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

CASE NUMBER: 041961/22

REPORTABLE: NO

OF INTEREST TO OTHERS JUDGES: NO

REVISED

DATE: 29 APRIL 2024

In the matter between

LEONARDUS JOHANNES LABUSCHAGNE

APPLICANT

and

FARM TO TABLE MEATS (PTY) LTD

FIRST RESPONDENT

JOHANNES FREDERICK VAN DER WALT

SECOND RESPONDENT

CAREL JOHN VAN HEERDEN

THIRD RESPONDENT

SEAN LEON LABUSCHAGNE

FOURTH RESPONDENT

STEFAN GEORGE VAN HEERDEN

FIFTH RESPONDENT

ANDREW VRELE DU TOIT

SIXTH RESPONDENT

JUDGMENT

BURGER AJ:

INTRODUCTION:

[1] This is an application for leave to appeal against the judgment and order herein dated 27 September 2023. The application is opposed and the Applicant in the eviction application applied for an order in terms of Section 18(3) of the Superior Courts Act, 10 of 2013. The latter application is also opposed. For purposes of this judgment, I will refer to the parties as they were referred to during the eviction application.

[2] The order sought to be appealed against, provides as follow:

"[57.1] That the First, Second, Third, Fifth and Sixth Respondents (hereinafter collectively referred to as "the Respondents") be ordered to vacate the immovable property known as Portion [...] (a Portion of Portion [...]) of the F[...] R[...] [...], Registration Division [...], Gauteng Province, held under Deed of Transfer T17358/1995, 206,5964 hectares in extent (hereinafter referred to as "the Property"), within a period of 30 days from the date upon which this order is served upon the Defendants;

[57.2] That, in the event that the Respondents fail or omit or refuse to vacate the property, as provided for and envisaged in paragraph 48.1 supra, the Sheriff of this Court and/or his/her Deputy be authorised and mandated to execute this order and to evict the Respondents from the Property and to obtain the assistance of the South African Police Services to assist him/her in this regard, if necessary;

[57.3] That the Respondents be ordered to pay the costs of this application jointly and severally, the one paying the others to be absolved pro tanto, on a scale as between attorney and client, the costs to include the services of 2 (two) counsel.

[3] This application is premised on the grounds set out in the Notice to Appeal dated 24 October 2023. The grounds raised by the Respondents are the following:

"1. The court erred in holding that the First, Second, Third, Fifth and/or Sixth Respondents (hereinafter referred to as "the Respondents") are in unlawful occupation of the immovable property known as Portion [...] (a portion of portion [...]) of the F[...] R[...] [...], Registration Division[...], Gauteng Province ("the property").

2. The court erred in holding that the Second to Sixth Respondents have direct and substantial interests in the order that the court might make.
3. The court erred in holding that the *contra proferentem* rule could only be of value if the parties were *ad idem* as to who the author of the agreement was, under circumstances where the Respondents, in an opposed motion, alleged that the Applicant was the author of the agreement.
4. The court erred in not accepting, for the purposes of the opposed motion, the Respondents' version that the Applicant was the author of the contract.
5. The court erred in holding that the *contra proferentem* rule might only have had value if it operated in favour of the Applicant.
6. The court erred in holding that the *contra proferentem* rule would not have had any effect on the position of the Respondents.
7. The court erred in holding that the Respondents breached the agreement between the parties.

8. The court erred in holding that the allegations made in paragraph 23 of the Respondents answering affidavit is factually incorrect and misguided "as the valuation by the registered valuator" (Annexure "F2") was obtained by the Applicant before the valuation by Remax", under circumstances where the Applicant never made such allegation (that the registered valuator's valuation was obtained prior the Remax valuation) and no reliance was placed thereon by the Applicant, in its affidavits or during argument. This should, in addition, be seen in light of the fact that the registered valuator's valuation utilised IVS 2022 International Valuation Standards Council 2022, which standards were only effective from 31 January 2022. The issue of the timing of the valuations were not raised during argument.
9. The court erred in holding that there existed no material factual dispute.
10. The court erred in failing to deal, in any way, alternatively by failing to give sufficient consideration, to the defence of rectification raised by the Respondents in their answering affidavit. The court did not deal with this defence in its judgement.
11. The court erred in holding that the dispute between the parties could have been resolved, in motion proceedings, in favour of the Applicant.

