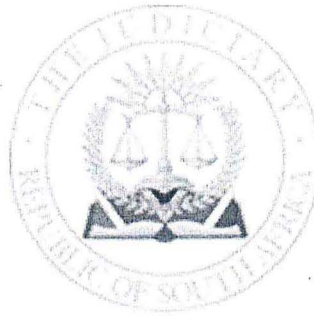




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 19 December 2022

SIGNATURE: *[Handwritten Signature]*

Case No. 38929/2022

In the matter between:

SPARTAN SME FINANCE (PTY) LTD

First Intervening Applicant

In re:

INSURANCE UNDERWRITING MANAGERS (PTY) LTD

Applicant

and

ZULULAND BUS SERVICES CC

First Respondent

MDUDUZI WILFRED SITHOLE

Second Respondent

SHERIFF, PRETORIA SOUTH – WEST

Third Respondent

KOBUS VAN DER WESTHUIZEN N.O

Fourth Respondent

VUSUMZI LUKAS MATIKINCA N.O

**(in their capacities as joint liquidators of AFRICA
PEOPLE MOVERS (PTY) LTD (in liquidation))**

Coram: Millar J

Heard on: 13 December 2022

Delivered: 19 December 2022 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 11H30 on 19 December 2022.

Summary: Application for leave to appeal against order granting intervention by true owners and discharge of ex-parte order – party appealing in contempt of order obtained by it – advertent failure to purge contempt before hearing of leave to appeal – further applications for intervention by legal representatives and for postponement of leave to appeal with no explanation for contempt or failure to purge it – applications for intervention and postponement refused – application for leave to appeal refused and application in terms of s 18(3) of the Superior Courts Act granted together with punitive costs.

ORDER

It is Ordered:

1. The application for intervention by Mr. Myburgh is removed from the roll with no order as to costs.

2. The application for intervention by Mr. Engelbrecht is refused with costs.
3. The application for postponement of the application for leave to appeal by IUM is refused with costs.
4. The application for leave to appeal brought by IUM is dismissed with costs on the scale as between attorney and client such costs to include the costs consequent upon the employment of two counsel.
5. The application in terms of s 18(3) of the Superior Courts Act 10 of 2013 is granted.
6. It is ordered that in the event that IUM launches an application for leave to appeal to the Supreme Court of Appeal, then pending the final determination of the such application, the order made by this court on 28 November 2022 be put into operation immediately.
7. The order in paragraph 6 above is subject to the provisions of s 18(4) of the Superior Courts Act 10 of 2013.
8. Spartan is granted leave and authorized to forthwith execute upon the order of 28 November 2022 and the said order is not suspended by any pending application for leave to appeal to the Supreme Court of Appeal.
9. IUM is ordered to pay the costs of the application in terms of s 18(3) of the Superior Courts Act 10 of 2013 on the scale as between attorney and client, such costs to include the costs consequent upon the employment of two counsel

JUDGMENT

MILLAR J

1. On 28 November 2022, this court handed down an order in which it was *inter alia* ordered that a rule nisi granted on 4 October 2022 in favour of the applicant (IUM) was discharged and the return of certain busses to the first intervening applicant (Spartan) and fifth respondent (NEC) was ordered.
2. The order was handed down without reasons and it was indicated to the parties that reasons would be furnished to any party that requested them. The same day, IUM requested reasons and, before the reasons could be delivered, on 29 November 2022, IUM lodged an application for leave to appeal.
3. On 7 December 2022, the reasons were made available to the parties and on the same day, the parties were notified that the application for leave to appeal would be heard at 09H00 on 13 December 2022.
4. On 8 December 2022, IUM requested a postponement of the hearing of the application for leave to appeal on the basis that its chosen senior counsel was not available to argue the application on that day. The parties were informed that the non-availability of counsel was not a reason to postpone the hearing of the application and that it would nonetheless proceed on that day.
5. Thereafter, Spartan brought a conditional application in terms of s 18(1) read together with s 18(3) of the Superior Courts Act¹ with which ZBS made common cause. IUM subsequently filed an answer and Spartan a reply.

