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

Case No: **013053/2024**

REPORTABLE: No
OF INTEREST TO OTHER JUDGES: No
REVISED: Yes
02 MAY 2025

In the matter between:

**CATERPILLAR FINANCIAL SERVICES SOUTH AFRICA
(PTY) LTD**

Applicant

and

MOISA GROUP (PTY) LTD

Respondent

This judgment is prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 02 May 2025.

JUDGMENT

RETIEF J

INTRODUCTION

[1] The applicant brings an application in terms of section 18(3) of the Superior Courts Act, 10 of 2013 [Superior Act] [section 18 relief]. The respondent opposes the section 18 relief and has filed an answering affidavit but no heads of argument. Counsel for the respondent when prompted, submitted that he was not instructed to file heads of argument. At this juncture it is significant to raise that the failure to comply with the directives and file heads of argument timeously, without seeking leave of the Court, was one of the reasons this Court raised when it dealt with cost order in the 30 January 2025 order. The reason for respondent's perpetual failure can surely not be that the respondent and its attorney are unable to understand the reasons provided, as the same were clear. The respondent's Counsel argued on the papers.

[2] Returning to the application, the applicant initially brought the application on an urgent basis as dictated by the nature of the relief sought. Procedurally, however, and due to the effluxion of time due and confusion of the filing of the application for leave to appeal with the Registrar of this Court, the application is now argued sometime after the initial request and certainly not within the time limits as envisaged in terms of rule 6(12). However to assist both the parties, the date for this hearing was, *inter partes*, agreed and arranged. The Court is mindful of the inherent urgency pertaining to the section 18 relief and accommodated the parties. The respondent's Counsel's submission that arranging a date does not detract that rule 18 relief is not urgent and to be heard before this Court was considered and rejected.

[3] Before commencing with the merits of the section 18 relief, it is prudent to consider the procedural steps taken, a landscape against which the import of the statutory requirements of section 18 of the Superior Act will be dealt with.

PROCEDURAL BACKGROUND

[4] On the 30 January 2025, this Court granted an order *inter alia* in terms of which the respondent was ordered to deliver and return 4 (four) Caterpillar units. Such consisted of 3 (three) articulated trucks and a motor grader all of which were

referred to in the main application as, in this application, as units [the units]. In terms of the order, the respondent had to deliver the units within 24 hours of the service of the order, failing which the Sheriff of the High Court was authorised to take possession of the units and to retain possession thereof until delivered to the applicant or its duly authorised representative.

[5] Before the execution of the order, and on the 4 February 2025, the respondent's attorney withdrew and a notice of substitution of record was served on the applicant's attorneys. According to the notice of substitution, Beirowski Attorneys had been appointed as the attorneys of record instead of the erstwhile Pistorius Scheepers. Simultaneously with the notice of substitution the applicant requested reasons for the order in terms of uniform rule 49(1)(c) and filed an application for leave to appeal.

[6] It is important to point out that the Court was not, through the Appeals Registrar, notified of the request for such reasons nor of the leave of appeal. It is understandable that following the directive and rules pertaining to applications for leave to appeal and appeals is important for all litigants. The advantage of compliance apparent and, for that matter too, for the Bench as it is a means to ensure that all the parties procedural rights pursuant to an order and its consequences are considered timeously. In this matter, it initially appeared that the respondent's attorney did not follow due process by filing the application for leave to appeal with the Registrar as envisage in terms of section 18(5) of the Superior Act. This aspect was fully ventilated at the hearing and any perceived non-compliance was laid to rest.

[7] Be that as it may, returning to the request for reasons, after the Court became aware the request it duly explained to the respondent's attorney the meaning of the provisions of rule 49(1)(c) of the Uniform Rules and unequivocally stated in unambiguous terms that no such leave for an application to be brought was granted at the date of the hearing. The reasons were clear *ex facie* the record and due to the respondent Counsel's submission, that he was unable to argue the merits in the main application. However, the finer nuances of rule 49 appeared to be missed or ignored and the respondent persisted with its request. Notwithstanding, in the interest of