12. The court erred in placing reliance on the judgment of Business Aviation Corporation (Pty) Ltd and Another v Rand Airport Holdings (Pty) Ltd and the authorities referred to therein, relating to the exercise of lien over farmland, and the court erred in relying on the Placaeten of 1658 and 1659, under circumstances where the Applicant never even raised the issue of possible restrictions placed on the Respondents' right to exercise a lien. The Applicant would have been required to affirmatively raise such restrictions in its replying affidavit and/or during argument. The Applicant did not contend in its affidavits or during argument, that the Respondents, in principle, would not be entitled to exercise a lien over the property due to it being farm/agricultural land. The court raised issue, *mero moto*, for the first time during its judgment. This should, in addition, be seen in light of the fact that the Applicant has always maintained that the eviction is a "commercial eviction".

13. The court erred in holding that the Applicant is entitled to rely on the contractual provisions that: any improvements and/or alterations effected to the property, by the First Respondent, should have been approved by the Applicant, in writing, prior to such improvement/alterations being undertaken. This should be seen under circumstances that the Applicant was, at the time of the improvement/alterations being effected at the property, aware of it and at least verbally and/or tacitly, consented thereto.

14. The court erred by failing to give any, alternatively sufficient, consideration to the Applicant's knowledge of the alterations/improvements by the First Respondent, at the time that it was effected by it, without the Applicant ever objecting to it or raising the (contractual) issue of written consent.

15. The court erred in failing to give any, alternatively sufficient, consideration to the evidence produced by the Respondent, and the contentions made, that the Applicant had approved and consented to the improvements/alterations, by way of quasi-mutual assent.

16. The court erred in failing to give any, alternatively sufficient, consideration to the judgment of the Supreme Court of Appeal on the matter of Pillay and Another v Shaik and Others, in which the court, *inter alia*, held that where there had not been strict compliance with the prescribed formalities of a contract, and one party, by its conduct, induced the other party to the reasonable belief, that there had been due acceptance according to the prescribed mode and that there was consensus, there is binding consequences despite there not apparent non-compliance with the formalities of the agreement.

17. The court erred in failing to give any, alternatively sufficient, considerations to the contention by the Respondents, that the Applicant

should be estopped from denouncing his consent to the construction of the cold room.

18. The court erred by failing to give any, alternatively sufficient, consideration to the contentions, and allegations, by the Respondents that the Applicant, in dealing with the Respondents, acted fraudulently and dishonestly, under circumstances where the Applicant was clearly, at all relevant times, aware of the improvements and alterations affected by the Respondents and, now, seeks to rely on the provisions of the agreement between the parties requiring written consent, to deny the Respondents compensation for the improvements effected to the property and security relevant thereto [the lien).
19. The court erred in holding that the fact that the First Respondent is conducting business from the property, "disqualifies" the Respondents from exercising the lien.
20. The court erred in placing reliance on the matter of *Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd*⁴ in which it was held that a lien, in general, does not entitle the possessor to use the object. The considerations, and the judgment, can only be relevant where an interdict had been sought to prevent the use of the property. The Applicant, in this matter, did not seek an interdict against the Respondents preventing them from using the property.

21. The court erred in holding that the fact that a lien holder uses the property disqualifies/terminates the lien.
22. The court erred in giving any consideration to the lawfulness of the utilisation of the property by the First Respondent, for its own benefit, where such consideration ought to be irrelevant for the application. The only consideration was whether the First Respondent lawfully possessed the property.
23. The court erred in holding that the Respondents raised fictitious disputes of fact.
24. The court erred in holding that the Respondents' defences, to the application for eviction, are clearly untenable, and justified the court in rejecting it, under circumstances where the Applicant did not even make such a contention (the contention that the Respondents version was clearly untenable and/or far-fetched).
25. The court erred in ordering that the Respondents pay the cost of the application, to be taxed on the scale as between attorney and client.

26. The court erred in refusing to pronounce on the question whether the cold storage facility constitutes a permanent structure or not.

27. The court erred in not holding that the First Respondent is in lawful occupation (possession) of the property.

28. The court erred in not dismissing the application with costs.

CONDONATION:

[4] The Replying Affidavit by the Applicant was filed on 15 March 2024 whilst, in terms of Rule 6 of the Uniform Rules of Court, it had to be filed no later than 12 January 2024. In view of the compelling reasons advanced by the Applicant to explain the lateness coupled with no resistance by the Respondents, I am inclined to grant condonation for the late filing of the Replying Affidavit. For reasons noted hereinlater, it is clearly in the interests of justice to accept the Replying Affidavit into record.

