



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

CASE NO: 33441/19

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
27/7/2019 DATE	
 SIGNATURE	

In the matter between:

INTERDEN MANAGEMENT SERVICES (PTY) LTD

First Applicant

ISIBONELO PROPERTY SERVICES (PTY) LTD

Second Applicant

and

DENNEBOOM INFORMAL TRADERS

ALL OTHER UNATHORISED PERSONS OCCUPYING

First Respondent

THE DENNEBOOM TRAIN STATION INTERCHANGE

Second Respondent

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Third Respondent

JUDGMENT

MTATI AJ

Introduction

1. The Applicants brought this matter before Court as one requiring urgent determination and as such dispensing with forms prescribed by the Rules and

request this Court to direct that it be so enrolled in terms of Rule 6(12) of the Uniform Rules.

2. The relief sought by the Applicants is in terms of section 18(3) of the Superior Courts Act 10 of 2013 pursuant to an order of Vorster AJ which has formed the basis of an appeal by the 1st Respondents. In brief, the Applicants seek an order that the directive given by this Court on 31 May 2019 should not be suspended despite the service by the 1st Respondent of the application for leave to appeal but rather that it operates and is extant pending the decision of the application for leave to appeal or the appeal itself.
3. The 1st Respondents sought a condonation for the late filing of their answering affidavit and there was no objection to this by the Applicants, correctly so in my view.
4. The relevant section (18) upon which this application is premised shall be dealt with further below but I first deal with a brief background facts in so far as they find relevance in this application.

Background

5. In 2012, the 1st Applicant concluded a Concession Agreement (**the agreement**) with the 3rd Respondent (**the Municipality**) for purposes of developing the Tshwane Regional Mall (**the Mall**) on three identified properties in Mamelodi. The Municipality owns a number of properties in the area. The construction of the Mall was to take place in the area that was partly used by informal traders and taxi operators. In order to accommodate the informal traders and the taxi operators, an adjacent piece of land was identified to temporarily accommodate them. This arrangement was agreed to by all the stakeholders including the 1st Respondents. The temporary

relocation arrangement was also contained in the agreement between the 1st Applicant and the Municipality.

6. It is important to mention at this stage that the relocation was temporary because the new development would have also catered for the Informal Traders (**1st Respondents**), taxi operators, street traders etcetera in terms of the agreement. The 1st Applicant is obliged in terms of the agreement to give effect to the accommodation of the 1st Respondents amongst other business entities. The Municipality also agreed and undertook to cooperate with the 1st Applicant in ensuring that the 1st Applicant is provided with vacant possession of the pieces of land in order to commence with the construction.
7. The Municipality however did not fulfil its side of the contract as there has always been informal traders as well as taxi operators when the construction commenced in April 2015. This is where the problem leading to this application began as I listened to arguments supplemented by the papers filed of record. There were approximately 463 informal traders and three taxi ranks with approximately 1069 registered members. A number of meetings were then held with various stakeholders about the temporary move to a different site and on 12 December 2016 all parties agreed to relocate. I infer that a number of persons moved to the temporary allocated site as a result of the events that follow.
8. Notwithstanding the agreement, the Informal Traders refused to move. This apparently led to a commotion between the Informal Traders and the taxi operators/associations who wanted the development of the Mall to be completed.

9. On the 3rd of February 2017, an urgent application was brought by the Informal Traders seeking an order interdicting the Applicants from evicting them from the site forming part of the dispute to the temporary site. Such order was granted in favour of the Informal Traders and on 10 February 2017, the parties were again before court. At this time an agreement was reached by all involved on the process of relocating to the temporary site. This agreement was made an order of court. The agreement created obligations for all parties and it is apposite to record the material part of these obligations as they form part of the dispute between the parties in this application.

10. In respect of the Applicants before me, the court ordered that:

10.1. The Applicants were to provide containers to those traders who currently occupy fixed structures, trading spaces for those who currently occupy informal structures;

10.2. The Applicants were to provide ablution facilities, including communal water and electricity at the temporary trading facility; and

10.3. The Applicants were to divert commuters from the Denneboom train station to the transport facilities, via the temporary area, within 48 hours after the informal traders have relocated to the temporary trading area.

