



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

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

Case No: 2023-052612

Case No: 2023-052191

2 APRIL 2024

SIGNATURE

DATE

In the matter between:

BITLINE SA 951 CC T/A SASOL ROODEPOORT WEST

Appellant

And

SASOL OIL (PTY) LTD

First Respondent

AMRICH 58 PROPERTIES (PTY) LTD

Second Respondent

In re matters between:

SASOL OIL (PTY) LTD

First Applicant (in the court a quo)

AMRICH 58 PROPERTIES (PTY) LTD

Second Applicant (in the court a quo)

And

BITLINE SA 951 CC T/A SASOL ROODEPOORT WEST Respondent (in the court a quo)

ORDER

On appeal from the from the High Court of South Africa, Gauteng Division, Johannesburg (Adams J sitting as court of first instance):

1. The appeal is dismissed with costs, including the costs of two counsel where so employed.
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JUDGMENT

Windell and Unterhalter JJ (Siwendu J concurring):

Introduction

[1] This is an automatic appeal in terms of section 18(4)(ii) of the Supreme Courts Act 10 of 2013 (the Act) against the judgement of Adams J (the court a quo) pursuant to which the respondents, Sasol Oil (Pty) Ltd (Sasol) and Amrich 58 Properties (Pty) Ltd (Amrich), were granted leave in terms of section 18(3) of the Act to execute a judgement granted in their favour (the main judgement).

[2] In terms of the main judgment (delivered on 11 December 2023) the appellant, Bitline SA 951 t/a Sasol Roodepoort West (Bitline) was:

- (i) Ordered to vacate the property known as the Sasol Service Station situated at corner Main Reef and Serfontein, Roodepoort West (the premises) on or before 31 January 2024;
- (ii) Interdicted and restrained from (a) conducting any activities associated with a service and filling station as contemplated in terms of the franchise agreement between Sasol and Bitline from the premises by utilising and/or by being associated with the Sasol brand, know-how, marketing and comprehensive blueprint for the operation of a convenience centre and related businesses, equipment and programmes, licences and/or trademarks and tradenames and/or intellectual property; and (b) sourcing and/or storing and/or distributing any third-party automotive fuel, automotive products, emission fluids and related products at or from the property, which products were sourced from parties other than the applicant.

[3] In terms of the order granted, Sasol was also authorised to gain access to the property and the site 'in order to effect an onsite disablement, which is to include the manual locking, where so required, of Sasol's systems and equipment on site'.

[4] Bitline applied for leave to appeal the main judgment. On 9 February 2024, the court a quo dismissed the application for leave to appeal, and on 29 February 2024 granted Sasol and Amrich's applications brought in terms of section 18(1) read with section 18(3) of the Act. Bitline has subsequently petitioned the SCA for leave to appeal.

Background facts

[5] The facts that gave rise to the dispute between the parties are common cause. Amrich is the registered owner of the premises. Sasol, pursuant to and in terms of a notarial lease, leased the premises from Amrich for the purposes of conducting a service and filling station. The lease afforded Sasol the right to sub-let the premises to a third party. Sasol exercised this right under the lease agreement and concluded a franchise agreement with Bitline in 2003. The franchise agreement granted Bitline the right to occupy the premises as a sub-tenant to Sasol, and to operate the site as a Sasol branded service and filling station.

[6] The agreement was extended on three occasions, with the most recent extension occurring on 1 April 2021. The addendum to the franchise provided that:

'1. WHEREAS the parties have agreed to extend the 3rd period Franchise Agreement from 31 July 2020 on a month to month basis for a period not exceeding 30 June 2022.

AND WHEREAS the Franchisor has agreed that it will provide three (3) months' notice to the Franchisee for termination of this Agreement if terminated earlier than 30 June 2022.

2. ...

2.1 ...

2.1.1 Duration of the Agreement

2.1.2.1 Notwithstanding signature date, this 3rd period Franchise Agreement shall endure from 31 July 2020 on a month to month basis unless it is terminated at any earlier time in terms of this Franchise Agreement.

2.1.2.2 The Franchisor shall notify the Franchisee, in writing, at least three (3) months prior to the termination of this Agreement.'

[7] Bitline was notified by Amrich on 15 February 2022 that the lease with Sasol 'ends on 27 July 2022 at 12 midnite SAST' and their 'operators will take over one second past midnite SAST on 28th July, 2022'. On 1 July 2022 Amrich sent a second letter to Bitline:

'We have now come to the end of the lease which will terminate at midnite SAST on 27th of July, 2022. We will take over the site as 12:01 am SAST on 28th July, 2022.'