NOTICE TO STRIKE OUT:

[5] This matter was scheduled to be heard in open court at 11:30 on 26 March 2024.

- [6] At 10:45 on 26 March 2024, while waiting in the Judge President's chambers for the proceedings to commence, my Registrar furnished me with a 3-page document which was uploaded onto CaseLines just before 10:45.
- [7] This document turned out to be an application to strike out certain portions of the Replying Affidavit filed by the Applicant with regards to the applications before me. The notice was not accompanied by an affidavit.
- [8] I invited the parties to deal with the notice before we deal with the applications.
- [9] Adv Botes SC, for the Applicant, submitted that the Court should not entertain the notice because the allegations in the replying affidavit of the Applicant were neither scandalous, irrelevant nor vexatious. In addition, the application to strike out should show prejudice to the party who sought the striking out. In the absence of an affidavit to substantiate such prejudice, the notice should be regarded as a matter *ex abundanti cautela*.
- [10] For the Respondents, Adv Raubenheimer argued that the Replying Affidavit contains paragraphs and documents which constitute a new case that is sought to be made out in reply and allegations that ought to have been made

in the founding affidavit. He submitted that paragraphs 4.11 to 4.18, 5.1 to 5.13 and 6.11 should be struck out.

[11] In **Mostert and Others v Firststrand Bank t/a RMB Private Bank and Another 2018 (4) SA 443 (SCA)** at paragraph 13, Van der Merwe JA stated the following:

“It is trite that in motion proceedings the affidavits constitute both the pleadings and the evidence. As a respondent has a right to know what case he or she has to meet and to respond thereto, the general rule is that an applicant will not be permitted to make or supplement his or her case in the replying affidavit. This, however, is not an absolute rule. A court may in the exercise of its discretion in exceptional cases allow new matter in a replying affidavit. . . .In the exercise of this discretion a court should in particular have regard to: (i) whether all the facts necessary to determine the new matter raised in the replying affidavit were placed before the court; (ii) whether the determination of the new matter will prejudice the respondent in a manner that could not be put right by orders in respect of postponement and costs; (iii) whether the new matter was known to the applicant when the application was launched; and (iv) whether the disallowance of the new matter would result in unnecessary waste of costs.”

[12] It is common cause that the Replying Affidavit was filed by the Applicant only on 15 March 2024, 11 days prior to the session in court. The Applicant

submitted that the reason for the late filing of the Replying Affidavit was the fact that the parties were in continuous settlement discussions since December 2023 and it was only settled and filed when the discussions seemed to be utterly fruitless. The Respondents did not traverse the aforementioned submission but rather complained about the little time available for the Respondents to settle their Heads of Argument.

[13] The Respondents, in addition, did not object to the lateness of the Replying Affidavit nor did the Respondents apply for a postponement of the matter in order to prepare an affidavit to accompany the application to strike out. In view of the importance of the matter to both parties as well as the complexity thereof, I would have considered such an application.

[14] Paragraphs 4.11 to 4.18 of the Replying Affidavit deals in detail with the dire financial situation the Applicant finds himself in as a direct result of the Respondents who resist eviction at all cost whilst not paying any rent and continuing business as usual on the property of the Applicant. The Applicant averred in the Founding Affidavit that he already utilized a substantial part of his life savings in order to restore his property rights and, unless the Applicant is able to regain possession and control of his property and find an alternative tenant, he will be left with no funds. The Respondents reacted to the latter in the Opposing Affidavit as follow:

“12. It is simply not correct that the Applicant is unable to sustain himself pending the finalisation of the appeal process in this matter. **He is a very wealthy person.**” (Emphasis added)

and

“13. He has failed, in his affidavit, to take this Honourable Court into his confidence. He says that he has been required to withdraw millions from his investments, yet he fails to make any allegations as to how much he has left by way of financial or other investment and other holdings. **The Applicant is an extremely wealthy person.**” (Emphasis added)

[15] I am satisfied that paragraphs 4.11 to 4.18 in the Replying Affidavit were necessitated by the nonchalant and lackadaisical attitude of the Respondents in the Opposing Affidavit averring that the Applicant is “extremely wealthy” and will be able to afford his legal and living expenses to the very end of the appeal process. It must be borne in mind that the Respondents made such statements from a position where they were conducting an extremely profitable business from the property of the Applicant whilst depriving the Applicant from rent which is legally due to the Applicant.

[16] I have no doubt that the Supreme Court of Appeal, as pronounced in *Mostert supra*, would have regarded the above scenario as exceptional.