11. In respect of the Informal Traders the court ordered that:

11.1. The Informal Traders were interdicted and restrained from harassing, intimidating or assaulting any employees agents or contractors of the Applicants and from causing damage to public or private property; and

11.2. The Informal Traders were ordered to relocate to the allocated trading space at the temporary trading facility within 48 hours of being

informed by the Municipality of their allocated containers or trading space.

12. In respect of the Municipality, the court ordered that:

12.1. The Municipality shall within seven days of the order, allocate a number to each and every trader at the trading facility, differentiating between traders who occupy fixed structures and traders who occupy informal stalls;

12.2. The Municipality was to also allocate a corresponding number to a container or trading space, as the case may be, at the temporary trading facility; and

12.3. The Municipality was ordered to inform the traders and their attorneys, in writing, of the allocation.

13. The Informal Traders were to provide three names of persons who would form part of a committee referred to as Denneboom Facilities Management Board. This committee would be responsible for coordination and facilitation of the smooth transition of the Informal Traders to the temporary site and address concerns of any party in relation to the construction of the Mall and the interests of the Informal Traders among other parties. As previously mentioned, it was emphasised on behalf of the Applicants that the Informal Traders will be accommodated in the completed Mall and will continue to trade.

14. It is this agreement which formed an order of court that appear to be the basis of the dispute. The Applicants argue that they have complied with the order of 10 February 2017 and the 1st Respondent deny that there was full compliance with the order.

The Order of 31 May 2019

15. The Applicants proceeded with the construction of the Mall until when they got to an area occupied by 29 Informal Traders. The number of these Informal Traders appear to have been received from the legal representatives of the 1st Respondent. It appears and it was argued before me that the number of Informal Traders is in fact 170 and not 29. It appears to me through argument by Mr Manentsa for the Applicants, that their concern is the 29 traders that form part of this application.

16. The Applicants were met with resistance to move the 1st Respondents to the temporary site. As a result thereof and on 15 May 2019, the Applicants brought an urgent application to this court seeking an order that the 29 Informal Traders cited as the 1st Respondents, be directed to vacate the area of the property which they are occupying. This application also contained a report from the Occupational Health and Safety consultants which highlighted risks to life and limb if the occupied area by the 1st Respondents is not vacated. This report was compiled during April 2019. Excerpts from this report provides, among others, as follows:

16.1. The Informal Traders that are occupying the walkway are exposed to dust as a result of the construction activities on site. Due to possible long term exposure, this can lead to the health of the Informal Traders being affected. This entails developing lung diseases and possible fatality years after the project has been finished and handed over to the end user.

16.2. The stalls that the Informal Traders have put up are not structurally safe. This is due to the way they have been constructed by the Informal

Traders. Affecting these stalls is construction activity taking place in the construction site. Heavy machinery such as tipper trucks, TLB's, Excavators and roller compactors causes vibration in and around the construction area. Exposure to the vibrations can lead to stalls falling leading to injury to the Informal Traders and other members of the community passing through this walkway.

16.3. It is proposed that the Informal Traders be moved to another area in order to avoid the possible scenarios which will inevitably lead to severe injuries and possible fatalities of the Informal Traders and members of the community. The urgency of the action is also emphasised in the report.

17. The 1st Respondents opposed the urgent application and denied that the area they were occupying was unsafe. The Municipality also opposed the application although it is not clear to me what formed the basis of their opposition.

18. Notwithstanding the opposition by the 1st Respondents and the Municipality, the court, through Vorster AJ, granted an order directing the Informal Traders to relocate to a safe place within 48 hours of the granting of the order. It is this order that forms the foundation of contestation between the parties. On the 3rd June 2019, the 1st Respondents filed an application for leave to appeal the effect of which the order of 31 May 2019 was suspended. The Applicants then filed this application on 7 June 2019 which was heard on 19 June 2019.

