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IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION, KIMBERLEY

Not reportable
Appeal Case no: CA&R32/2024

WIM JACOBS 1st Appellant

GAO XIA QIANG 2nd Appellant

HUANG FENG 3rd Appellant

MIKE BESTER 4th Appellant

and

ZINVOMAX (PTY) LTD Respondent

In Re:

Case no:1160/2021

ZINVOMAX (PTY) LTD Applicant

and

WIM JACOBS 1st Respondent

GAO XIA QIANG 2nd

Respondent

HUANG FENG

3rd Respondent

MIKE BESTER

4th Respondent

Neutral citation: *Jacobs and 3 Others v Zinvomax (Pty) Ltd*
(Case no. CA&R32/2024) (09 September 2024)

Delivered: 09 September 2024

Coram: Tlaletsi JP, Nxumalo J et Stanton J

This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The time and date of hand-down is deemed to be 14h00 on 09 September 2024.

ORDER

Full Bench Appeal:

1. The appeal is struck from the roll in terms of s16(2) of the Superior Courts Act 10 of 2013.
2. The appellants are to pay the respondent's costs jointly and severally, the one paying the other to be absolved.
3. Such costs shall be party and party costs on scale C of Rule 69.

JUDGMENT

TLALETSI JP

INTRODUCTION

1. The appellants, (Wim Jacobs, Gao Xia Qiang, Huang Feng and Mike Bester) are appealing against the order of this court in an application brought by the respondent (Zinvomax (Pty) Ltd) to execute the eviction judgment in terms of section 18(1) and (3) of the Superior Courts Act 10 of 2013 (the Act).¹ They are dissatisfied with the part of the order authorising their immediate eviction from certain property pending any appeal process they may embark upon.

THE FACTS

2. The dispute has its genesis in an application for the eviction of the appellants from a commercial property known as erf 2[....] K[...]. The said property is owned by the Ga-Segonyana Local Municipality. The Municipality had purchased the said property from Transnet in 2011 for a purchase price of just under R8 million (eight million rand). Registration of the property in favour of the Municipality happened on 24 November 2014.
3. The applicants are part of several persons (about 23 in number) who occupy certain premises on the said property and run various businesses from such premises.
4. A brief background on how the current respondent came into the picture is necessary for a proper understanding of the matter. It is as follows. The Municipality invited developers for the development of the property. Copy Centrum is a joint venture between Billy Purushotham and Built-IT Green

¹ Section 18 of the Act provides:

“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;
· · ·
- (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.”

Construction (Pty) Ltd (the Joint Venture). The Joint Venture submitted and won the tender to develop the property on behalf of the Municipality. There was a condition that the Joint Venture would be awarded a long-term lease of an initial period of thirty years with an automatic extension of a further twenty years in exchange for developing the property.

5. On 9 September 2019 a notarial deed of cession and assignment was concluded and also registered between the respondent and the Joint Venture. The Municipality was also a party to such cession agreement. The Joint Venture ceded to the respondent, its rights to occupy the property in terms of the said notarial lease agreement. It is significant to note that with this transaction, the respondent thus procured the rights as a long-term tenant of the property, protected in terms of the notarial deed of lease and cession agreement registered against the title deed of the property.
6. On 8 June 2021 the respondent, the Municipality and the Joint Venture and its parties, launched an application to evict the applicants and all other parties that occupied the premises on the property to enable the respondent to commence with the planned development of the property. The application was opposed by the current appellants only. The opposing affidavit was filed by Mike Bester. The other three appellants only filed supporting affidavits, without providing independent versions or defences to the eviction application.
7. The appellants, in their opposition to the eviction application, expressed an intention to launch a review application aimed at setting aside certain of the decisions of the Municipality. On 4 February 2022, the court a quo granted a stay of the eviction proceedings pending the finalisation of the intended review application.
8. On 21 June 2022, the fourth appellant (Mike Bester) launched the review application seeking orders on the following terms:

- “1. That the decision of the first respondent that an invitation of development proposals for Erf 2[....], K[....] be expedited for long term lease be declared constitutionally invalid, reviewed and set aside;
2. The decision of the first respondent to award the tender to the third respondent be declared constitutionally invalid, reviewed and set aside;
3. Further and/or alternative relief”²

The review application was dismissed by Mamosebo J and Chwaro AJ on 10 March 2023.