[8] On 27 July 2022, the day on which the notarial lease expired by effluxion of time, Sasol presented Amrich with a draft addendum to the notarial lease to secure an extension of the main lease. Amrich did not grant the extension requested. On 9 August 2022, Amrich wrote to Bitline and recorded:

'As discussed in writing, as (sic) communicated with Sasol, we require you to vacate the premises immediately as the lease with Sasol has terminated. We do not have any contractual obligations with you or any of your entities but do with Sasol, and require you to adhere to Sasol's request to vacate the site. Our operators would like to start immediately with renovations and fit out of the site. We require you to remove your possession and allow us uninterrupted access and operation of the site, Sasol Roodepoort Wes, with immediate effect.'

[9] Bitline did not vacate the premises on 30 July 2022. On 22 September 2022 Sasol notified Bitline in writing that:

'Lease negotiations between Sasol and the Landlord were unsuccessful thus placing us in a position to divest from the site situated at Corner Main Reef & Serfontein Road, Roodepoort. You are hereby provided with 30 days' notice to vacate the premises by no later than 23h59, 01 November 2022.'

[10] Bitline refused to vacate the premises once more. As a result, Sasol terminated Bitline's access to the electronic operating system and ceased the supply of fuel to Bitline during November 2022. The site ought to have been rendered inoperable upon the cessation of supply and the termination of the electronic operating site. Instead Bitline re-activated or bypassed the electronic operating system and sourced its fuel requirements from third party suppliers other than Sasol.

[11] Following Sasol's discovery of Bitline's circumventions, Sasol filed an urgent application during May 2023 for an interdict against Bitline, which was struck from the roll due for lack of urgency. In response to Sasol having disabled Bitline's access to the system, Bitline approached the urgent court, claiming that Sasol's actions amounted to spoliation and sought an order that its access to the system be restored. The urgent court dismissed the application with costs. Of particular relevance, however, is the defence that Bitline's raised in those proceedings and the hearing before the court a quo, namely that the parties verbally agreed during July 2022 to extend the franchise agreement until 31 January 2023, and that this agreement was only terminable on three months' notice. As they were not given three months' notice, the franchise agreement has not been terminated and they are entitled to remain in the premises and conduct the business under the Sasol name and brand.

[12] On 11 December 2023 the court a quo delivered its judgment, evicting Bitline from the premises, and granting the interdictory relief initially claimed in the urgent application in May 2023.

[13] From November 2022 to date, Bitline has not paid any amount to Amrich or Sasol in respect of its continued occupation of the premises, and the continued operation of the Sasol branded service and filling station.

The applicable principles

[14] Section 18 of the Act provides that:

'(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.'

[15] The requirements for an order in terms of section 18(3) that alters the ordinary course of the appeals' process is now well established (see *Ntlemeza v Helen Suzman*

*Foundation*¹). For Sasol and Amrich to have succeeded in their application, they were required to establish that: (a) exceptional circumstances exist for the relief sought to be granted; (b) proof exists, on a balance of probabilities, that: (i) they have suffered, and will continue to suffer irreparable harm as a result of Bitline's unlawful holding over, and its continued unlawful use of Sasol's equipment and intellectual property; and (ii) Bitline will not suffer any irreparable harm.

[16] The court a quo found that both Sasol and Amrich are entitled to be placed in possession of their respective assets. First, it found that exceptional circumstances were established. Both Sasol and Amrich are deprived of their proprietary rights and Bitline continues to occupy the premises and conducts the business, absent any right to do so, a situation that has endured for a period in excess of a year. Second, if Bitline were to continue to occupy the premises and conduct the business, both Sasol and Amrich would suffer damages in that they are deprived of the benefits of the ownership of their assets. These damages are unlikely to be recovered. Lastly, the harm that Bitline stands to suffer cannot be said to be irreparable as a claim for damages is and remains a satisfactory alternative, should it ultimately succeed before the SCA.

