



**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No.: **20608/2024**

In the matter between:

**INFUSION SOCIAL CLUB CAMPS BAY (PTY) LIMITED**  
[Registration Number: 2023/782936/07]

Applicant

and

**CAMPS BAY INVESTMENT TRUST (PTY) LIMITED**  
[Registration Number: 2022/871627/07]

First Respondent

**THE SHERIFF OF THE COURT, CAPE TOWN, WEST**

Second Respondent

Date of hearing: 27 September 2024

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**JUDGMENT DELIVERED ON 30 SEPTEMBER 2024**

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**GORDON-TURNER, AJ:**

**Introduction**

1. Until its ejectment on 23 September 2024, the applicant was occupant of certain commercial premises being Shop 4, Central Parade, Victoria Road, Camps Bay, Cape Town (**the premises**). The applicant was ejected from the premises, under a warrant of ejectment, by the Second Respondent (**the Sheriff**) pursuant to the judgment of and under an order granted by the

Honourable Justice Wille (**Wille J**) on 11 July 2024 under case number 14487/2024 (**the eviction order**) at the instance of the first respondent.

2. In its notice of motion, the applicant seeks an urgent hearing and the grant of orders, "*pending the finalisation of the appeal process that the applicant is intent upon exhausting*"<sup>1</sup>, as follows:
  - 2.1. Suspending the warrant of ejectment issued against the applicant pursuant to the eviction order and acted upon by the Sheriff;
  - 2.2. Immediately reinstating the applicant into the premises;
  - 2.3. Suspending the operation of the eviction order; and
  - 2.4. Interdicting the respondents from executing the eviction order;
3. The relief has been sought on three court days' notice to the respondent.
4. The application is opposed. Answering and replying affidavits have been filed.
5. Both the founding papers and the first respondent's succinct answering papers included a broad reference to the papers that had served before Wille J in the eviction proceedings, in which the historic disputes between the parties are set out in detail. Given the very short notice afforded to the first respondent (**the respondent**), those detailed allegations had not been repeated in the answering affidavit. Counsel for the respondent, Mr Fehr, handed up a copy of the court file under cover of an identificatory affidavit from his instructing attorney, and urged me to have regard thereto.
6. The historic disputes giving rise to the eviction order are largely irrelevant to the

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<sup>1</sup> Further attention is given to this wording below.

issues I am required to decide. Just as much of the founding affidavit is devoted to setting out those disputes, it is unnecessary to review the material that underpinned Wille J's judgment: the present proceedings are neither a review nor an appeal. However, there is force in Mr Fehr's submission that I can usefully have regard to Wille J's reasons for the eviction order, as the learned Judge summarised therein the parties' respective contentions regarding prejudice either would suffer if the applicant continued to occupy the premises, or not. The same elements of prejudice are relevant to evaluating the balance of convenience when considering the interdictory relief sought in the present application. Mr Fehr provided me with a copy of Wille J's reasons, without objection by the applicant.

7. The Sheriff's return of service on the ejectment was not part of either party's papers. The Sheriff did not participate in the proceedings.

#### **Background to the litigation**

8. On 4 March 2024 the applicant and the respondent concluded a lease in respect of the premises as well as an addendum to the lease in terms of which the applicant would rent the premises for the purposes of operating a restaurant and bar. In effect the applicant took over the premises from another occupant, Firefly Café (Pty) Ltd (**Firefly**) which had operated a café style restaurant at the premises. On 8 March 2024, the applicant concluded a sale agreement with Firefly, conditional upon the applicant acquiring security of tenure in the premises. In terms of the sale agreement, the applicant purchased from Firefly business equipment in the premises, and undertook to settle arrear rental due by Firefly to the respondent. Pursuant to an addendum concluded the same day, Firefly's liquor licence was to be transferred to the applicant, and the

payment terms for acquisition of the movables were varied.

9. On 1 March 2024 the applicant took occupation of the premises.
10. Disputes set in between the applicant and the respondent from early March 2024.
11. On 5 April 2024 the applicant perceived that locks were changed at the premises preventing applicant from having access to the premises. The applicant brought a spoliation application which was opposed by the respondent, and heard on 2 May 2024 by Ndita J. The application was granted in favour of the applicant on 9 May 2024.
12. Thereafter the respondent forewarned the applicant that it was taking steps to have the applicant ejected from the premises without prejudice to its rights to claim damages for holding over. The respondent delivered the eviction application on 26 June 2024. It was heard by Wille J on 10 July 2024. Judgment in favour of the respondent was granted on 11 July 2024.
13. The eviction order provided that the matter was determined to be an urgent one. It confirmed the valid cancellation of the lease agreement (with the addendum) concluded between the parties dated 4 March 2024. The applicant and all those holding under it were ordered to vacate the premises and restore full and complete possession of the premises to the respondent by no later than 17h00 on 26 July 2024 (i.e. 15 calendar days after the grant of the eviction order), failing which the Sheriff was authorised to evict on 27 July 2024.
14. On 26 July 2024, the applicant delivered an application for leave to appeal against the eviction order, running to some ten pages.
15. On 12 September 2024, Wille J heard the application.