¹ 10 of 2013

6. On 12 December 2022 on the eve of the hearing and at 16h17, IUM delivered an application for the postponement of the hearing of the application for leave to appeal. An hour later, a further application to intervene in the proceedings by Mr. Myburgh (who had appeared for IUM) was delivered.
7. On 13 December 2022 at 08h39, another application to intervene was delivered, this time on behalf of Mr. Engelbrecht (the attorney who is on record for IUM).
8. When the application for leave to appeal was called, the court thus had 5 different applications before it. Adv. Kilian appeared to argue the postponement application and the 2 intervention applications on behalf of IUM, Mr. Myburgh and Mr. Engelbrecht respectively. Mr. Myburgh appeared to argue the leave to appeal and opposition to the s 18 application. Mr Ramdhani SC and Mr Wessels appeared to oppose the applications for postponement, intervention and leave to appeal and to prosecute the s 18 application.
9. It was decided as a matter of convenience that the applications for intervention and postponement be heard first. Since these 3 applications had simply been uploaded onto CaseLines the night before and the morning of the hearing, the court had not had an opportunity to read the papers beforehand. When this was brought to the attention of Mr. Kilian, he seemed somewhat surprised and submitted that the uploading of these applications onto CaseLines was sufficient. I indicated that the mere uploading of documents at the eleventh hour onto CaseLines did not constitute proper service on either the parties or notice to the court as CaseLines is nothing more than an electronic administrative platform which is designed to replace and enhance the manual functions previously performed by the Registrar.
10. In order to avoid any delay in the proceedings, I heard Mr. Kilian on the applications. The applications in their essence were brought on the following basis:

- 10.1 Firstly, the application to intervene by Mr. Myburgh ostensibly because he had been reported to the LPC in accordance with the direction given by me on the reasons of 7 December 2022.
 - 10.2 Secondly, the application to intervene by Mr. Engelbrecht ostensibly because his good name and reputation were adversely affected in consequence of the referral of his conduct to the LPC; and
 - 10.3 Thirdly, the application for postponement on the basis that IUM was not able to brief its counsel of choice and that having regard to the provisions of rule 49 of the Uniform Rules of Court, IUM still had time within which to consider its position on the application for leave to appeal.
11. I now deal with each of these in turn.
 12. In regard to Mr. Myburgh, I indicated to Mr. Kilian that the reason for the referral of the matter to the LPC had pertinently been made in consequence of the subversion of the court order of 4 October 2022. When I had asked Mr. Myburgh during the proceedings on 28 November 2022, where the busses were located, he did not know and had to take an instruction during the proceedings from Mr. Engelbrecht.
 13. This was stated in my reasons. After the reasons had been handed down, the representatives of Spartan had forwarded the reasons to the LPC and besides lodging a complaint against Mr. Engelbrecht, had also lodged a complaint against Mr. Myburgh. During the argument, I indicated to the parties that the referral was in no way intended to encompass Mr. Myburgh but only Mr. Engelbrecht.
 14. I enquired from Mr. Ramdhani SC whether or not Spartan intended to pursue the matter against Mr. Myburgh, and he indicated that they did not. He further indicated that correspondence would be addressed withdrawing the complaint

against Mr. Myburgh. I furthermore indicated that I would clarify the matter as set out in paragraphs 12 and 13 above in this judgment.

15. Mr. Kilian then indicated that the application for intervention on behalf of Mr. Myburgh would not be pursued and it was not.
16. In regard to the application for intervention by Mr. Engelbrecht, it was asserted that he had not had an opportunity to be heard and that findings had been made against him. This it was argued gave him an interest in the proceedings and a right to intervene. It bears mention that in the affidavit attached to his application, Mr. Engelbrecht voices his outrage at what he perceived to be an affront to his good name and reputation and yet failed at all to deal with the very reason why the court had directed the referral of the matter to the LPC – it is common cause that Mr. Engelbrecht deliberately and in violation of the court order of 4 October 2022 arranged that the busses be towed from the address specified in the court order (Charlotte Maxeke) to a different address to the one specified (Doornkloof) in that order.
17. Furthermore, although the busses had been taken to a different address, in a different city and within the area of appointment of a different sheriff – an address in Bedfordview Johannesburg. Mr. Engelbrecht seems to have been unmoved and unappreciative of the legal consequences of his actions. None of this is addressed in his affidavit and furthermore, I was informed during the argument, that the busses are still located at the Bedfordview address.
18. Mr. Engelbrecht is an officer of the court. His self-admitted and persistent misconduct in acting in a manner that is in direct conflict with an order of court is a matter of serious concern that must be fully investigated by the LPC. A court is required to comment on the conduct of litigants and its officers, particularly where that conduct is not disputed.