[17] Paragraphs 5.1 to 5.13 of the Replying Affidavit deals with a completely new matter which goes to the core of the question whether the Respondents stand to suffer irreparable harm should this Court grant the Section 18(3) application in favour of the Applicant. The Applicant was not obviously aware of such facts when deposing of the Founding Affidavit.

[18] In brief, the Applicant avers that the Respondents were not complying with various requirements in order to conduct the business of a commercial abattoir and on 28 September 2023 and 31 October 2023, the Department of Agriculture and Rural Development issued directives to the Respondents to comply with said requirements.

[19] The Respondents seemingly did not rectify their wrongdoing and, as a result, the Department of Agriculture and Rural Development issued a stop order on 14 February 2024. This entails that the Respondents are legally barred from conducting the business of a commercial abattoir.

[20] During argument before me, Adv Raubenheimer averred that he was not aware of the recent developments at his clients' business. I invited Adv Raubenheimer to take instructions in this regard as I regarded it to be of importance in the matter I was called to adjudicate and his instructing attorney

and client were sitting in court. Despite my invitation, Adv Raubenheimer bluntly refused to obtain instructions in this regard.

[21] I therefor find that all the relevant facts necessary to determine the new matter referred to in paragraphs 5.1 to 5.13 in the Replying Affidavit were placed before me, that the Applicant was not aware of such facts when the Section 18(3) Application was launched and that the matter is inherently extraordinary in nature.

[22] Paragraph 6.11 is a repetition of an averment in the Founding Affidavit by the Applicant in that the Respondents will suffer no harm should the Section 18(3) Application be granted save for the alleged improvements which were erected by the Respondents on the property of the Applicant. In this regard, the Applicant, in his Founding Affidavit, submitted that the Respondents can approach a court to recover the expenses related to the improvements and that the value of the property of the Applicant provides more than adequate security for such claim. In essence, the Applicant averred in the Founding Affidavit that the Respondents will suffer no harm should the Court decide in favour of the Applicant in re the Section 18(3) Application.

[23] The content of the Replying Affidavit as a whole will thus be considered by this Court in reaching a conclusion herein.

APPLICATION FOR LEAVE TO APPEAL:

Legal principles:

[24] Applications for leave to appeal are governed by **Section 17** of the **Superior Courts Act, number 10 of 2013**. Section 17 (1) provides as follows:

"(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that:

- (a) (i) the appeal would have 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;

[25] The traditional test that was applied by the Courts in considering leave to appeal applications have been whether there is a reasonable prospect that another Court may come to a different conclusion to the one reached by the Court *a quo* [**Commissioner of Inland Revenue v Tuck 1989 (4) SA 888 (T)**]. With the enactment of section 17, the test obtained statutory force. In terms of section 17 (1)(a)(i), leave to appeal may now only be granted where

the Judge or Judges concerned is of the view that the appeal would have a reasonable prospect of success, which made it clear that the threshold to grant leave to appeal has been raised. In **Mont Chevaux Trust v Tina Goosen and 18 Others decision [2014] JDR 2325 (LCC)** at para 6, it was held that:

"It is clear that the threshold of granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another Court might come at a different conclusion, see **Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 342H**. The use of the word "would" in the new statute indicates a measure of certainty that another Court will differ from the Court whose judgment is sought to be appealed against." In **Notshokuvu v S (2016) ZASCA 112** at para 2, it was indicated that an Appellant faces a "higher and stringent" threshold under the Superior Courts Act. Thus, in relation to said section 17, the test for leave to appeal is not whether another Court "may" come to a different conclusion, but "would" indeed come to a different conclusion."

[26] With regard to the meaning of reasonable prospects of success, it was held in **S v Smith 2012 (1) SACR 567 (SCA) 570**, at para 7, as follows:

"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the fact and the law, that a court of appeal

could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. **There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.**" (Emphasis added)

Discussion:

[27] I have already comprehensively dealt with all relevant issues in my judgment dated 27 September 2023.

[28] The simple facts of this matter can be summarised as follow:

- It is common cause that the Applicant is the owner of the property in dispute.
- It is further common cause that a verbal lease agreement existed between the Applicant and the First and Second Respondents in terms

whereof the Respondents would lease the commercial abattoir situated on the property of the Applicant and a certain amount of money will be paid to the Applicant on a monthly basis.

- At the end of August 2022, the Respondents failed to pay the rent and this was met with a letter of demand from the attorneys for the Applicant calling on the Respondents to rectify their breach.
- The Respondents failed to rectify the breach and the Applicant duly cancelled the agreement.
- From such time the Respondents were not lawful in their occupation of the Applicant's property.