16. The day before the scheduled hearing of the application for leave to appeal, the applicant's attorneys addressed correspondence to the respondent's attorneys recording that in the event that leave to appeal was refused, its instructions were to petition the Supreme Court of Appeal (**SCA**) for leave to appeal. The applicant requested an undertaking that the respondent would stay execution of the warrant of execution "*pending the determination and outcome of our anticipated petition to [the SCA]*". Failing such undertaking an urgent application for interdictory relief would be brought. The respondent was reminded that as an appeal had been noted the provisions of section 18(1) of the Superior Courts Act 10 of 2013 (**the Act**) were of operation.
17. The respondent's attorneys replied on 11 September that the respondent refused to furnish the undertaking to stay execution. The respondent's attorney recorded:

*"... as soon as Judge Wille refuses your client's leave to appeal there is no pending appeal suspending the operation and execution of the eviction order and, thus, our client will be entitled to execute the order as it intends to do. Any urgent application seeking to suspend the operation of the order without a petition to the SCA would not be based on any legal right and our client would oppose such application.*

*Finally we note that in terms of section 18(1) and 18(3) of [the Act], our client is entitled to pursue an application to enforce an order even if there is a pending petition to the SCA (and even before such petition is made) and we are instructed that our client would consider pursuing such application as a counter-application to any ill-conceived urgent application your client may bring."*

18. The applicant's attorneys addressed a further letter to the respondent's attorneys on 13 September 2024 (while judgment on the leave to appeal application was still awaited from Wille J) denying the respondent's accusations

that it was abusing the process of court, referring to the respondent's refusal to provide an undertaking to stay execution pending a petition to the SCA, and decrying this as "*an inherent departure from the provisions and intent of Section 18(1) of [the Act]*". The applicant contended that it was incumbent upon the respondent to institute an application under section 18(3) of the Act. The respondent was requested to reconsider its position so that an application (such as the present matter) could be avoided, failing which punitive costs would be sought against the respondent. No response was forthcoming.

19. Thus were the battle lines drawn.
20. On 20 September 2024 Wille J handed down judgment refusing leave to appeal **(the refusal order)**.
21. The same afternoon the applicant served an urgent application under case number 20543/2024 upon the respondent seeking a stay of execution, as had been forewarned in their correspondence. In the respondent's answering affidavit those proceedings were characterised (like the present application) as "*an abuse of process with an ulterior motive aimed at, amongst others, extending its presence on the Premises*".
22. In a sharp change of tactics, instead of opposing that application, the respondent caused the Sheriff to attend at the premises the very next day, Saturday 21 September 2024. Counsel for the applicant, Mr Seale, appearing with Mr Zazeraaj, repeatedly emphasised that the effecting of an ejectment on a Saturday is unusual. That may well be so, but service of court process on a Saturday is permissible.<sup>2</sup> The applicant's attorneys advised the Sheriff of the

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<sup>2</sup> Rule 4(1)(c) provides:

applicant's intention to apply for leave to appeal and drew attention to section 18(1) of the Act. After intervention by members of the South African Police Services, the Sheriff desisted from the ejectment, but only until Monday 23 September 2024, when the ejectment of the applicant was effected. The applicant withdrew its first application (as having been overtaken by events), and thereafter the present application was delivered. This application, so I was advised by counsel, is substantially similar to the withdrawn application save that relief is now sought for reinstatement of occupation of the premises.

### **The case on the papers and the case in argument**

23. The cases presented in the parties' respective affidavits can be summarised thus:

23.1. The respondent adopted the position that unless and until the applicant applied to the SCA for leave to appeal against the eviction order, effect should be given thereto.

23.2. The applicant's retort, in effect, was that the correspondence directed to the respondent's attorneys has the effect of 'noting an appeal', which by operation of section 18(1) of the Act<sup>3</sup> suspends the eviction order. The applicant contends that it was incumbent upon the respondent to apply for an order in terms of section 18(3) of the Act<sup>4</sup> for leave to execute the

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*"(c) No service of any civil summons, order or notice and no proceedings or act required in any civil action, except the issue or execution of a warrant of arrest, shall be validly effected on a Sunday unless the court or a judge otherwise directs."*

<sup>3</sup> The section provides:

**"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."*

<sup>4</sup> That section provides:



eviction order, pending the appeal that the applicant is intent upon prosecuting.