19. I was referred MEC for Health, Gauteng v Lushaba² and Motswai v Road Accident Fund³ as authority for the propositions that a direction of referral to the professional body was an order in the strict sense and that adverse findings regarding the conduct of an attorney could not properly be drawn without giving him an opportunity to be heard. The present matter is distinguishable from both those cases – firstly because there was no order made against Mr. Engelbrecht personally and secondly because there was no ‘finding’. The conduct in question was self-admitted.
20. Again a troubling feature of the application for intervention is that it is silent on the failure to comply with the court order initially and then after 28 November 2022 – to demonstrate an interest, some explanation was required – particularly since this was raised in the reasons of 7 December 2022 - outrage at being criticized and having the regulatory body look into the conduct of a professional person who is an officer of the court does not to my mind constitute an interest in the litigation⁴.
21. Turning to the postponement application. Rule 49 of the Uniform Rules of Court affords a party a period of 15 days within which to bring an application for leave to appeal. The 15-day period is reckoned from the date judgment is handed down or from the date of on which the reasons are delivered if they are not delivered when judgment is handed down. There is no obligation on any party to bring an application for leave to appeal any sooner and the reason for this is clear – applications for leave to appeal must be brought on properly considered grounds.
22. The consequence of bringing an application for leave to appeal is to suspend the operation of the order in respect of which the application is made. This, unlike the 15-day period which operates for the benefit of the party who may wish to

² 2017 (1) SA 106 (CC) at para 10

³ 2014 (6) SA 360 (SCA)

⁴ See Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others (CCT 66/21) ZACC 37 (14 November 2022) at paragraph 71 and to the authorities referred to therein.

appeal, has a direct and immediate consequence for the party who may wish to seek to enforce the order – it suspends the order and prevents enforcement.

23. Accordingly, the 15-day period is the time period afforded to consider whether an application for leave to appeal should be brought. Once an application for leave to appeal has been brought, the 15-day period is no longer of any moment. This ground of postponement seems to me to be an entirely contrived and self-serving misinterpretation of the provisions of the rule designed to procure a delay in the hearing of the application for leave to appeal.
24. IUM is *dominus litis* in the application for leave to appeal and made an advertent decision to bring the application when it did. It knew that the consequence of bringing the application would be to prevent enforcement of the order of 28 November 2022 by Spartan, ZBS and NEC. Not content with immediately suspending the operation of that order, an application for postponement was made on the specious basis of the non-availability of counsel of choice and an entitlement to additional time in terms of rule 49.
25. At the conclusion of the argument on the application for intervention by Mr. Engelbrecht and for the postponement, I enquired from Mr. Kilian what the consequence would be if I were to have considered the grant of the order for Mr. Engelbrecht to intervene but refused the postponement. He indicated that if that were to occur, he had instructions to apply for a postponement so that Mr. Engelbrecht could consider his position and file further papers.
26. Mr. Engelbrecht's application was delivered at 08h39 – 20 minutes before the hearing. It was clearly brought as an adjunct to the postponement application and to bolster it.
27. After hearing those applications, I adjourned for some time to afford me an opportunity to consider the papers that had been filed and the arguments. When

the court reconvened, I granted orders dismissing Mr. Engelbrecht's application for intervention and the postponement with costs.

28. I then proceeded to hear the application for leave to appeal.
29. The application for leave to appeal is nothing more than a repetition of the arguments presented on 28 November 2022. I dealt with those arguments in the reasons and need not repeat them here. However, there is one aspect which was raised which requires comment. Mr. Myburgh argued that while Spartan had made a number of procedural missteps in the run up to the hearing on 28 November 2022, NEC for its part had not and was thus properly given leave to intervene in the proceedings. It was argued that in consequence of these missteps, Spartan was not entitled to the relief that had been granted in its favour and for that reason, leave appeal ought to be granted.
30. The order granted on 28 November 2022 properly construed and in particular paragraphs 7 and 9, orders that the busses concerned be made available to Spartan and NEC. Since both Spartan and NEC made common cause that the busses should be returned to them, whether or not Spartan ought not to have been given leave to is of no moment. While I am of the view that Spartan was properly joined, even if I erred, the concession that NEC was properly joined renders this moot.
31. The test to be applied in considering whether leave to appeal should be granted is set out in s 17(1)⁵ of the Superior Courts Act. It is trite that the test is whether the appeal "*would have a reasonable prospect of success*". For the reasons handed down on 7 December 2022, I am of the view that another court would not

⁵ "Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard; including conflicting judgments on the matter under consideration;"

come to a different conclusion and that an appeal would not have any prospect of success.