[17] Bitline submits that the court a quo erred in that the present applications, eviction and interdict, are commonplace, and, as a consequence, no exceptional circumstances have been demonstrated by Sasol or Amrich. Instead, the order granted by the court a quo has the potential to flood the courts with section 18 applications. As to Bitline's contention that it has a right of continued occupation and

¹ *Ntiemeza v Helen Suzman Foundation and Another* 2017 5 SA 402 SCA ((2017] 3 All SA 589; (2017] ZASCA 93) paras 28 and 35 —37. See also *Knoop NO v Gupta (Execution)* 2021 3 SA 135 SCA ((2021] 1 All SA 17) paras 44 —48.

a right to operate the site, it is contended that the court a quo should have determined the issues on Bitline's version (by recourse to the Plascon-Evans principle) and accepted that until a three-month termination notice had been issued, its rights to occupy endure. It is further contended that the non-payment of rental and/or royalties or the loss of opportunity to lease the property to another third party for a higher rental did not constitute exceptional circumstances, and in any event, Sasol has only itself to blame, in that it terminated Bitline's access to the electronic operating system and stopped supplying Bitline with fuel. It is argued that the execution of the judgment and orders would result in the demise of Bitline's business, and a loss of employment, which is not capable of being remedied, should it succeed on appeal.

[18] It is not possible to lay down precise rules as to what constitute exceptional circumstances. Each case has to be decided on its own facts.² In *Jai Hind EMCC CC t/a Emmarentia Convenience Centre v Engen Petroleum Ltd South Africa*,³ Sutherland DJP emphasized that the question whether exceptional circumstances exist does not depend upon the exercise of a judicial discretion, but their existence or otherwise is a matter of fact which the Court must decide.

[19] In *University of the Free State v Afriforum and Another*⁴ the court held that the prospects of success on appeal is a relevant factor in determining whether there are exceptional circumstances justifying an order under section 18(3). In *The Minister of Social Development Western Cape and Others v Justice Alliance of South Africa and*

² *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* 2014 (3) SA 189 GJ.

³ 2023 (2) SA 252 (GJ).

⁴ 2018 (3) SA 428 (SCA).

Another,⁵ Binns-Ward J concluded that the judgment creditor's prospects of success on appeal were so poor that they ought to have precluded a finding of a sufficient degree of exceptionality to justify an order in terms of section 18 of the Act and in *Zero Azania Pty Ltd v Caterpillar Financial Services SA Pty Ltd*,⁶ the Full Court held that the poor prospects of success on appeal constitute in themselves the kind of exceptional circumstances that might justify interim execution.

Conclusion

[20] As in *Jai Hind*, the peculiarities of the respondents' case warranted the judgment of exceptionality 'and took it out of the broad range of ordinary perils of litigation.' Bitline's only justification for maintaining its presence on the premises is that it was not provided with a notice period of three months prior to its departure. This is the only basis upon which it claims a right to remain in occupation of the premises, despite the agreement having come to an end on 27 July 2022. For at least sixteen months, it has remained in occupation of the premises, beyond the three month notice period claimed, without compensating Sasol or Amrich, and without a licence to sell Sasol products. Even on Bitline's version, it would not have been entitled to conduct its business from the premises for more than three months after it was informed that Sasol's head lease had come to an end.

[21] Moreover, Bitline admits that Amrich is the registered owner of the site and that there is no contractual nexus between Bitline and Amrich. It can thus not be disputed that for so long as Bitline remains in occupation of the site, Amrich is unable to

⁵ (20806/2013) [2016] ZAWCHC 34 (1 April 2016)

⁶ [2024] 1 All SA 883 (GJ).

conclude a lease (including a long term lease) in respect of the premises. Amrich is ultimately deprived of the site and its right to secure a commercially viable tenant and generate revenue from it by a party whose prospects on appeal are remote.

[22] From Sasol's perspective, it is indisputable that it enjoys ownership of the site's equipment and all the intellectual property associated with the Sasol brand. Likewise, Bitline's prospects of success against Sasol in any appeal are poor. Because Bitline's has so little prospect of success in obtaining leave to appeal, its continued occupation of the property, whilst it runs the business for its own profit without any payment or tender, is an abuse of the court processes.

[23] The irreparable harm to Amrich is thus self-evident from the attributes that make the case exceptional. It is unable to obtain possession of the site and utilize it to derive an income. Furthermore, Sasol is potentially liable to Amrich for compensation for the holding over of the premises by its tenant, Bitline; to this extent demand for payment in lieu of holding over has already been made. Sasol may be able to satisfy such a debt, should it pursue such a claim and a court holds it liable to Amrich. For as long as Bitline remains in occupation of the site, the aforesaid debt escalates. The continued unlawful use of Sasol's equipment and intellectual property, also exposes Sasol to possible claims from members of the public.