23.3. The respondent opposed the application on the basis that the relief sought is incompetent, for the following reasons:

23.3.1. Urgency has not been established;

23.3.2. The applicant has already been evicted in terms of a lawful court order which was not suspended in terms of Section 18(1) of the Act;

23.3.3. There is no prayer to set aside the eviction order or the execution thereof – which could only be granted if there is a reviewable irregularity in the process, which is not the applicant's case;

23.3.4. There are no legal grounds for reinstating the applicant in the premises;

23.3.5. The requirements for an interim interdict have not been satisfied: the applicant has no clear or even *prima facie* right to the relief sought, and the applicant has an alternative remedy, which it has chosen not to use, viz applying for leave to appeal to the SCA; and

23.3.6. The applicant is endeavouring to re-litigate the matter without appealing.

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"(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."



- 23.4. The respondent contends that the application is abusive and vexatious and seeks its dismissal with a punitive costs order.
24. During the course of argument the parties' respective positions evolved to the following:
- 24.1. Mr Seale agreed that 'noting' an appeal via correspondence does not suffice for purposes of an automatic suspension of an order pursuant to section 18(1) of the Act. This concession was correctly made in view of the express provisions of section 18(5) of the Act:
- "(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."*
- 24.2. Mr Seale's concession diverges from the position set out in the applicant's affidavits summarised above. Mr Fehr submitted that the applicant must be held to the case set out in its founding papers – this is correct only in regard to factual allegations. The Court applies the law, not what a deponent mistakenly believes the law to be.
- 24.3. Mr Seale confirmed that the applicant's application to the SCA (**petition**) was in the process of being drafted, that the applicant was committed to delivering it (within the one month time limit permitted by section 17(2)(b) of the Act),<sup>5</sup> and that, for purposes of securing the relief sought in this application, the applicant would accede to an order compelling the

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<sup>5</sup> Sec 17(2)(b) provides:

*"If leave to appeal in terms of paragraph (a) is refused, it may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after such refusal, or such longer period as may on good cause be allowed, and the Supreme Court of Appeal may vary any order as to costs made by the judge or judges concerned in refusing leave."*

lodging of its petition on an earlier date to be determined by this Court.

- 24.4. He conceded that, as pointed out by Mr Fehr and the Court, the relief sought in the notice of motion "*pending the finalisation of the appeal process that the applicant is intent upon exhausting*" did not limit the suspension of the eviction order only until the determination of the petition. However, so submitted Mr Seale, for purposes of securing the relief sought in this application, the applicant will accede to such a limit.
- 24.5. Mr Fehr agreed that as soon as the applicant lodged its petition, the eviction order would be suspended by operation of section 18(1), so the relief sought in prayers 2, 4 and 5 of the notice of motion to stay the warrant, to stay the operation of the order and to interdict its execution would be afforded to the applicant automatically by operation of law.
- 24.6. The remaining point of contention between the parties was the applicant's desire to re-occupy the premises, and to resume trading pending the determination of its petition, and the respondent's steadfast resistance to re-occupation of the premises by the applicant. Lodging the petition would not entitle the applicant to re-occupy, hence that relief being sought in this application. Mr Fehr submitted that the respondent had not had an adequate opportunity to set out why re-occupation was prejudicial to the respondent – a factor relevant to the balance of convenience when considering the interim interdictory relief sought.
- 24.7. The respondent maintained in the first instance that there is no pending appeal at present, and the application should be dismissed with punitive costs, but as an alternative, should the Court postpone the application with a set timetable for the lodging of the petition and the delivery of a

section 18(3) application by the respondent, then the respondent undertook to leave the premises vacant until the petition was determined.

**The ejectment: was the respondent's conduct lawful?**

25. The case argued on behalf of the applicant was that the respondent had 'stolen a march' on the applicant by executing the eviction order with extraordinary alacrity, and that by doing so in the face of the correspondence exchanged between the parties, it had acted improperly. This improper conduct, so it was argued, rendered the execution unlawful.
26. The argument was developed that the applicant had a clear right to remain in occupation of the premises pending its appeal process, that this right had been infringed by the eviction, that the applicant was suffering ongoing and irreparable harm, (trading losses and reputational damage), that no satisfactory alternative remedy exists, and accordingly the applicant is entitled to interdictory relief and to restoration of the *status ante quo*, namely restoration of its use and possession of the premises.
27. The premise of the applicant's case is the alleged impropriety of the ejectment effected under the eviction order. In essence, the applicant is aggrieved that it was outmanoeuvred by the respondent's change of tactics from that indicated in its correspondence to one of summarily ejecting the applicant prior to it being able to apply for suspension of the eviction order.
28. In developing the case of improper conduct, the applicant's counsel relied upon the judgment of Rogers J (as he then was) in the full bench decision of this



Court in *P v P*,<sup>6</sup> in which the Court roundly disapproved the conduct of a litigant who conducted himself as if the order in his favour was operative in circumstances where an application for leave to appeal had been lodged, of which he knew, or of which he had constructive knowledge.<sup>7</sup>

28.1. The full bench in *P v P* was determining an appeal by the mother of three minor children against an order awarding their primary care to their father, and authorising him to relocate the children to Alaska. Leave to appeal had been refused to the mother by the court of first instance. She applied to the SCA for leave to appeal, which was granted, hence the full bench hearing.