32. Turning now to Spartan's application in terms of section 18(3)⁶, Spartan is required to demonstrate firstly exceptional circumstances which justify the execution of the order pending an appeal, secondly that the Spartan will suffer irreparable harm if it is not executed, and, thirdly that IUM will not be irreparably harmed if the order is executed. The consideration of these factors is through the lens of the prospects of success of the pending appeal.⁷
33. The first stage of the enquiry, whether "exceptional circumstances" are present depends on the peculiar facts of each case. The exceptional circumstances must be derived from the actual predicaments in which the litigants find themselves
34. The following factors to my mind, establish exceptional circumstances:

⁶ **"18 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.*

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."

⁷ See *Democratic Alliance and Others v Premier for the Province of Gauteng and Others* (18577/20) [2020] ZAGPPHC 330 (10 June 2020) paragraphs [11] – [13].

- 34.1 Firstly, the substantive relief granted in favour of Spartan and NEC was the setting aside of an *ex parte mandament van spolie* in terms of which ZBS, as the lawful possessor of the busses on behalf of Spartan and NEC, was deprived of possession.
- 34.2 Secondly, IUM was never in possession of the busses itself and therefore never entitled to the *ex parte* order.
- 34.3 Thirdly, having sought and obtained the *ex parte* order in specific terms whereof the busses were to be attached and removed from the premises at Charlotte Maxeke and removed to Doornkloof, IUM then failed to comply with the order – initially when the *ex parte* was executed on 5 October 2022 until the present⁸.
35. The second stage of the enquiry is in regard to whether there is irreparable harm to Spartan and NEC. This was expressed as primarily financial in nature but also includes the livelihoods of persons employed by ZBS to maintain and operate the busses in its operations. While substantial financial loss may on its own not constitute irreparable harm, the same cannot be said in regard to the loss of employment and opportunity to the persons who were employed to operate the busses.
36. To my mind ‘irreparable harm’ must in the particular circumstances of this matter includes both the financial harm suffered by Spartan and NEC, as well as the financial and other harm suffered by ZBS and its employees. In the present matter it cannot be overlooked that in consequence of the conduct of IUM, the true owners and ZBS have been deprived of the use of their property for more than a year.

⁸ *ibid*

37. The third stage of the enquiry is whether there is irreparable harm to IUM. On the facts, there is no harm let alone irreparable harm to IUM. IUM holds no right to the busses. Mr. Engelbrecht in his application to intervene states:

"18. The provisions of the Companies Act provide that all steps taken in litigious proceedings after the provisional liquidation of a company are void. I knew that whatever steps had been taken for my client by that (sic) became void and I only became aware of such information on 11 November 2021.

19. Void to my mind means that it never happened in law. The thing is, it happened in fact and my client IUM had to decide what to do about this in the circumstances and what they needed to do properly about the busses that were now with the sheriff on a void attachment. The honourable court with respect failed to consider the predicament and the difficulty that it posed.

20. I knew then that to the extent possible, my client had to take steps to reverse the factual position to be aligned with the position in law.

21. What happened next complicated that substantially because of the following circumstances. First, I had to establish if any provisional liquidators had been appointed, and who they were. This was needed because the busses could not simply be placed back at the place they were removed from by the sheriff. That may have been detrimental to the creditors and the provisional liquidators if there were any."

38. On 11 August 2021, the provisional liquidators had already written to IUM and informed them that the busses were not the property of APM⁹. The assertion by Mr. Engelbrecht in paragraph 21 of his affidavit, quoted above, is simply not borne out by the facts. IUM knew before 11 November 2021 who the provisional liquidators were and that the busses were not the property of APM.

⁹ Reasons for judgment handed down on 7 December 2022 – para 4

39. The opposition to the *rei vindicatio* brought by NEF was entirely contrived when one has regard to the fact that immediately after the order was granted ordering the return of the busses to NEF (and taken on appeal by IUM), it then proceeded to use the suspension of the order and purported continued attachment of the busses as a lever with which to try and procure the purchase of its claim in APM Global by ZBS and Mr. Sithole.
40. IUM used the attachment as a commercial lever well knowing that such attachment was void. IUM could never have instructed the sheriff to have sold the busses in execution of the warrant and knew it.
41. The continued attempt to enforce the attachment to the detriment of the true owner/s at the beginning of 2021 was self-serving as was obtaining the ex parte order, opposing its discharge and now the application for leave to appeal.
42. There are in my view simply no prospects of success in any appeal whatsoever¹⁰ and on application of the ordinary test the granting of an order in terms of section 18(3) is appropriate.
43. Furthermore, if the orders sought by Spartan are not granted then the untenable (and unlawful) position of a court sanctioned endorsement of the failure to comply with an order would be created. IUM's failure to carry out the order of 4 October 2022 and concealment of the location of the busses, followed after 28 November 2022 by no attempt to either explain or comply is to be deprecated in the strongest terms. Such a situation is anathema to our law¹¹. I would mention that I invited both Mr. Kilian and Mr. Myburgh to address me on this issue. Mr. Kilian declined on the basis that it was beyond the remit of his instructions and Mr. Myburgh on the basis that it was not relevant.