justice and accepting that although the respondent was *au fait* with the reasons provided by the Court at the date of the hearing because it had already filed an application for leave to appeal without written reasons, the Court would still provide a response, and did so by uploading further written reasons on the 4 April 2025. The respondent has to date, even after receiving the written reasons, taken no further procedural steps to prosecute the hearing of the application for leave to appeal. This includes filing an intention to amend. Counsel for the respondent submitted that the application for leave to appeal had not been enrolled by the respondent and, as set out in the papers it was not enrolled to be heard with the section 18 relief. However, when prompted he submitted that he held instructions that the application for leave to appeal in any event could be argued simultaneously with the section 18 relief notwithstanding the opposition as set out in the filed answer. A welcome instruction in order to bring finality at this stage. On that basis, and on the submissions made both applications were argued. This Court first heard and dealt with the rule 18 relief.

[8] Doing so requires a glance at the applicable statutory provisions.

LEGISLATIVE FRAMEWORK

[9] In terms of the Superior Courts Act, section 18 deals with the suspension of decisions pending appeal. The content of section 18 and in particular with reference to subparagraph (1) thereof, its provisions state 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.

[10] In terms of subparagraph (3), a Court may only order otherwise, with reference to subparagraph (1), if the party who applied to the Court to order otherwise, in this case the applicant, in addition to exceptional circumstances 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.

[11] In terms of subsection (5) and for the purposes of subsection (1), the

suspension of the operation and execution of a decision is triggered as soon as an application for leave to appeal, or a notice of appeal is lodged with the Registrar in terms of the rules.

SECTION 18 RELIEF

[12] The applicant with particularity dealt with the basis for exceptional circumstances referred to in subsection (1) and subsection (3) of the Superior Act as well as irreparable harm.

[13] Before turning to the exceptional circumstances this Court considers the relief sought by the applicant in its notice of motion. In particular prayer 4 in which the applicant seeks this Court to authorise the applicant to retain possession of the units at a location to be elected by the applicant, where the units shall be held in safekeeping and shall not be sold by the applicant until the appeal process has been finalised, alternatively, until the prescribed period for any future or subsequent appeals, has lapsed. It would appear that in terms of prayer 4, is an undertaking to preserve the status *quo* of the units pending the outcome of any future or subsequent appeal, lapsed or otherwise.

[14] Bearing the applicants intention with prayer 4 in mind, it is of interest that the respondent in paragraph 32 of its answering affidavit, deposed to by Mr Melusi Isaac Mnisi, the director of the respondent, too deemed the preservation of the units a material factor. He did so by confirming that the units are *de facto* being preserved by him and not used anyway. Mr Mnisi states that:

“32. - I can unequivocally confirm that the machines (the units – own emphasis) are not operating and are safely parked at a location known to the applicants on their version, with 24 hour security on the site, and all the applicant’s concerns are misplaced.”

[15] To appease the applicant, the respondent makes this statement. This Court when considering the aspect of preservation of the units, now accepts that that the need to preserve the units appears to be common cause between the parties. The

units are being kept albeit preserved, at this time by the respondent.

[16] The safe preservation of the units pending the outcome of an appeal whether lapsed or otherwise is indeed in the interest of both the applicant and the respondent going forward. It is a material common cause factor to be applied in awarding prayer 4 but is it a factor when considering the circumstances under which the rule 18 relief has been brought.? To consider the answer is to deal with the grounds relied on by the applicant in support of exceptional circumstances. Listed, they are:

16.1. failure to allow the inspection of the units and provide confirmation of insurance; (ground 1)

16.2. the continued utilisation, albeit unlawful, of the units; (ground 2) and

16.3. failure to service and maintain the units (ground 3); this appears to overlap with the first ground);

16.4. dilatory and *mala fide* conduct by the respondent ((ground 4) this appears to overlap with the first, third and fifth ground);

16.5. that the application for leave to appeal constitutes an abuse of the proceedings. (ground 5)

[17] Considering the evidence as a whole and by applying the nub of the respondent's version in the main application as maintained in answer namely that the agreements have not been terminated, this includes the Master agreement, then one can accept that any party acting in good faith, will want to adhere to the terms of the provisions of such agreement it relies on. Unfortunately, the respondent's actions in both the main application with its common cause default of payments due in terms of the agreement and on the undisputed facts in this application, demonstrate a different stratagem.