28.2. During the interval between being refused the first application for leave and the mother receiving leave from the SCA, the father planned and executed the removal of the children to Alaska. By the date of their removal the application to the SCA had been lodged, which had the effect of suspending the order by the court of first instance. The full bench held that father's conduct was unlawful.

28.3. The mother successfully applied for an order that the children be repatriated to South Africa, and was awarded punitive costs by Cloete J. On this, Rogers J held:

*“[39] The punitive costs order was fully justified. Alan claimed that he was not aware, when he and the children left South Africa on 22 April, that the petition had been lodged with the SCA on 18 April. In terms of s 18(5) of the Superior Courts Act 10 of 2013, a decision only becomes the subject of an application for leave to appeal when the application is lodged*

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<sup>6</sup> *P v P* [2020] 2 All SA 587 (WCC) (19 December 2019).

<sup>7</sup> At para [28] to para [42].

with the registrar. In the present case SPA for some reason did not immediately lodge the founding papers in the petition with the SCA registrar. Instead they waited for the exchange of affidavits to be completed, in accordance with the agreed timetable, before sending complete sets of the papers to Bloemfontein.

[40] Nevertheless, Alan knew that for all practical purposes an application for leave to appeal was pending. After all, he filed his opposing affidavit on 10 April, and his attorneys received Ann's replying affidavit on 16 April. He must have known that Ann and her attorneys were working on the basis that the application for leave to appeal was pending and were quite possibly under a misapprehension that service on Alan's attorneys was sufficient in law to achieve this result. Given the earlier correspondence, Alan and SIA must have known that if Ann and SPA believed Alan to be at liberty to relocate with the children because the SCA petition had not as yet been lodged with the registrar, they would have insisted on a further undertaking or sought interim protection. ..." (my underlining)

28.4. The facts in the present matter are distinguishable in that (1) at the moment that the ejectment took place no appeal was pending in the sense defined by section 18 of the SCA, whereas in *P v P* the mother had already lodged her appeal at the moment the children were removed from the country, and (2) that the full bench in *P v P* found the father's conduct to be morally reprehensible as the matter concerned the interests of minor children, which is not a concern in this matter.

28.5. However, in principle, the full bench's strong disapprobation of the father's conduct (albeit *obiter*) must inform the Court's approach in this matter. A compelling factor in *P v P* was that the father knew at all

relevant times that the mother was intent on petitioning the SCA – just as the respondent in this matter knew of the applicant's intentions as early as 11 September 2024 both to lodge a petition to the SCA, and to apply for interim protection. The matters are similar in that the conduct of the party who had been successful in the first instance was directed at exploiting a timing advantage and creating a *fait accompli*, thereby thwarting the suspension that would, absent this stratagem, protect the rights of the unsuccessful party pending appeal. On my reading of the judgment, this stratagem attracted trenchant criticism by the full bench.

29. Despite the significant distinguishing feature that an appeal is not yet pending in this matter, the lawfulness of the respondent's conduct can be assessed through another lens. The point of focus is the eviction order.
30. As is the usual practice in eviction matters, an opportunity was afforded to the applicant to vacate prior to the engagement of the Sheriff in the ejection. The eviction order provided for a period of 15 days. This accords with the 15 day period allowed in Uniform Rule 49(1)(b) for bringing an application for leave to appeal. The eviction order therefore sensibly and fairly afforded the applicant the opportunity to deliberate if it wished to use its procedural rights to invoke an appeal process, and to do so if so advised. Up to the point within the allowed interval for doing so, the applicant could (and did) remain in occupation of the premises.
31. When Wille J refused leave to appeal on 20 September 2024, he did not specify a similar *spatium deliberandi* in the refusal order within which the applicant's appeal rights were to be exercised, alternatively within which period the applicant was to vacate. However, Wille J's silence on this aspect is not



reasonably interpreted as requiring *immediate* vacation by and authorising *immediate* ejectment of the applicant. The refusal order must be interpreted against the background of the statutory framework and in the context of Wille J's earlier eviction order, in which he took care to balance the respective rights of the parties. No wording in his refusal order suggests that Wille J diverged from this position; nor, with respect could he have done so given the procedural rights afforded by the legislature in Section 18(1) of the Act.