9. The application for eviction was subsequently heard by Lever J on 2 June 2023 and handed down his Judgment on 19 January 2024. The learned Judge granted orders essentially evicting the respondents and all persons or entities occupying the property through them and that in the event that the respondents and persons occupying the property refuses to immediately vacate the property, that the Sheriff be directed with the assistance of the South African Police Services (if necessary) to give effect to the order. The current appellants were ordered to pay the applicants party and party costs, jointly and severally, the one paying the other to be absolved.³ The order immediately came into operation and could be executed.
10. Aggrieved by the order above, the appellants filed their application for leave to appeal the eviction order. The filing of the application for leave to appeal automatically suspended the operation and execution of the eviction order. Soon thereafter the respondent launched a counter-application for leave to carry into effect the order of eviction granted in terms of the judgment referred to above, under the provisions of s18(1) and (3) of the Act.

² *Michael Hendrik Van Niekerk Bester v Ga-Segonyana Local Municipality and others*; Case no 316/2022, Unreported: delivered on 10 March 2023. Northern Cape, Kimberley.

³ *Zinvomax (Pty) Ltd and Others v Iga and Others* (1160/21) [2024] ZANCHC 2 (19 January 2024).

11. The two motions, namely the leave to appeal application by the appellants and the counter-application to execute the eviction by the respondent, were heard by Lever J separately on 13 June 2024 and rendered a judgment incorporating the two applications on 18 June 2024.⁴

THE JUDGMENT OF THE COURT A QUO

12. In adjudicating the two applications, the court a quo made the following remarks:

- “11. In the main judgment I found: ‘As a direct consequence of the dismissal of the said review application, the only basis upon which the opposing respondents could continue to oppose the eviction application was on the question as to whether the three main (applicants) had *locus standi* to bring this application for eviction. Indeed, this was the only basis upon which the opposing respondents opposed the eviction application at the hearing hereof.’
12. In the main judgment I decided that the eviction order could be granted if any one of the three main applicants established their *locus standi* to bring the said application. This finding in the main judgment has not been challenged.
13. In the main judgment I found that the second applicant had established its *locus standi* and the authority to launch the eviction application.
14. I did not decide the *locus standi* or the authority of the first and third applicants in the eviction proceedings. It was not necessary to do so.”

⁴ *Jacobs and Others v Zinvomax (Pty) Ltd and Others* (1160/2021) [2024] ZANHC 58 (18 June 2024).

13. As can be seen from the quoted excerpt of the judgment of the court a quo, when the eviction application was resumed after the dismissal of the review application, the only basis upon which the eviction application was resisted by the appellants was that the respondent, the Municipality as well as the Joint Venture did not have *locus standi* to launch the application for eviction of the appellants from the property. Their resistance of their eviction was not anchored on any claim of their entitlement to occupy the premises. The court a quo held that they could not claim any entitlement because they failed to establish a valid and existing lease agreement other than a month-to-month lease. In deciding the *locus standi* objection, the court a quo held that the municipality as the registered owner of the property had *locus standi* and the authority to launch the eviction application. For the purpose of eviction, the court a quo concluded that it was not necessary to decide the *locus standi* or the authority of the first respondent and the Joint Venture. It is essentially on the basis of the above reasons that the court a quo granted the orders evicting the appellants and other occupiers of the property in issue.

APPLICATION FOR LEAVE TO APPEAL

14. Having made the above remarks and observations, the court a quo turned to consider the merits of the application for leave to appeal. The Court made the following fundamental observations regarding the basis of the case for the appellants in seeking leave to appeal:

“20. The two grounds of appeal relied upon by the opposing respondents in the argument presented by Mr Moeng are: Firstly, in respect of *locus standi* and authority of the Municipal Manager to launch the eviction application as asserted in paragraph 1.3 of the founding affidavit do not prove that the municipality resolved to institute the eviction application; and Secondly, on a proper interpretation of the Power of Attorney, being annexure “FA2” to the founding affidavit of the eviction application, does

not authorise the launching of the application on behalf of the Ga-Segonyana Local Municipality.