Requirements to give effect to an order of court pending application for leave

19. The 1st Respondents have not complied with the order of Vorster AJ and instead filed an application for leave to appeal his decision. I do not deal in

this judgment with the application for leave to appeal but find it necessary to mention the three themes upon which the application is founded, namely:

19.1. The Respondents contend that they consist of 170 traders and not 29. I have already addressed this concern by stating that the Applicants seek an order against 29 Informal Traders who were part of the order made on 31 May 2019.

19.2. The 1st Respondent further contends that they were spoliated in April 2019 and as such they should not have been ordered to vacate the area they are occupying. In response thereto the Applicants argue that the 1st Respondents are still occupying the unsafe area and have not been unlawfully deprived of the area they are occupying. It is for that reason that the Applicants applied for an eviction order.

19.3. Lastly, the 1st Respondents argue that the Applicants have not complied with the court order of 10 February 2017. In fact, the 1st Respondents argue that they were forcibly removed from the site they were occupying by taxi owners as well as the employees of the Applicants. As it appears in this judgment, the Applicants argue that they have complied with the order of 10 February 2017. I deal further with this aspect below when considering the arguments of both parties.

20. The effect of the application for leave to appeal is regulated by section 18 of the Superior Courts Act 10 of 2013, the relevant portion providing as follows:

"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..."

21. In order for the Applicants to be successful in this application, they should comply with the test as set out in ***Incubeta Holdings (Pty) Ltd and Another v Ellis and Another 2014 (3) SA 189 (GJ)***. The requirements are formulated as follows:

21.1. Whether or not 'exceptional circumstances' exist; and

21.2. Proof on a balance of probabilities by the Applicant of –

20.2.1 the presence of irreparable harm to the Applicant, who

wants to put into operation and execute the order; and

20.2.2 the absence of irreparable harm to the Respondent,

who seeks leave to appeal.

22. Exceptional circumstances have been addressed by Thring J in the case of

MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and Another 2002 (6) SA 150 (C) where he explained as follows:

"What does emerge from the examination of the authorities, however, seems to me to be the following:

1. What is ordinarily contemplated by the words 'exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; 'besonder', 'seldsaam', 'uitsonderlik', or 'in hoë mate ongewoon.
2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.
3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.
4. Depending on the context in which it is used, the word 'exceptional' has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.
5. Where in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstance relied on as allegedly being exceptional." See also **University of the Free State v Afriforum** 2018 (3) 428 SCA at paragraph [9].

23. I now proceed to deal with the arguments of both the parties, in particular, to determine if the Applicants have met the requirements tabulated above.

Did Applicants meet the requirements of section 18?

24. According to the Applicants, the order of Vorster J was intended to prevent the possibility of injury to the Informal Traders and train commuters that walk past the stalls of the Informal Traders. The 1st Respondents dispute the fact that the area they occupy is dangerous. There was however, no report filed by the 1st Respondents refuting the report prepared by the independent Occupational Health and Safety consultants. In fact, this reported was not disputed. It is important to note that the dangers elicited in the report are not applicable only to the Informal Traders but other members of the public who normally use the walkway.

25. It was argued on behalf of the Applicants that section 9 (1) of the Occupational Health and Safety Act (**OHSA**) obliges them to ensure, as far as reasonably practicable, that persons other than those in their employment who may be directly affected by the construction, are not thereby exposed to hazards to their health and safety. The Informal Traders do not have safety protective gear. Neither are the members of the public, passing nor using the walkway, making use of the safety gear. Failure to comply with section 9 of the OHSA may attract punitive consequences for the Applicants.

26. The 1st Respondents on the other hand deny that the area is unsafe. They further dispute the averments made that Vorser AJ's order was premised on the area being unsafe. The 1st Respondents appear to also suggest that they are the persons who should decide whether the area poses health risks on their lives and not the Applicants. I am not comfortable with this assertion. The

Court cannot ignore an undisputed report that suggest danger to limb and life merely because of what the 1st Respondents choose to accept as reality. Furthermore, it is conceded that other members of the public, not party to this dispute, may also be affected. I am aware of the contention made on behalf of the 1st Respondents that the report was not made under oath. Notwithstanding, I am of the view that it is preferable to err on the side of caution than to risk lives of the 1st Respondents and in particular, members of the public.

