

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2023-082594

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: YES

DATE: 20 NOVEMBER 2024

SIGNATURE OF JUDGE: [REDACTED]

In the matter between:

LYNETTE JEAN JONES
PHILIPPUS VERMEULEN
JEFFREY ALBERT EARLE

First Applicant
Second Applicant
Third Applicant

and

HENDRIK FREDERICK DELPORT
JAN ANDRIES COETZEE
KOLISANG MOCHESANE LEPHOLISA
NIKLAAS JOHANNES DEGENAAR
CHRISTOPHER ARTHUR ILLSTON PICKARD
NICOLETTE MULLER
RAND AIRPORT HOLDINGS (PTY) LTD
RAND AIRPORT MANAGEMENT COMPANY (PTY) LTD

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent
Eighth Respondent

JUDGMENT: APPLICATION IN TERMS OF SECTION 18(1) OF THE *SUPERIOR COURTS ACT*, 2013

H F OOSTHUIZEN AJ

- [1] This is an application in terms of section 18(1), read with section 18(3) of the *Superior Courts Act*, 2013¹ ("the act") by the first to third applicants (collectively "the applicants") that the operation and execution of my order in terms of section 71(5) of the *Companies Act*, 2008,² reviewing and setting aside the determinations of the boards of directors of the seventh and eighth respondents (collectively "the companies") to remove the applicants as directors of the companies ("the order") not be suspended pending the decision of an application for leave to appeal or an appeal against the order. All references in this judgement to sections are to sections of the act unless otherwise indicated.
- [2] I will, simultaneously with this judgement, hand down a judgement dismissing the first to eighth respondents (collectively "the respondents") application for leave to appeal on the basis that the envisaged appeal would have no reasonable prospect of success and that there is no other compelling reason why the appeal should be heard, as provided for in section 17(1)(a). The respondents are accordingly entitled to apply to the Supreme Court of Appeal for leave to appeal in terms of section 17(2)(b).
- [3] The power of a High Court to order that the decision be put into operation is not contingent on the decision having been suspended by virtue of the lodging of an application for leave to appeal.³ It is accordingly irrelevant that there is currently no application for leave to appeal which suspends the order.

¹ Act 10 of 2013

² Act 71 of 2008

³ *Ntlemenza v Helen Suzman Foundation* 2017 (5) SA 402 (SCA) paras [27] to [32]

[4] The test for leave to put into operation and execute an order pending the appeal process is twofold. The requirements are:

[4.1] that “*exceptional circumstances*” exist; and

[4.2] proof on a balance of probabilities by the applicant of:

[4.2.1] the presence of irreparable harm to the applicant, who wants to put into operation and execute the order; and

[4.2.2] the absence of irreparable harm to the respondent, who seeks leave to appeal.⁴

[5] In *University of the Free State v Afriforum*⁵ the Supreme Court of Appeal held that “*in evaluating the circumstances relied upon by an applicant, a court should bear in mind that what is sought is an extraordinary deviation from the norm, which, in turn, requires the existence of truly exceptional circumstances to justify the deviation*”.

[6] In *Zero Azania (Pty) Ltd v Financial Services SA (Pty) Ltd*⁶ the majority held that “*there appears to be no reason, certainly in principle, why prospects of success should not be taken into account, both to determine exceptionality and as a factor to be considered in exercising the discretion to enforce a court order pending an application to the Supreme Court of Appeal for leave to appeal (a petition).*”

[7] The requirements of irreparable harm to the applicant and no irreparable harm to the respondent do not involve a balancing exercise between the two. Both must be established on a balance of probabilities.⁷

⁴ *Incubeta Holdings (Pty) Ltd v Ellis* 2014 (3) SA 189 (GJ) para [16], cited with approval in *Ntlemenza v Helen Suzman Foundation supra* para [36]

⁵ 2018 (3) SA 428 (SCA) para [13]

⁶ 2024 (2) SA 574 (GJ) para [42]

⁷ *University of the Free State v Afriforum supra* para [10]

- [8] In an effort to establish exceptional circumstances, the applicants contend that:
- [8.1] the application for leave to appeal is without merit;
 - [8.2] the nature of the order restores the *status quo* and does not denote execution in respect of property;
 - [8.3] financial mismanagement in the companies by the first respondent;
 - [8.4] litigation in the seventh respondent due to the first respondent's reckless behaviour; and
 - [8.5] the boards of the companies require oversight in terms of the corporate governance provisions of the *Companies Act*.
- [9] In support of the contention that the applicants "*will suffer irreparable harm*" if the order is not implemented, the applicants rely on:
- [9.1] the alleged exceptional circumstances, set out in the previous paragraph;
 - [9.2] the applicants represent shareholders of the 50% shareholder of the seventh respondent; and
 - [9.3] the first respondent "*is intent on running the [companies] as his personal fiefdom, and excluding the applicants in doing so*".
- [10] I am of the view that the circumstances relied upon by the applicants are not truly exceptional to justify the extraordinary deviation from the default position that the appeal process stays the operation and execution of the order appealed against. This is notwithstanding the poor prospects of success in the appeal.

- [11] The applicants have more importantly failed to prove that they will suffer irreparable harm if the order is not implemented. Although the allegations of financial mismanagement and reckless behaviour by the first respondent and the alleged lack of oversight may possibly harm the companies, the shareholders of the seventh respondent and/or the shareholders of the seventh respondent, there is no indication in the founding affidavit how these aspects will harm the applicants if the order is not implemented. The applicants have accordingly also not proved that any possible harm to them would be irreparable.
- [12] The mere fact that the respondents will not suffer irreparable harm if the order is implemented, does not assist the applicants. All three requirements must be met.
- [13] I accordingly grant an order in the following terms:
- [13.1] The application in terms of section 18(1), read with section 18(3) of the *Superior Courts Act*, 2013 is dismissed.
- [13.2] The first to third applicants are directed to pay the costs of the application on scale B.

H F OOSTHUIZEN AJ
ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 28 August 2024.

Appearances

Counsel for the applicants: Adv F J Labuschagne
Instructed by Cilliers Attorneys

Counsel for the first to eighth respondents: Adv D L Williams
Instructed by Wright Rose-Innes Inc

Date of Hearing: 13 November 2024
Date of Judgment: 20 November 2024