21. For the sake of clarity, here we are really dealing with the authority of the municipality's agent to bind the municipality to be a party to the launching of the application for eviction. As owner of the relevant property the *locus standi* of the municipality to launch eviction proceedings against occupiers of such property ought not to be an issue.
22. The answers to both grounds of appeal are, to a large extent, the same. The opposing respondents, in the answering affidavits filed on their behalf, are obligated to admit or deny, or confess and avoid the contentions set out in the founding affidavit. If the opposing respondents fail to do so, the court will, for the purposes of the application accept the allegations made in the founding affidavit. Although the authority referred to is old, the obligation of a respondent in dealing with material contentions set out in the founding affidavit is so ingrained on our motion proceedings that it can be regarded as trite. The reason for this is plain.”⁵
15. The reasoning of the court a quo above makes it plain that in both grounds of appeal, the appellants sought to challenge the authority of the Municipal Manager to be a party to the launching the application for eviction, as well as the wording of the power of attorney which in their view did not specifically authorise the launching of the eviction application on behalf of the municipality. The court a quo reasoned that nowhere in the appellants' answering affidavit did the appellant challenge the authority of the Municipal Manager to act on behalf of the Municipality as well as the wording of the power of attorney. What they did was only to note the averments made and as such were deemed to have admitted such authority. Furthermore, the Court a quo arrived at this

⁵ *Ibid.*

conclusion because the appellants did not invoke the provisions of Rule 7(1), alternatively, Rule 35(12) of the Uniform Rules⁶ which were available to them.

16. The court a quo found no merit in the grounds of appeal raised by the appellants and dismissed the application for leave to appeal which was solely grounded on section 17(1)(a)(i) of the Act, namely that the appeal would have reasonable prospects of success. The court a quo went further though, to find that there is no compelling reason why the appeal should be heard. It is significant that the appellants did not seek to show that they were or are entitled to occupy the property. Neither did they seek to challenge the findings of the court a quo that they have not proved any right to be in occupation of the property.

THE COUNTER-APPLICATION

17. Having disposed of the application for leave to appeal the court a quo proceeded to adjudicate the respondent's counter application in terms of s18(1) of the Act. Section 18 of the Act provides 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

⁶ Rule 7(1) provides that: “Subject to the provisions of sub-rules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such a person is so acting, or with the leave of the court on good cause shown at any time before judgement, be disputed, whereafter such person may no longer act unless he satisfies the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.”

Rule 35(12) (a) provides that: “Any party to any proceeding may at any time before the hearing thereof deliver a notice. . . to any other party in whose pleadings or affidavits reference is made to any document or tape recording to —

- (i). produce such document or tape recording for inspection and to permit the party requesting production to make a copy or a transcription thereof.”

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) (a) 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.
- (b) 'Next highest court', for purposes of paragraph (a)(ii), means—
 - (i) a full court of that Division, if the appeal is against a decision of a single judge of the Division; or
 - (ii) the Supreme Court of Appeal, if the appeal is against a decision of two judges or the full court of the Division.

[S 18(4) substituted by s. 29 of Act 15 of 2023 with effect from 3 April 2024.]

(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.”

18. It is perspicuous that s18 restates the common law position that the noting of an appeal automatically suspends the operation and execution of the order of the court pending the outcome of the appeal. However, a party who the order is in his or her favour, may apply to the court to be granted an order that the operation and execution of the order not be suspended but put in operation. A court may grant such an order in exceptional circumstances. The applicant must show on a balance of probabilities that it will suffer irreparable harm if the order is not granted and that the other party will not suffer irreparable harm if the order for execution of the order is granted.⁷ Should the court decide to order that the order should be executed, it is required to immediately record the reasons supporting such an order. The aggrieved party is granted an automatic right of appeal to the next highest court.
19. The court a quo was alive to the onus resting on the respondent to satisfy the requirements for the immediate execution of the eviction order. The court analysed the parties’ averments and contentions and found the following circumstances to be exceptional: -

⁷ See *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) wherein the SCA observed thus:

“[23] As can be seen, s 18(4)(ii) has made orders to execute appealable, fundamentally altering the general position that such being purely interlocutory orders, they were not appealable. Moreover, it granted to a party against whom such an order was made, an automatic right of appeal. In addition, s 18(3) requires an applicant for an execution order to prove on a balance of probabilities that he or she ‘will’ suffer irreparable harm if the order is not granted and that the other party ‘will not’ suffer such harm.”