32. I do not interpret the refusal order as conveying any intention by Wille J to deprive the applicant of its procedural rights. His refusal order did not need to spell out that the applicant enjoyed another *spatium deliberandi* : this was necessarily implied both by the structure of his antecedent eviction order and the statutory provisions referred to.
33. Section 18(1) of the Act cannot be reasonably interpreted as authorising successful litigants to immediately execute upon orders so as to thwart the unsuccessful litigant's right of appeal and the concomitant protection of a suspension of the order under appeal.
  - 33.1. Section 17(2)(b) of the Act provides that leave to appeal must be applied for within one month after the refusal of leave. Clearly, a petition cannot be filed with the Registrar of the SCA in Bloemfontein, with all of the required formalities and attachments, immediately upon refusal of leave to appeal.
  - 33.2. In section 18(3) of the Act, the legislature provided a mechanism for the successful litigant *under exceptional circumstances* to maintain the operation of the order under appeal. That mechanism imposes a heavy *onus* upon the successful litigant seeking an order that the order under

appeal is not suspended. That litigant must prove “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”.

34. Explaining why the suspension of an order under appeal is necessary, the learned author Erasmus<sup>8</sup> comments: “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 execution of the judgment in any other matter appropriate to the nature of the judgment appealed from”. (my underlining)
35. The SCA has held<sup>9</sup> that: “The immediate execution of a court order, when an appeal is pending and the outcome of the case may change as a result of the appeal, has the potential to cause enormous harm to the party that is ultimately successful”.
36. The very wording of sections 18(1) and 18(3) of the Act conveys the value the legislature has placed upon a right of appeal<sup>10</sup>: suspension of the order under appeal is automatic and the litigants are restored to a position as if the order under appeal had not been granted; this differs only in exceptional circumstances where the Court orders otherwise upon the successful party discharging the *onus* upon it. On execution orders granted under section 18(3), the SCA has held<sup>11</sup> that “A further safeguard against the risk of harm being

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<sup>8</sup> “Superior Court Practice” at page D-121.

<sup>9</sup> *Knoop NO v Gupta (Execution)* 2021 SA 135 (SCA) at 139 D.

<sup>10</sup> The statutory right of appeal fleshes out the constitutional right of access to courts:

**“34 Access to courts**

*Everyone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal forum.”*

<sup>11</sup> *Knoop NO v Gupta (Execution)* *supra* at 139 I to 140 A.

*caused by an execution order is the automatic right to an urgent appeal given by s 18(4). Pending such an appeal, the statute expressly provides in s18(4)(iv) that the operation of the suspension order is itself suspended."*

37. The statutory regime is directed, as a general rule, at preserving the *status quo* prior to the grant of an order under appeal, until such time as the litigants' procedural rights on appeal have been exercised. This is the context in which the respondent's conduct must be evaluated.

38. The respondent attempted to justify its immediate ejectment of the applicant on two bases:

38.1. The respondent alleges that the applicant had tarried before bringing the leave to appeal application before Wille J as part of a strategy to protract its occupation of the premises, and the respondent apprehended that this strategy would be repeated. This accusation is not borne out by the facts. The applicant brought its (first) application for leave to appeal within the prescribed time limits. The respondent took no steps to enforce the eviction order between 11 July 2024 and the hearing of the leave to appeal application on 12 September 2024. Immediately upon the grant of the refusal order, the applicant took steps to protect its position pending the next application for leave to appeal, which is in the process of being prepared, in order to lodge within the prescribed time limits (or such shorter period as this Court may direct).

38.2. The respondent submits that the applicant has poor prospects of success on appeal, a conclusion with which I was urged to agree by considering Wille J's reasons for the eviction order and his judgment on the leave to appeal application. I decline to make such a finding as it



would be inappropriate that I do so: such a finding is the prerogative of the judges of the SCA assigned to determine the applicant's petition. Even if it is found that the applicant has poor prospects on appeal, the respondent cannot now be judge in its own cause, assume that a finding in its favour will be made, and act in a manner that subverts the applicant's right to apply for leave to appeal.

39. In my view, the respondent's hasty ejectment of the applicant is not justified. The respondent knew that the applicant intended to exercise its further right to apply for leave to appeal, that the applicant had requested an undertaking to maintain the *status quo* to obviate the need to approach the Court to do so, and that the applicant had, in fact, issued and served such an application, yet, in calculated fashion, the respondent arranged and caused the ejectment of the applicant to proceed within one court day of the refusal order being granted. The respondent thereby engineered a scenario where, due to the time that would elapse before a petition and an appeal (if any) was determined, even if successful on appeal the applicant could be frustrated from taking up occupation because the respondent would have been able to relet the premises. The speedy execution of the eviction order, before the petition could be filed, was undoubtedly directed at circumventing the applicant's right to apply for leave to appeal from the SCA, or at the very least, at rendering success on appeal a pyrrhic victory. The respondent's conduct in doing so was unlawful.
40. I emphasise that in making this finding, I do not suggest that successful litigants are generally prohibited from executing upon orders in their favour until the time limit within which an appeal may be brought has expired. This must be decided on the particular facts of each case. For example, an unsuccessful litigant may have conveyed, in unequivocal terms, that it does not intend to pursue an

appeal, in which event prompt execution of the order would not be a frustration of its appeal rights, and would not be unlawful.<sup>12</sup> The particular facts of this case, on the other hand, render the conduct of the respondent unlawful.