[18] The applicant in its founding papers relies on both clause 3 and 8 of the Master agreement relating to inspection and insurance of the units. This it did on the 4

February 2025 in writing after it received the application for leave to appeal. At this time, any finding of the termination of the Master agreements and Schedules in support of the return of such units purportedly suspended by the operation of section 18. The respondent admits the request for inspection, denied the applicant access for inspection and merely notes the allegation of such request of inspection. No facts pleaded in this regard are placed in dispute. With regard to clause 8 dealing with confirmation that the units are to be insured, the respondent in answer to the material allegation in support of the exceptional circumstances, merely notes the request for a policy document. The respondent other than referring to 24 hours surveillance provides no proof of its contractual compliance nor an intention to comply. Grounds 1 and 3 raised by the applicant in support of exceptional circumstances are duly admitted. The respondent's conduct contrary to the undisputed terms of the agreement and in the circumstances are *male fide*.

[19] Having regard to the common cause preservation factor against the backdrop of the admitted facts discussed, the argument in support of exceptional circumstances arises and is compelling. On the admitted facts, the applicant could not as a direct result of the respondent's conduct, assess the integrity of each unit making up the property it holds as security for a considerable debt owed by the respondent. The applicant's inability to inspect and therefore assess the integrity of each unit will persist as access to inspect the units in the future is not tendered. Furthermore, the inability to provide proof that such units are insured as obliged, compounds the risk and the need to inspect the units were ever located. The respondent tenders no proof of the 24-hour surveillance nor the location where such surveillance is being performed. Ground 1 read together with the ground 3 overlap and are under the circumstances accepted in support of and establishes exceptional circumstances.

[20] Turning to ground 2 the continued utilisation of the units and failure to service and maintain the units, the Court considers the evidence provided by the applicant duly confirmed by Kelvin Ndlovu, a recoveries and inventory specialist employed by the applicant to assess and retrieve data in respect of the units from each units monitoring system. The Court also considers Mr Mnisi's response again at paragraph 32 of his answering affidavit, as paraphrased above, and accepts that

even if both the applicant and the respondent know of the location of the units, this knowledge, absent access to such location does not assist the applicant to inspect the units to ascertain if they are indeed maintained and to access the consequences of such failure to maintain.

[21] Access denial to the units is admitted and because Mr Mnisi does not deem it appropriate to tell this Court, when prompted by the applicant, where each unit *de facto* can be located to test the default maintenance claims, the failure strikes at the core of the respondent's *bona fides* and the respondent's comfort that they are safe rings hollow. This is support of ground 4.

[22] The respondent in answer to the confirmed facts relied on by the applicant by Mr Ndlovu, is that the respondent bears no knowledge, as pleaded an acceptable response absent evidence to the contrary.

[23] Mr Ndlovu deposed to a confirmatory affidavit in which he stated that he was employed as a recoveries and inventory specialist by the applicant. In consequence, he is not an independent expert, but in the employ of the applicant. His evidence is not provided as an expert and nor does he purport to be one. He does not provide opinion evidence but merely supports and confirms the allegations that as a result of his position as a recoveries and inventory specialist of the applicant, he is familiar with and proficient in utilising the unit monitoring system installed in the units known as VisionLink.

[24] Common sense dictates that the respondent can't bear any knowledge of VisionLink nor of the utilisation of the unit monitoring system installed in the units. The Court in the absence of other evidence accepts the evidence of Mr Ndlovu's which indicates that the units are being used and that all but one have not been serviced and thus, are not being maintained. The Court applies the necessary weight to this evidence.

[25] As far as the respondent in paragraph 89 of its answering affidavit pleaded yet further responses to the evidence of Mr Ndlovu, these do not make sense in the absence of other evidence to the contrary and are therefore rejected.

[26] Accepting the evidence in support of ground 2 does not automatically translate into an exceptional circumstance on its own but having regard to all the evidence together pertaining to ground 1 and 3 and considering the conduct of the respondent, the stacks begin to weigh in favour of applicant. Applicant's Counsel too reminds this Court that the main claim is a vindicatory claim pertaining to the rights of property ownership which property, to the satisfaction of contractual compliance, is not being maintained and, which property is security held for a considerable debt owed by the respondent. Having regard to all the facts ground 2 is accepted in support of an exceptional circumstance together with grounds 1 and 3.

