

Costs

[24] The agreement between the parties provided for costs at the scale as between client and attorney. This provision cannot be departed from and the costs should follow the result.

Order

[25] The following order is made:-

25.1. The application for leave to appeal is dismissed with costs;

25.2. The applicant is authorised to dispense with the requirements of the Rules of Court relating to service and time periods, and the application in terms of section 18(3) of the Superior Courts Act 10

of 2013 is disposed of as an application of urgency in terms of Rule 6(12) of the Uniform Rules of Court.

25.3. The operation and execution of the judgment and order granted against the respondent by this Court on 8 September 2023 under the abovementioned case number is, is not suspended pending:

25.3.1.the finalisation of the application for leave to appeal launched by the respondent on 12 September 2023 against the judgment and order of the Honourable Judge Senyatsi under the above mentioned case number; and/or

25.3.2.the finalisation of any subsequent appeal(s), or the expiry of the time period for the launching of any subsequent appeal(s).

25.4. The Sheriff of the High Court is directed and authorised to take immediate possession of the Units listed below, from wherever he/she may find it, and to retain possession of the Units until delivered to the applicant or its duly authorised representative:

a Caterpillar Large Excavator 336 with serial number JFW10284;
and

a Caterpillar Large Excavator 366 with serial number JFW10319 ("hereinafter collectively referred to as **"the Units"**).

25.5. The applicant is authorised to retain possession of the Units at a location to be elected by the applicant, where the Units shall be held in safekeeping and shall not be sold by the applicant until the appeal process has been finalised, or until the prescribed time period for any future or subsequent appeals has lapsed.

25.6. The respondent is ordered to pay the costs of the application in terms of section 18(3) of the Superior Courts Act 10 of 2013 on the attorney and client scale.



ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 02 October 2023.

APPEARANCES

For the Applicant: Adv PG Louw

Instructed by: Werksmans Attorneys

For the Respondent: Adv B Smith

Instructed by: Van Der Walt Attorneys

Date Applications Heard: 29 September 2023

Date Judgment handed down: 02 October 2023