### **The relief to be granted**

41. Mr Seale submitted that the applicant had a clear right to remain in occupation of the premises pending its appeal process, and it was upon this right that the applicant's claim to interdictory relief was based. Mr Fehr submitted on behalf of the respondent that if I found the applicant to enjoy a clear right to undisturbed possession of the premises pending appeal, I would be making new law. I disagree.
42. The undisputed facts are that the applicant was in undisturbed and peaceful possession of the premises from 9 May 2024 (when the spoliation by respondent was remedied) until 23 September 2024 (when the ejectment at the instance of the respondent took place).
43. I have found the conduct of the respondent in causing the ejectment to take place, in the particular circumstances of this matter, to be unlawful.
44. The Court bears the duty to ensure that both procedural and substantive justice is served. That is not a novel concept. Even in adversarial litigation such as the present matter, litigants must conduct themselves with due regard to the procedural rights of their adversaries, and when, by design, they fail to do so, they may be acting unlawfully, which the Court is entitled, indeed enjoined, to

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<sup>12</sup> See also *Janse Van Rensburg v Obiang and Another* 2022 JDR 2682 (WCC) at para [57] to para [60], and at para 65] to para [67], where the conduct was being examined as potentially contemptuous of a court order.

redress. As held by the Navsa JA,<sup>13</sup> “*The principle of legality, a cornerstone of the Constitution, applies to government and governed alike.*”

45. Our Courts do not passively accept a *fait accompli* engineered by a litigant. For example, where building works take place unlawfully, demolition of the works<sup>14</sup> is ordered.
46. Similarly, the Court enjoys the power to unravel the unlawful conduct of the respondent, and, pending the filing of its petition to the SCA, to restore to the applicant undisturbed possession of the premises as enjoyed prior to the ejection. This I intend to order.
47. Mr Fehr submitted that account should be taken of prejudice to the respondent in the event of the applicant re-occupying the premises. The Court hearing an application under section 18(3), and not this Court, should evaluate the allegations regarding prejudice to the respondent. In the reasons for the eviction order, prejudice to the respondent was described as *potential* loss of business of other tenants, *exposure* to liability against other tenants who may have been entitled to cancel their lease agreements with the respondent, and loss of insurance cover over the building in which the premises are situated (my italics). Two of these elements are framed in tentative terms, and all fall short of Wille J finding irreparable harm to the respondent or that exceptional circumstances exist (which he was not required to determine in the eviction proceedings). Requiring this Court make such findings, without full papers from

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<sup>13</sup> *Van Rensburg and Another NNO v Naidoo and Others NNO; Naidoo and Others NNO v Van Rensburg NO and Others* 2011 (4) SA 149 (SCA) at 162 H.

<sup>14</sup> *Van Rensburg and Another NNO v Nelson Mandela Metropolitan Municipality and Others* 2008 (2) SA 8 (SE) at 11 H to 12 E, which was upheld on appeal in *Van Rensburg and Another NNO v Naidoo and Others NNO; Naidoo and Others NNO v Van Rensburg NO and Others* supra at 162 G to 163 A.



both parties dealing with all the requirements under section 18(3), is to subvert the statutory provisions governing appeals.

48. Mr Seale submitted that the Court can locate its power to suspend the eviction order, and with it the power to restore possession of the premises to the applicant, in Rule 45A.<sup>15</sup> Mr Fehr correctly submitted that Rule 45A relates to the staying of orders and the execution of orders rather than the setting aside of orders duly executed. Regarding the setting aside of orders, he referred to the judgment in *Brummer v Gorfil Brothers Investments (Pty) Ltd*<sup>16</sup> in which Spoelstra J held that where execution has already been completed (as it has in this case) the court can only interfere if there was a reviewable irregularity in the process which prejudiced the debtor and ulterior motives or hidden agendas become irrelevant. That judgment pertained to an attempt to set aside a sale in execution of the plaintiff's right, title and interest in a pending action before the court so as to deprive the debtor of the right to proceed with his action. Spoelstra J declined to assist the plaintiff because the rights of other persons – the purchasers at the sale in execution - were involved. He found that the rights of the parties had altered as a result of the sale of the right at an auction and the matter did not merely involve the stopping of a process without the alteration or deprivation of any existing rights of the parties.