[24] Sutherland J, in *Jai Hind supra* held that pecuniary grounds relied upon for purposes of section 18 of the Act can give rise to grounds for irreparable harm. He remarked as follows:

'[10] There is a further leg to Engen's plight, which critically informs the bargain the parties struck in the settlement agreement. If Engen does not get possession on due date and also

does not get paid the holding-over sums and must wait indefinitely for relief, will it be able to get the arrear holding-over payments at an uncertain later date? Engen's deponent states that a search for ancillary assets possessed by Jai Hind turned up nothing. What Jai Hind says about its own predicament reinforces Engen's predicament. Jai Hind's principal rationale for resisting the s 18 order to pay the holding over sums, as it agreed to do in the settlement agreement, is that, were it to do so, the effect on its cash flow would cause it to cease trading, which it describes as its 'irreparable harm'. Because of the peculiarities of the regulatory regime for the retail sale of fuel, the opportunity to trade is site-specific and Jai Hind cannot simply move its business to other premises and carry on. The revelation by Jai Hind that it cannot meet the holding-over obligation that it took upon itself suggests, if true, that it acted mala fide when submitting to that obligation to settle the arbitration. In Jai Hind's papers this impecuniosity is ventilated by bald allegations without any corroborating substantiation. Notwithstanding that deficiency in disclosure, it cannot be concluded that the allegation is implausible because the common-cause facts are that the business of Jai Hind is solely the sale of fuel and its sole revenue stream.'

[25] The facts in Jai Hind are similar to the facts in the current matter. Sasol has a clear right to (a) possession of the premises being restored to Amrich in order to limit any liability that Sasol may ultimately have towards Amrich on the grounds of the holding over of its sub-tenant and (b) possession of its equipment and intellectual property since November 2022, and (c) to be paid damages in lieu of the breach of the franchise agreement.

[26] Sasol and Amrich must expect to suffer harm of a kind that is ordinarily associated with the appellate process taking its course, and without interim redress. But harm that is out of the ordinary requires intervention. Here, Bitline is profiteering off the resources of others, with no apparent means to make good the losses of Sasol

and Amrich, and no tender of damages should its petition, with such slender prospects, fail before the SCA. This constitutes an exceptional circumstance because Bitline is using the appellate process to secure time to run a business with the use of the resources of others, to which it has no entitlement. This is aggravated by its failure to pay anything to Sasol, while it pursues its right to seek leave to appeal.

[27] Bitline has not provided any evidence to satisfy this court that it will be able to pay damages to Sasol should it fail to secure leave to appeal, or fail in any appeal, in the unlikely event that it is granted leave. The likelihood of Sasol getting paid were it required to await the exhaustion of the appeal process is remote. Bitline holds no fixed property; its sole business is the service and filling station that operates from the premises, and that if unsuccessful in the appeal process, Bitline will not be able to simply continue its trade at alternative premises, thereby permanently terminating Bitline's only source of income, given the licensing scheme imposed in terms of the Petroleum Products Act, Act 120 of 1977. There is thus good reason to intervene in terms of section 18(3) of the Act to prevent further losses suffered by Sasol as a result of Bitline's occupation of the premises.

[28] In contrast, should the order be awarded, Bitline would not experience any irreparable damage. It could, at most, assert a claim for damages equivalent to the three months it claimed it was entitled to. Regardless, Sasol assumed liability during the hearing for any damages Bitline might establish in regard to its "loss" of the three months of occupation to which it claims an entitlement.

[29] The court a quo was thus correct in finding that the requirements in section 18(3) have been met. In the result the following order is made;

1. The appeal is dismissed with costs, including the costs of two counsel where so employed.



L WINDELL

JUDGE OF THE HIGH COURT GAUTENG LOCAL DIVISION

I agree



N.T.Y SIWENDU

JUDGE OF THE HIGH COURT GAUTENG LOCAL DIVISION

I agree



D UNTERHALTER

JUDGE OF THE HIGH COURT GAUTENG LOCAL DIVISION

Delivered: This judgement was prepared and authored by the Judges whose name are reflected and 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 for hand-down is deemed to be 2 April 2024

APPEARANCES

Appellant's Attorneys:

Des Naidoo and Associates

Counsel for Appellant: Advocate J. A. Venter

First Respondent's Attorneys: Mathopo Moshimane Mulangaphuma
Incorporated t/a DM5 Incorporated

Counsel for First Respondent: Advocate S. Aucamp

Second Respondent's Attorneys: Hirschowitz Flionis Attorneys

Counsel for Second Respondent: Advocate J.J. Brett SC
Advocate J.L. Kaplan

Date of hearing: 20 March 2024

Date of judgment: 2 April 2024