- 19.1 The appellants have delayed the respondent's occupation and development of the said site for approximately four years. This has led to the construction costs escalating by a large percentage. The price of structural steel alone had gone up by 60% in that period. Had it not been for the delay by the appellants, the contemplated shopping centre would have been built and operational already. The respondent has lost rental income to be derived from the property which he would not be able to recover.
- 19.2 The respondent had to secure tenants and concluded lease agreements with them. It had to hand over occupation of the premises to the tenants by a fixed date in 2025 failing which it would suffer penalties. There is also a competing shopping centre in the area which adversely affects the interests of the respondent because of the delays caused by the appellants.
- 19.3 The respondent is not seeking to enforce an unlawful contract as alleged by the appellants but merely to evict them from the property, where they have no right of tenure to occupy. The conclusion that the appellant does not have a legitimate right to occupy the premises is based on their own version and cannot, and was not challenged.
- 19.4 That any prospective right the appellants may have had in relation to the relevant premises vanished when the review application was dismissed.
20. With regard to the appellants suffering irreparable harm if the court orders otherwise (that ordering execution of the order), the court a quo reasoned that the appellants cannot claim irreparable harm because they have no right to occupy the relevant premises, even if they succeed on appeal. And that success on appeal won't conjure up for the appellants a lease or some other right to occupy the relevant premises.

21. Regarding Mr Bester's claim that he will suffer irreparable harm because he has certain environmental obligations in decommissioning the filing station that he is operating on the premises, the court a quo reasoned that:

Mr Bester has known since the dismissal of the review application that he would ultimately have to decommission and vacate the relevant premises as he himself does not assert a right to occupy the relevant portion of the premises concerned. Furthermore, he does not have to be in possession of the premises to comply with his environmental obligations in decommissioning the filing station, and he merely has to make appropriate arrangements with Zinvomax. None of the appellants, the court a quo found, will suffer irreparable harm if the eviction order is made executable immediately.

22. In the result the court a quo made an order on the following terms:

- "1) The application for leave to appeal is dismissed.
- 2) The applicants in the application for leave to appeal are to pay the costs of the respondents in the application for leave to appeal on the basis of scale C of Rule 69.
- 3) Insofar as it provides for the eviction of the respondents and all persons occupying erf 2[....] K[...] through the said respondents, and the assistance of the Sheriff and South African Police Services (if required), the judgment handed down in the eviction application on the 19th January 2024 is declared immediately executable and is not suspended by any application or petition for leave to appeal the said eviction judgment and order, or any subsequent appeal.
- 4) The respondents in the application to execute the eviction judgment in terms of section 18(1) and (3) of the Superior Courts Act 10 of 2013 are to pay the applicant's (Zinvomax's) costs in the section 18 application on the scale provided for in scale C of Rule 69."

23. It is against paragraphs 3) and 4) of the order and the conclusions on which it is based that the current appeal is based. As pointed out the appeal is in terms of s 18 of the Act.

THE APPEAL

24. The respondent raised a preliminary point to the effect that the appeal has become moot and academic. This contention is based on the fact that the appellants' application for leave to appeal was dismissed on 18 June 2024 by the court a quo. In terms of s17(2)(b) of the Act, the appellants were entitled to apply for leave to appeal to the Supreme Court of Appeal within one month after their application for leave to appeal was refused. Because of the failure to file any further application for leave to appeal, the respondent contends, the court a quo's order evicting the appellants from the subject property has in any event become final.
25. In my view, it is necessary to determine the preliminary point first. Should the preliminary point be decided in favour of the respondent, it shall not be necessary to determine the merits of the appeal namely, whether the court a quo was correct in finding that there are exceptional circumstances justifying the granting of the immediate execution of the eviction order.
26. Section 16(2)(a) of the Act provides that:
- “(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.
 - (ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.”