49. In this matter, the Court is not constrained by any alteration of the parties'

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<sup>15</sup> When it was introduced by GN R1262 of 1991, it simply read "*The court may suspend the execution of any order for such period as it may deem fit.*" The rule was substituted by way of an amendment in GN R1157 of 30 October 2020 which took effect from 1 December 2020 to read, with the new wording underlined, as:

**45A Suspension of orders by the court**

*The court may, on application, suspend the operation and execution of any order for such period as it may deem fit: Provided that in the case of an appeal, such suspension is in compliance with section 18 of the Act.*"

<sup>16</sup> 1997 (2) SA 411 (T).

respective rights flowing from the ejectment of the applicant.

50. I have already found that the order was not “duly” executed because the ejectment of the applicant, in the circumstances of this matter, was unlawful, and that reinstatement will be ordered.
51. The applicant has made it clear that, in this application, it seeks only suspension, not setting aside of the eviction order and the warrant of execution.
52. The order for reinstatement to the premises obviates the conceptual challenge of suspending steps that have already been executed, including the ejectment of the applicant from the premises. This problem was considered in *O’Sullivan v Mantel and Another*,<sup>17</sup> the court holding<sup>18</sup> that ejectment is not complete until the occupier and those claiming to occupy through him as well as his belongings have been removed and the keys of the premises handed over to the execution creditor.
53. The applicant’s prayers for suspension of the warrant and suspension of the eviction order can, however, sensibly be granted if occupation of the premises is restored.
54. Apart from the provisions of Rule 45A, the Court has an inherent discretion to order a stay of a sale in execution and to suspend the operation of an ejectment order granted by it. It is a discretion which must be exercised judicially but which is not otherwise limited<sup>19</sup>. In their commentary on Rule 45A, the learned authors Erasmus *et al* of *Superior Court Practice* point out that as a general rule a court will grant a stay of execution where real and

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<sup>17</sup> 1981 (1) SA 664 (W).

<sup>18</sup> *Ibid* at 669 B; and see also 669 F.

<sup>19</sup> *Whitfield v Van Aarde* 1993 (1) SA 332 (E) at 337F to G.

substantial justice requires such a stay or, put otherwise, where injustice will otherwise be done, such as where the underlying *causa* of the judgment debt is being disputed or no longer exists, or when an attempt is made to use for ulterior purposes the machinery relating to the levying of execution. The underlying *causa* in this instance is intended to be the subject of an appeal; the respondent has used the machinery of execution to stifle the efficacy of prosecuting an appeal.

55. The general principles for the granting of a stay in execution were summarized as follows in *Gois t/a Shakespeare's Pub v Van Zyl*<sup>20</sup>:

- “(a) *A court will grant a stay of execution where real and substantial justice requires it or where injustice would otherwise result.*
- (b) *The court will be guided by considering the factors usually applicable to interim interdicts, except where the applicant is not asserting a right, but attempting to avert injustice.*
- (c) *The court must be satisfied that:*
  - (i) *the applicant has a well-grounded apprehension that the execution is taking place at the instance of the respondent(s); and*
  - (ii) *irreparable harm will result if execution is not stayed and the applicant ultimately succeeds in establishing a clear right.*
- (d) *Irreparable harm will invariably result if there is a possibility that the underlying causa may ultimately be removed, i.e. where the underlying causa is the subject-matter of an ongoing dispute between the parties.*

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<sup>20</sup> 2011 (1) SA 148 (LC).

In *Firm Mortgage Solutions (Pty) Ltd v Absa Bank Ltd* 2014 (1) SA 168 (WCC), the court, with reference to the *Gois* case, stated the following (at 170F–G):

*‘It is clear that what was intended in this case was that, where the causa for the execution is a judgment, and the judgment is placed in dispute because an application for rescission has been brought, grounds may well exist for the exercise of a favourable discretion by a court.’*



(e) *The court is not concerned with the merits of the underlying dispute—the sole enquiry is simply whether the causa is in dispute.”*

56. I am satisfied that, given what has transpired to date, absent an order to stay the eviction order until a petition is filed at the SCA, (1) the applicant has a well-grounded apprehension that the respondent may again attempt to execute an eject the applicant and (2) irreparable harm will result if execution is not stayed and the applicant ultimately, upon appeal, establishes a clear right (under the lease agreement) to continue occupying and trading at the premises. Real and substantial justice requires a stay of execution and a suspension of the eviction order until the applicant files its petition at the SCA, whereupon the protections afforded by section 18(1) of the Act will come into operation.