[27] Each ground appears to overlap with each other in support of exceptional circumstances. Now to the last ground 5, being an application for leave to appeal constitutes an abuse of process. The Court the respondent's reluctance to set the application for leave to appeal down and that the respondent has not succinctly set out grounds which raised the Court's misdirection whether on fact or in law in its application for leave to appeal. An inference of a delay to prosecute is not unwarranted. Whether such delay goes to the heart of exceptional circumstances, is another matter and the Court is not convinced. Many litigants delay and there are other remedies including consideration of costs which would cure any prejudice. The respondent is entitled to apply for leave, has done so and its Counsel has agreed that it can be heard. Ground 5 remains unconvincing in support of exceptional circumstances.

[28] Having considering all the remaining grounds they are sufficient to justify a finding that exceptional circumstances exist, and furthermore that the preservation of each unit pending the finalisation of an appeal or lapse thereof is a relevant material consideration when considering whether exceptional circumstances exist based on the facts. Thus, prayer 4 too also succeeds. The Court now turns to irreparable harm.

[29] The heart of irreparable harm is closely tied up with the facts in support of exceptional circumstances. Therefore, flowing from the acceptance of grounds 1-4 the facts in support of harm suffered by the applicant are clearly demonstrated.

However is such harm irreparable? Yes, such harm is irreparable as evidence exists that the units are not being maintained, and because no proof exists that such units are insured. Culminated with these facts is that the applicant has been denied access to inspect whether a possibility to rectify the position pertaining to the units exists. This applies to the present position as well as too the future whilst the appeal process is to be finalised. This all is as a result of the respondent's own conduct. Therefore, on a balance of probabilities the applicant has discharged its onus of demonstrating its own irreparable harm.

[30] In so far as the respondent will not suffer irreparable harm, the respondent denies that it will suffer irreparable harm. It pegs its denial to the mast in support of the fact that the units are not being used, albeit for implied legal or illegal means. This should therefore on its own version be the end of the enquiry. Moving from this premise, the respondent's irreparable harm defence, being linked to the use of such units pending the outcome of an appeal or lapse thereof is proved on a balance of probabilities and too supports the preservation of such units. The respondent fails to deal with any of the other facts relied on by the applicant in this regard to ameliorate irreparable harm and its denial of irreparable harm can at times become confusing in that it does not explain, absent the units, whether it can or can't use utilise third party as contractors in support of its denial. Be that as it may, on the respondent's own version the applicant must succeed.

[31] The applicants rule 18 relief must therefore succeed, including prayer 4 and there is no reason why the costs should not follow the result, save on a party and party scale other than as argued by the applicant.

[32] Wherefore the following order:

1. The application is disposed of on an urgent basis as envisaged in terms of section 18 of the Superior Courts Act 10 of 2013 [Act].
2. That the operation and execution of the order granted by Retief J against the respondent on the 30 January 2025 under the above- mentioned case number is, in terms of section 18(3) of the Act, not suspended, pending:

2.1. the finalisation of the application for leave to appeal launched by the respondent on the 4 February 2025, or as amended, against the order of Retief J; and/or

2.2. the expiry of the time period for the launch of any subsequent appeal(s) by the respondent.

3. The Sheriff of the High Court is ordered to take immediate possession of the units listed below from wherever he or she may find it, and to retain possession of the units until delivered to the applicant or its duly authorised representative:

3.1. a Caterpillar articulated truck 745 with serial number 3[...];

3.2. a Caterpillar articulated truck 745 with serial number 3[...];

3.3. a Sem Sem Grader 919 with serial number S[...]; and

3.4. a Caterpillar articulated truck 745 with serial number 3[...]

[collectively “the units”]

4. The applicant is hereby authorised to retain the possession of the units at a location to be elected by the applicant, where the units shall be held in safekeeping and shall not be sold nor used by the applicant until the appeal process has been finalised, alternatively, until the prescribed time period for any future or subsequent appeal(s) have lapsed;

5. Costs of the application to be paid by the respondent taxed on scale C.

L.A. RETIEF

Judge of the High Court Gauteng Division

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Date of judgment 29 April 2025