[29] During argument before me, the Respondents persisted that they did not breach the lease agreement, but rather the Applicant did. The aforementioned view is premised on the averment that the Applicant offered the property for sale to a third party. I already found in my judgment that such submission is bad in law and in fact and still stands to be rejected.

[30] The position regarding an improvement/enrichment lien on rural property in our law has been dealt with in my judgment and I am not going to repeat

same here. The Respondents criticized me for researching the aforementioned and submitted that, at the very least, I should have invited the parties to make further submissions with regards to the *dicta* I referred to from **Business Aviation Corporation v Rand Airport Holdings [2006] SCA 72 (RSA)**.

[31] It is correct that I did not invite the parties to make further submissions in this regard. However, no amount of argument could have altered the cold, hard facts present in this matter. No amount of argument could have changed the geographical location of the property in dispute from rural to urban. The property in dispute is, without a shadow of a doubt, situated on agricultural land and the Respondents are therefor barred from relying on the protection of an improvement/enrichment lien.

[32] In addition, the Respondents argued that this Court is bound to the cases presented and arguments delivered before court by the respective parties. This position is normally accepted. It is however not acceptable to expect from a judicial officer to choose the “more correct” argument to the “lesser correct” one. This Court is duty bound to pronounce the legally correct position and not something in between. The argument of the Respondents, in this regard, stands to be rejected.

[33] The Respondents also argued that this Court erred in not entertaining the submissions relating to verbal and/or tacit consent by the Applicant – in

relation to the erecting of the cold storage facility – and the question of *estoppel*. In view of my finding *i.e.* that the Respondents cannot rely on the protection of a lien, I did not deem it necessary to pronounce on said issues.

[34] It needs to be noted that, when engaged during argument before me with the question as to when, where and how did the Applicant verbally consent to the erection of the improvements, Adv Raubenheimer was at a loss of words. When prompted as to how the Third Respondent can make such allegation in his Answering Affidavit if his representative is unable to substantiate same, Adv Raubenheimer merely submitted that he could not take the matter any further.

[35] The Respondents, as part of their arsenal of legal challenges, submitted throughout the proceedings that the Respondents always intended to apply for rectification of the initial agreement between the parties. According to the Respondents and in light of the “defence” of rectification, the Respondent did not intend to agree that any improvements or alterations to the property of the Applicant should be preceded by written consent by the Applicant. If one has to entertain such contention as serious, the question remains as to why did the Respondent not apply for such rectification much earlier? I regard the rectification “defence” as merely an afterthought to be utilized by the Respondent if everything else fails.

[36] Adv Botes SC, for the Applicant, submitted that the matter before me was an eviction application, no more, no less. I agree with the contention and have already noted the simple facts of the matter in paragraph 28 *supra*.

[37] In addition, the Applicant argued that the Respondents reverted to a shotgun approach when settling their application for leave to appeal. Simple reading of the grounds of appeal reveals that the Respondents contest in essence every finding I made in my judgment. Adv Raubenheimer echoed the aforementioned during argument before me by submitting that, even if I find that a court of appeal would come to a different conclusion on only one ground of appeal, I would be obliged to grant leave to appeal. Such an approach needs to be discouraged as it creates the impression that the party who acts as such, does not have real and specific grounds of appeal but still continues on its path in the hope that the presiding Judge doubts at least one of his/her findings. This is nothing less than an abuse of process.

[38] The Applicant argued that my judgment was, with regards to the material aspects, properly reasoned and correctly decided.

[39] In conclusion, the Respondents must convince this court on proper grounds that they have prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. Having taken the submissions by the parties, on paper and viva voce, into consideration, I am

of the opinion that a court of appeal would not come to a different conclusion.

The application for leave to appeal must therefore fail.

APPLICATION IN TERMS OF SECTION 18(3) Act 10 of 2013:

Legal principles:

[40] Section 18(3) of the Superior Courts Act reads as follow:

"(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."

[41] In *MV Ais Mamas Seatrans Maritime v Owners MV Ais Mamas & Another* 2002 (6) SA 150 (C), a decision often quoted by this Division and the Supreme Court

of Appeal, Thring J dealt with the phrase “exceptional circumstances” and a summation of the meaning of the phrase is given at 156I – 157C:

“What does emerge from an examination of the authorities, however, seems 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 accepted 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 especially 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 circumstances relied on as allegedly being exceptional.”