¹⁰ See *Minister of Social Development Western Cape and Others v Justice Alliance of South Africa and Another* (20806/2013) [2016] ZAWCHC 34; *University of the Free State v Afriforum and Another* 2018 (3) SA 428 (SCA) at paragraphs 14 - 15

¹¹ *Knoop and Another NNO v Gupta (No 1)* 2021 (3) SA 135 (SCA) at par [29]. See also in this regard *De Faria v Sheriff, High Court, Witbank* 2005(3) SA 372 (T) at 397 and *Schierhout v Minister of Justice* 1962 AD 99 at page 109.

44. Ordinarily, applications for leave to appeal are set down for hearing at 09h00 and disposed of within an hour or two. In the present matter, given the timing with which IUM presented its application for postponement and Mr. Myburgh and Mr. Engelbrecht's applications to intervene, the exigencies of a full hearing of all the 5 applications that were before the court on 13 December 2022 required that the hearings lasted the entire day.
45. I indicated to counsel that in consequence of this and subject to any costs orders which I would make, direction would be given to the taxing master to indicate the duration of the matter and that the orders for costs should be taxed for the full day. This however does not apply in respect of the orders made in regard to the postponement and the intervention application of Mr. Engelbrecht.
46. It was argued for Spartan and ZBS that the conduct of IUM in regard to these applications merited censure and that an appropriate punitive order for costs would be on the scale as between attorney and client. I agree and it is for this reason that I make the costs order that I do.
47. In the circumstances it is ordered:
- 47.1 The application for intervention by Mr. Myburgh is removed from the roll with no order as to costs.
- 47.2 The application for intervention by Mr. Engelbrecht is refused with costs.
- 47.3 The application for postponement of the application for leave to appeal by IUM is refused with costs.
- 47.4 The application for leave to appeal brought by IUM is dismissed with costs on the scale as between attorney and client such costs to include the costs consequent upon the employment of two counsel.
- 47.5 The application in terms of s 18(3) of the Superior Courts Act 10 of 2013 is granted.

- 47.6 It is ordered that in the event that IUM launches an application for leave to appeal to the Supreme Court of Appeal, then pending the final determination of the such application, the order made by this court on 28 November 2022 be put into operation immediately.
- 47.7 The order in paragraph 47.6 above is subject to the provisions of s 18(4) of the Superior Courts Act 10 of 2013.
- 47.8 Spartan is granted leave and authorized to forthwith execute upon the order of 28 November 2022 and the said order is not suspended by any pending application for leave to appeal to the Supreme Court of Appeal.
- 47.9 IUM is ordered to pay the costs of the application in terms of s 18(3) of the Superior Courts Act 10 of 2013 on the scale as between attorney and client, such costs to include the costs consequent upon the employment of two counsel



A MILLAR

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON:

13 DECEMBER 2022

JUDGMENT DELIVERED ON:

19 DECEMBER 2022

COUNSEL FOR THE 1ST INTERVENING
APPLICANT:

ADV. D RAMDHANI SC

INSTRUCTED BY:	ADV. AJ WESSELS
REFERENCE:	TIM DU TOIT & COMPANY INC
	MR W DU RANDT
COUNSEL FOR THE APPLICANT	MR A MYBURGH
IN THE LEAVE TO APPEAL:	
INSTRUCTED BY:	ENGELBRECHT ATTORNEYS INC
REFERENCE:	MR G ENGELBRECHT
COUNSEL FOR THE APPLICANT	ADV. J KILLIAN
IN THE POSTPONEMENT AND	
FURTHER INTERVENTION APPLICATIONS:	
INSTRUCTED BY:	JURGENS BEKKER ATTORNEYS
REFERENCE:	MR C ISHERWOOD
COUNSEL FOR THE 1 ST & 2 ND	
RESPONDENTS:	ADV. D RAMDHANI SC
	ADV. AJ WESSELS
INSTRUCTED BY:	GIYAPERSAD INC
REFERENCE:	MS T NAICKER

NO APPEARANCE FOR THE 3RD, 4TH AND 5TH RESPONDENTS (THE SHERIFF AND JOINT LIQUIDATORS AND NEC RESPECTIVELY)