27. It is important to re-emphasize the fact that the Court a quo issued two orders: the first was the dismissal of the Application for leave to appeal the eviction order. This is the order which necessitated the appellants' approach to the Supreme Court of Appeal for leave if aggrieved thereby. The second is the order for the immediate execution of the eviction order which was sought by Zinvomax. This is the order that results in an automatic right of appeal accruing to the aggrieved party to approach the next highest court. The "next highest court" in this context would be the present Court as constituted.
28. It is common cause that at the time of initiating the purported automatic appeal proceedings against the order of the court a quo, the appellants had not lodged an application for leave/petition to the Supreme Court of Appeal. They also did not make any such allegation in the applicants' papers. They only mentioned in the heads of argument that were filed on 22 July 2020 that the "applicants [are] in the process of submitting their application for special leave to the Supreme court of Appeal..." It was only after the respondent raised the point that the appeal is moot, that the appellants took steps to lodge their application for leave accompanied by condonation application for the late lodging of the application to the Supreme Court of Appeal a few days thereafter. This date was after the one-month period prescribed in s17(2)(b) of the Act.
29. The question to be considered at this stage is what is the effect of an application for Leave to appeal to the Supreme Court of Appeal which is out of the prescribed one-month period. The issue similar to the one at present was considered by the Full Court in *Duduzile Cynthia Myeni v Organisation Undoing Tax Abuse NPC and Another*.⁸ In that case Ms Myeni had been declared a delinquent director in terms of s162(5) of the Companies Act 71 of 2008 based on findings that she had seriously misconducted herself during her tenure as the former non-executive chairperson of South African Airways SOC Ltd. She

⁸ *Myeni v Organisation Undoing Tax Abuse and Another (15996/2017) [2021] ZAGPPHC 56 (15 February 2021)*

filed her application for leave to appeal the order within the prescribed period for lodging such an application. The respondents filed their counter-application in terms of s18 of the Act for the enforcement of the principal order pending the outcome of the decision in the application for leave to appeal.

30. The application for leave to appeal was subsequently dismissed and simultaneously the respondents' counter-application in terms of s18(1) and 18(3) of the Act was upheld. Aggrieved, Ms Myeni brought an application in terms of s18(4) of the Act against the order upholding the counter-application. It was common cause as in the present case, that the application for leave to appeal to the Supreme Court of Appeal against the order declaring her a delinquent director had not been filed timeously in terms of the one-month period.
31. In dismissing Ms Myeni's contention that the court should take into account that the parties in that matter, had always anticipated that there would be further appeals in the matter the fact that the application for leave to appeal to the Supreme Court of Appeal was not filed in time should not stand in the way of the Full Court hearing the urgent appeal, the court held:

"[18] This argument is misconceived. Section 18(1) provides that "...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." The quoted passage denotes that the existence of an application for leave to appeal or an ongoing appeal process is a prerequisite for an application in terms of section 18 to arise. Put differently, the wording of section 18(1) signifies that in the absence of an application for leave to appeal or an appeal, the judgment and order in question are not suspended and are in fact deemed final. The fact that the noting of an appeal suspends the execution of a judgment appealed

against logically means that in the absence of such an appeal, the judgment is not suspended and is in fact deemed executable and thus, final. Given that section 18 exists to regulate the position when an application for leave to appeal or an appeal against a judgment is pending, it stands to reason that where no such application for leave to appeal or appeal is pending, the purpose of section 18 ceases to exist and as such, the judgment and order are deemed final and executable for all intents and purposes.

[19] As such, an important question would then be what effect would the lodging of the petition after the right to appeal has lapsed then have on the principal judgment's order. Having regard to the case law, in light of the belated petition now filed by the appellant, the principal judgment's order continues to remain operational for the mere fact that the service of an application to condone the late filing of the petition to the SCA does not suspend the operation and execution of any order. To conclude otherwise would give rise to an untenable situation in law where, after an order has been operational for a number of months, a party could simply bring a condonation application which would result in such an order suddenly being suspended. Such a situation would clearly give rise to far reaching consequences that this court cannot condone.”⁹

32. In *Myeni*, the Full Court referred to *Panayiotou v Shoprite Checkers (Pty) Ltd and Others*¹⁰ and held that:

“The court in that matter pointed out that, in terms of section 18(5) of the Superior Courts Act, and as a matter of fact and of law, ‘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

⁹ footnotes omitted.