[42] The court in the matter of **Incubeta Holding (Pty) Ltd and Another v Ellis and Another 2014 (3) SA 189 (GJ)** at paragraph 24 the court considered irreparable harm and held:

“(24) The second leg of the s 18 test, in my view, does introduce a novel dimension. On the South Cape test, No 4 (cited *supra*), an even-handed balance is aimed for, best expressed as a balance of convenience or of hardship. In blunt terms, it is asked: who will be worse off if the order is put into operation or is stayed. But s 18(3) seems to require a different approach. The proper meaning of that subsection is that if the loser, who seeks leave to appeal, will suffer irreparable harm, the order must remain stayed, even if the stay will cause the victor irreparable harm too. In addition, if the loser will not suffer irreparable harm, the victor must nevertheless show irreparable harm to itself. A hierarchy of entitlement has been created, absent from the South Cape test. Two distinct findings of fact must now be made, rather than a weighing-up to discern a 'preponderance of equities'. The discretion is indeed absent, in the sense

articulated in South Cape. What remains intriguing, however, is the extent to which even a finding of fact as to irreparable harm is a qualitative decision admitting of some scope for reasonable people to disagree about the presence of the so-called 'fact' of 'irreparability'."

[43] The Supreme Court of Appeal, in the matter of **Ntlemeza v Helen Suzman Foundation and Another 2017 (5) SA 402 (SCA)**, said the following at paragraphs [19] to [21] thereof:

"(19) In **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A)** at 544H — 545G this court set out the common-law position as follows: 'Whatever the true position may have been in the Dutch Courts, and more particularly the Court of Holland ... it is today the accepted common law rule of practice ... that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make special application ... The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from ... The Court to

which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised ... In exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, *inter alia*, to the following factors: (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted; (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused; (3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, eg. to gain time or harass the other party; and (4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be. (Authorities omitted)

- (20) In South Cape this court held that in an application for leave to execute the onus rests on the applicant to show that he or she is entitled to such an order. The court went on to hold that an order granting leave to execute pending an appeal was one that had to be classified as being purely interlocutory and was thus not appealable. There were exceptions to the rule that purely interlocutory orders were not appealable. It is

necessary to point out that a number of judgments of this court relaxed this rule on the basis that an appeal may be heard in the exercise of the court's inherent jurisdiction in extraordinary cases where grave injustice was not otherwise preventable. In **Philani-Ma-Afrika and Others v Mailula and Others 2010 2 SA 573 SCA ((2009) ZASCA 115)** this court considered the position where a High Court had granted leave to execute an eviction order despite having granted leave to appeal. It held the execution order to be appealable in the interests of justice. It must also be borne in mind that before the advent of s 18, the position at common law was that the court had a wide general discretion to grant or refuse an execution order on the basis of what was just and equitable whilst appreciating that the remedy was one beyond the norm.

(21) Until its repeal on 22 May 2015, rule 49(I I) of the Uniform Rules read as follows: 'Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs. This was a restatement of the common law and formed the basis on which applications of this kind were determined.'

[44] In the **University of Free State v Afriforum and Another 2018 (3) SA 428 (SCA)**, at paragraph 9, the Supreme Court of Appeal held:

"(9) What is immediately discernible upon perusing ss 18(1) and (3), is that the legislature has proceeded from the well-established premise of the common law that the granting of relief of this nature constitutes an extraordinary deviation from the norm that, pending an appeal, a judgment and its attendant orders are suspended. Section 18(1) thus states that an order implementing a judgment pending appeal shall only be granted "under exceptional circumstances". The exceptionality of an order to this effect is underscored by s 18(4I), which provides that a court granting the order must immediately record its reasons: that the aggrieved party has an automatic right of appeal; that the appeal must be dealt with as a matter of extreme urgency and that pending the outcome of the appeal the order is automatically suspended. (10) It is further apparent that the requirements introduced by ss 18(1) and (3) are more onerous than those of the common law. Apart from the requirement of "exceptional circumstances" in s 18(1), s 18(3) requires the applicant "in addition" to prove on a balance of probabilities that he or she "will" suffer irreparable harm if the order is not made, and that the other party "will not" suffer irreparable harm if the order is made. The application of rule 49(11) required a weighing-up of the potentiality of irreparable harm or prejudice being sustained by the respective parties and where there was a potentiality of harm or prejudice to both of the parties, a weighing-up of the balance of hardship or convenience, as the case may be, was required. Section 18(3), however, has introduced a higher threshold, namely proof on a balance of probabilities that the

applicant will suffer irreparable harm if the order is not granted and conversely that the respondent will not, if the order is granted."