57. Similarly, and taking account of the overlapping requirements for a stay under Rule 45A, I am satisfied that the applicant has established the requirements for the grant of an interim interdict,<sup>21</sup> pending the filing of its petition to the SCA.

57.1. I emphasise that the right to be protected by the interdict is that of possession of the premises that existed, as a fact, at the moment of respondent unlawfully executing the eviction order, and which is to be restored by the order I intend to grant. In protecting that right with an interdict, the Court is not making any finding in regard to the respective rights of the parties arising from the lease agreement which is the subject of their disputes, and which will be the subject of the intended appeal, in the event of leave being granted to the applicant. The interim interdict does no more than restore and preserve the *status quo* pending the

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<sup>21</sup> *Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton and Another* 1973 (3) SA 685 (A) at 691.

determination of rights of the parties, and does not involve or affect a final determination of these rights.<sup>22</sup>

57.2. The element of a well-grounded apprehension of harm has been established.

57.3. The applicant enjoys no satisfactory alternative remedy: the respondent's contention that the filing of the petition affords an alternative remedy is not an answer – the applicant requires protection in the intervening period prior to filing, by reason of the respondent's conduct to date.

57.4. In considering the balance of convenience, I have weighed, among other factors already deliberated above, the prejudice to the applicant if the interdict is withheld against the prejudice to the respondent if it is granted. The duration of the interim interdict is limited to the period up to filing of the applicant's petition to the SCA, at which point the respondent can file an application under section 18(3) of the Act (if so advised). The balance of convenience favours the grant of the interim interdict.

58. Finally, I am satisfied that the applicant could not be afforded substantial redress at a hearing in due course. Much as the correspondence and affidavits incorrectly set out the legal position in certain respects, it was clear at all times that the purpose of this application was to restore and maintain the *status quo* until such time as the applicant filed its petition to the SCA. This necessarily required an urgent approach to this Court.

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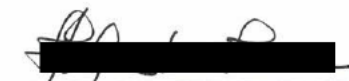
<sup>22</sup> *National Gambling Board v Premier, Kwa-Zulu Natal and Others* 2002 (2) SA 715 CC at 730H to 731B.

59. The applicant is entitled to a period of a month (30 calendar days) from date of the removal order to lodge its petition. Ten days of that period have elapsed. The applicant proposed that it file it be ordered to file its petition within ten days of this Court's order, which amounts to 14 calendar days. Although the six calendar day difference is not significant, as the applicant is prepared to commit to a shorter timeframe, this will be so ordered.
60. The applicant is entitled to costs as following the result. The matter is not of such complexity as to warrant the employment of two counsel. For the reasons that the respondent's conduct has been criticised in this judgment, punitive costs are appropriate.
61. I had intended to hand down this judgment on Friday 27 September 2024 and so indicated to the parties. As neither the Court nor Mr Fehr had seen the applicant's heads of argument until the commencement of argument, Mr Fehr requested an opportunity to file written submissions in answer, particularly as he perceived a shift in the applicant's case. I granted him leave to do so later that day. In the final result, I received those submissions together with a legible electronic copy of Wille J's reasons for the eviction order, by email after court hours. I also received by email from the applicant's counsel a copy of the applicant's heads of argument. This was followed the following morning by brief written submissions in reply from the applicant's counsel. In the circumstances, the handing down of judgment was delayed by another court day until I had an opportunity to assimilate all the submissions from counsel, which are appreciated and have been of great assistance.
62. I order as follows.
63. **Pending the lodging and institution of the applicant's petition to the**



Supreme Court of Appeal, seeking leave to appeal the judgment and order of the Honourable Mr Justice Wille, under Case No: 14487/2024, dated Thursday, 11 July 2024 (*"the judgment under appeal"*):

- 63.1. The warrant of ejectment issued against the applicant under case number 14487/2024 and acted upon by second respondent is suspended;
  - 63.2. The applicant shall be immediately reinstated into the premises it was ejected from on Monday, 23 September 2024, namely Shop 4, Central Parade, Victoria Road, Camps Bay, Cape Town;
  - 63.3. The operation of the judgment under appeal is suspended; and
  - 63.4. The first and second respondents are interdicted from executing upon the judgment under appeal.
64. The applicant is ordered to lodge and institute its petition to the Supreme Court of Appeal within a period of ten (10) days from the granting of this order.
65. The first respondent is to pay the costs of the application on an attorney and client scale, counsel's costs to be on Scale C.

  
GORDON-TURNER AJ

Appearances:

Counsel for the Applicant:

Adv Mark Seale SC  
Adv Luke Zazeraj

Instructed by:

Lauwrence De Swardt  
LDS Attorneys & Associates Inc

Counsel for the First Respondent:

Adv Cei Fehr

Instructed by:

S Krige & Mbongiseni Hlongwana  
Werksmans Attorneys