27. The Court cannot sit back and rely on a technical point raised by the 1st Respondents that the Occupational Health and Safety report was not furnished under oath. The possible injury that can be suffered, however remote, cannot countenanced. There will be irreparable harm to the Applicants if the provisions of OHSA are not complied with especially if injury/ies can eventuate. I accept the report of the Occupational Health and Safety consultants and I have considered same in coming to my conclusions.

28. The Informal Traders, as mentioned above, will be temporarily accommodated on a site that is ready for occupation. It was specifically stated that the commuter traffic from the trains will be diverted through a fence in order to pass by the new temporary trading area. The court order of 10 February 2017 mentions that this should be done by the Applicants within seven days after the relocation. The argument that the Informal Traders will therefore lose their customers cannot stand. According to the Applicants, they have even renovated three other dilapidated houses nearby for the occupation and use by the Informal Traders. These renovations did not form part of the initial agreement which resulted in the order of 10 February 2017. The temporary

relocation is for a period of approximately four months before the Informal Traders move back to the Mall.

29. In reviewing the obligations of each of the parties in terms of the 10 February 2017 order, it seems to me that the primary culprit who did not comply with her side of the order, is the Municipality. The question then before Court is, should the Applicants be frustrated in progressing and finalising the construction merely because of the noncompliance by the Municipality? In answering that question it is important to consider the extent of noncompliance by the Municipality as is relevant in this application. What the Municipality has still failed to do is the allocation of numbers to the Informal Traders it appears. If that were the case and the concomitant dangers as surfacing from the Occupational Health and Safety report, such failure should not stall the temporary relocation of the 1st Respondents. I do not find that the 1st Respondents will suffer any irreparable harm. The Court is convinced that, on a balance of probabilities, the Applicants have demonstrated that they will suffer irreparable harm.

Urgency

30. The application of the order that is sought to operate by the Applicants was granted in an urgent court. It then only makes sense to me that this application shall also be considered on an urgent basis. Whilst the 1st Respondents presented an opposition on their papers for the application to be considered by way of urgency, there seemed to be a concession during argument that the matter is indeed one of urgency. The Court has already concluded that it accepts the Health and Safety report and as such, any matter that affects life and limb are, in my view, to be considered urgently.

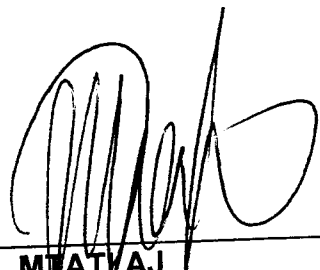
Costs

31. In argument on behalf of the Applicants, it was argued that a cost order is sought against the Municipality. It is not clear to me on what basis such an order is required as the Municipality did not oppose this application. At any rate, the Applicants in their notice of motion claimed an order of costs against any party opposing this application. I do not have before me any motivation in the papers to grant the order as claimed. The Applicants did not ask for a cost order against the Informal Traders. The 1st Respondents requested that the application be dismissed with costs.

32. After listening to the arguments from both Counsel, I consider the following order to be appropriate under the circumstances:

Order

- 1. The matter is enrolled as an urgent application in accordance with the provisions of Rule 6 (12) of this Court;*
- 2. The late filing of the 1st Respondent's answering affidavit is hereby condoned;*
- 3. It is directed that the order of Vorster AJ dated 31 May 2019 will operate and is extant, until the final determination of the 1st Respondent's leave to appeal application and any appeal flowing therefrom; and*
- 4. Each party shall bear his/her own costs.*


V.T. MBATIA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

APPLICANTS: B. L. MANENTSA

INSTRUCTED BY: ADAMS & ADAMS

FOR THE 1ST RESPONDENTS: A. DE VOS SC and D MEYER

HEARD ON: 19 JUNE 2019

JUDGMENT DELIVERED ON: 22 JULY 2019

INSTRUCTED BY: LAWYERS FOR HUMAN RIGHTS