[45] It is expected from me to consider:

[45.1] whether or not "exceptional circumstances" exist; and

[45.2] whether the Applicant proofed, on a balance of probabilities:

- the presence of irreparable harm to the Applicant; and
- the absence of irreparable harm to the Respondents.

Discussion:

[46] I am guided by the authorities referred to above and which were provided by the Parties in their Heads of Argument.

[47] During his argument before me, Adv Botes, for the Applicant, argued that the Applicant will suffer irreparable harm if the order is not executed while the Respondents will not suffer irreparable harm, if any. This argument was based on the personal circumstances of the Applicant, the unlikelihood of an appeal hearing in the near future, the value of the farm presenting more than adequate security for the Respondents claim and the fact that the

Respondents, at their own hand, were stopped by the Government to continue with operations.

[48] The Respondents argued that the Applicant did not make out a case on paper that exceptional circumstances exist and that the Respondents will not suffer irreparable harm if the order is executed. The fact that the Respondent will lose their lien and 100 employees will lose their employment is adequate proof that the Respondents will suffer irreparable harm.

[49] I am not going to repeat the arguments of the parties in this regard as it is scrupulously noted in their respective Heads of Argument.

[50] I find the following to be exceptional in this application:

[50.1] The Applicant is 79 years of age. It is rare that a man of his age has to fight a lengthy and expensive legal battle in an attempt to retrieve what legally belongs to him;

[50.2] The Applicant is on the brink of exhausting his life savings whilst the Respondents present a laid-back attitude claiming that the Applicant is “wealthy” and he can afford the legal battle;

[50.3] At his age and absent any significant monthly income, the Applicant will surely not be able to secure a loan at any financial institution in order for him to provide security to the Respondents for the improvement lien they endeavour to enforce against him. The security referred to above, was in essence the condition set by the Respondents to vacate the property of the Applicant;

[50.4] The current *status quo* of the Respondent presents an extraordinary situation *i.e.* the Respondents is continuing their daily activities and trades on the property of the Applicant and in the process earning a significant income to foot their legal bill. In the same breath, the Respondents inexplicably refuse to pay rent depriving the Applicant a much-needed income. To amplify the situation, the Respondents refuse *ad nauseam* to disclose whether the rent is indeed held in the trust account of their attorney and what amount is held; and

[50.5] The real possibility exists that, if leave to appeal is granted on petition, the matter will be referred to a Full Court in this Division and, if not satisfied with the decision of the Full Court, the Respondents will in all probability pursue the matter to the Supreme Court of Appeal. This will take years to conclude. In view of the Respondents proven track record displaying their lack of urgency in dealing with this matter, it can be expected that the finalisation of the matter will rather be prolonged than expedited by the Respondents.

[51] The matter before me is a typical example where a litigant, who clearly can afford the litigation, does its utmost best to exhaust its opponent to such an

extent that his opponent is either financially ruined or succumbs to the unreasonable and unlawful demands of the litigant. Such behaviour is at odds with the values entrenched in our Constitution and creates an injustice which should be discouraged by our courts in the strongest terms.

[52] I further find that the Applicant will suffer irreparable harm should I refuse to grant the order in terms of Section 18(3). The Applicant will, in all probability, lose everything he acquired through hard work during his entire life.

[53] I also find that the Respondents will not suffer irreparable harm should my order be executed. My conclusion is based on the following:

[53.1] The Respondents are not in lawful possession of the property as the lease agreement was lawfully terminated;

[53.2] The Respondents are still operating the abattoir business on the premises of the Applicant undeterred even though our law prohibits such actions. To claim that the employees of the Respondents stand to lose their employment, holds no water. If any harm is suffered in this regard, same will be self-inflicted;

[53.3] The current illegal operations of the Respondents were in any case stopped by the Department of Agriculture and Rural Development due to their own actions or rather lack thereof. This situation is also self-inflicted;

[53.4] The Respondents were willing to pay R 20 million for the property of the Applicant. I agree with the contention by the Applicant that the Respondent will have more than adequate security to execute their claim for unjust enrichment against the Applicant should the Respondents be able to proof their claim.

[54] In view of the above, the application in terms of Section 18(3) of the Superior Courts Act should therefor succeed.