¹⁰ 2016 (3) SA 110 (GJ).

lodged with the registrar in terms of the rules'. Section 18 thus contains "the conditions necessary for a judgment of the High Court to be suspended, pending a petition to the Supreme Court of Appeal for leave to appeal..."¹¹

33. Similarly, in the present case the one-month period for the lodgement of an application for leave to appeal has lapsed. It is only when condonation is granted by the Supreme Court of Appeal that the application for leave, special leave to appeal will be said to have been lodged. In that instance there will be compliance with s18(5) which prescribes that 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. Compliance with the rules is peremptory for it is to be said that a decision is a subject of an application for leave to appeal or of an appeal. The only exception is where failure to comply with the rules is condoned by the court having jurisdiction over the matter. The granting of an automatic right of appeal to be heard urgently in terms of s18(4) does not exempt the appellants from complying with the time periods necessary for the filing of the application for leave to appeal to the Supreme Court of Appeal.
34. For the above reasons the appeal as it stands is moot. The provisions of s18 of the Act have not been triggered. There is another aspect that makes the appeal moot. It is to be recalled that the application to review and set aside the resolutions of the Municipality awarding the tender to the Joint Venture and its implications was dismissed. That decision is not the subject of any further appeal and it stands.
35. Furthermore, it is common cause that there are no proceedings that have been instituted by any of the appellants seeking to set aside the cession by the Joint Venture to the respondent. The notarial cession gives the respondent certain

¹¹ *Myeni (supra)* at para [23]

rights to deal with the property which is the subject matter of this appeal. In the absence of the appellants asserting any rights to occupy the property, they remain the so-called "Commercial Squatters". As the court a quo found, which is not challenged, even if the Supreme Court of Appeal were to grant them condonation for the late filing of their petition, and decide the locus standi point and the appeal in their favour, they would still not acquire any right to occupy the property. It is evident that they are pursuing their case only on the basis that it should not have been the respondent, but the Municipality who should have instituted the counter-application to seek immediate execution of the eviction order. The outcome of the appeal will in my view, have no practical effect or result. It is also important to note that it was conceded on behalf of the appellants that they had not challenged the respondent, in their answering affidavit to prove its locus standi to launch the counter-application. This issue was only raised during argument on the appeal. The Supreme Court of Appeal would not in its adjudication of the intended appeal deal with the legality or otherwise of the cession. It is not a matter that is the subject of the execution of the eviction order.

36. It was contended on behalf of the appellants that this court should exercise its discretion by dealing with the appeal since it is already before court. There is no merit in this submission. Firstly, as pointed out above, the provisions of s18(5) are peremptory in so far as it requires that the decision should be the subject of an application for leave to appeal or an appeal. That is not the case here. Secondly, there is no discrete legal issue of public importance that arises in this matter and that will affect matters in the future and on which the adjudication of this court is required. The appellants have no right to occupy the property and to conduct their businesses therein. It has been stated that s16(2) of the Act was enacted to avoid overburdening appeal courts with matters

which are of no practical effect or result.¹² The appeal falls to be struck off the roll.

37. What remains is the issue of costs. Both parties agree that costs should follow the result. However, the respondent contended that such costs should be on attorney and client scale if the appellants are not successful. I am not persuaded that it can be said that the appellants acted with mala fide or that the appeal is vexatious. We are not at this stage deciding the merits since the conclusion is that the appeal is moot. Punitive costs are therefore not warranted. Party and party costs on scale C of Rule 69 would be appropriate in the circumstances.

ORDER:

In view of the above, the following order is made:

3. The appeal is struck from the roll in terms of s16(2) of the Superior Courts Act 10 of 2013.
4. The appellants are to pay the respondent's costs jointly and severally, the one paying the other to be absolved.
5. Such costs shall be party and party costs on scale C of Rule 69.

Nxumalo and Stanton JJ concur in the judgment of Tlaletsi JP.

L P TLALETSI

Judge President

APPEARANCES:

For Appellants : **Adv. A. Swanepoel**

¹² *Panayiotou v Shoprite Checkers (Pty) Ltd and Others* (248/2016) [2017] ZASCA 12 (17 March 2017) at para [8]; see also *Legal Aid South Africa and South v Magidiwana & Others* [2014] ZASCA 141; 2015 (2) SA 568 (SCA) paras 2-3; *Coin Security Group (Pty) Ltd v SA National Union for Security Officers & Others* [2000] ZASCA 48; 2001 (2) SA 872 (SCA) paras 7-8.

Taylor Inc. Attorneys

KIMBERLEY

For Respondent

: **Adv. J.A Venter**

Engelsman Magabane Inc.

KIMBERLEY