COSTS:

The obstructive and abusive demeanour of the Respondents:

[55] When considering a just cost order, this Court is guided by caselaw in general and specifically the matter of **Public Protector v South African Reserve**

Bank [2019] ZACC 29 where the Constitutional Court dealt with punitive cost orders.

[56] I already dealt with the delaying actions by the Respondents leading up to the initial application in my judgment in paragraphs 25 and 54.

[57] On 5 October 2023, the Applicant forwarded a letter to the Respondents requesting a site inspection and that the retained funds for the lease of the property be transferred to the trust account of the Applicant's attorneys of record.

[58] No response was forthcoming which prompted the Applicant's attorneys to forward a second letter on 9 October 2023 requesting a response to the letter of 5 October 2023.

[59] Only then, on 9 October 2023, the Respondents' attorneys reacted informing the Applicant that a meeting with the Respondents was scheduled for the 10th of October 2023.

[60] On 11 October 2023 the Applicant's attorneys had to enquire once again with regards to the outcome of the meeting on 10 October 2023 before receiving a

reaction from the Respondents' attorneys. The response was *inter alia* as follow:

“ . . .

After careful consideration and deliberation have we have been instructed to proceed with a formal Appeal as provided for by Rule 49. (*sic*)

. . .

In conclusion, confirm that **our clients appeal will follow imminently, well within the prescribed time period.**” (My emphasis)

[61] The Respondents filed the application for leave to appeal on the very last day allowed by the Rules of this Court.

[62] When the date was arranged for the applications to be heard (26 March 2024), this Court issued two directives to the parties *i.e.* that all the relevant documents regarding the applications should be uploaded onto CaseLines by 16 March 2024 and the Heads of Argument by 23 March 2023.

[63] The parties adhered to the 16 March deadline but the Respondents, once again, did not adhere to the 23 March deadline. The Heads of Argument of the Respondents was only settled and uploaded onto Caselines on 25 March 2024.

[64] Although Adv Raubenheimer, for the Respondents, apologised for the late filing of the Heads as he was not aware of my directives, I find the apology insincere as the Respondents must have been aware of the deadlines because the Respondents adhered to the first deadline.

[65] The Respondents tendency to stall proceedings is unacceptable and borderline contemptuous.

[66] I regard the behaviour of the Respondents, prior and throughout the proceedings before me, as obstructive, vexatious, *mala fide* and an abuse of process. This Court's displeasure will be reflected in the order to follow.

ORDER:

[67] Having considered the affidavits by the parties, the heads of argument, arguments by the parties in court, the relevant caselaw and after having applied my mind, I make the following order:

[67.1] Condonation for the late filing of the replying affidavit by the Applicant is granted;

[67.2] The First, Second, Third, Fifth and Sixth Respondents' application for leave to appeal is dismissed;

[67.3] The operation and execution of the order granted by this Court on 27 September 2023 in terms whereof the First, Second, Third, Fifth and Sixth Respondents were ordered to vacate the immovable property known as Portion [...] (a Portion of Portion [...]) of the F[...] R[...] [...], Registration Division [...], Gauteng Province, held under Deed of Transfer T17358/1995, 206,5964 hectares (hereinafter referred to as "the property"), shall not be suspended pending the finalisation of the application for leave to appeal and subsequent applications/petitions for leave to appeal;

[67.4] The order granted by this Court on 27 September 2023 shall be implemented and the First, Second Third, Fifth and Sixth Respondents are ordered to vacate the property within 30 days from date of granting of this order;

[67.5] In the event that the First, Second Third, Fifth and Sixth Respondents fail to vacate the premises in terms of paragraph 67.4 *supra*, the Sheriff of this Court and/or his/her Deputy is authorised and mandated to execute this order and to evict the First, Second Third, Fifth and Sixth Respondents from the property and to obtain the assistance of the South African Police Services to assist him/her in this regard, if necessary;

[67.6] The First, Second Third, Fifth and Sixth Respondents, are ordered to pay the costs of the application for leave to appeal and the Applicants' application in terms of section 18(3) of the Superior Courts Act, 10 of 2013, on an attorney and client scale jointly and severally, the one paying the others to be absolved *pro tanto*, on a scale as between attorney and client, including the costs consequent upon the employment of 2 (two) counsel.

BURGER AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

FOR THE APPLICANT: ADV FW BOTES SC
ASSISTED BY: ADV R DE LEEUW
INSTRUCTED BY: VDT ATTORNEYS

FOR THE RESPONDENTS: ADV R RAUBENHEIMER

INSTRUCTED BY: CJ WILLEMSE & BABINSKY ATTORNEYS