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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case number: 2025/132162

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

SIGNATURE.

DATE: 2 OCTOBER 2025

In the matter between:

LERATO WELHEMINA MARIMA

First Appellant

RAPULANG MARIMA

Second Appellant

and

JOSEPH HLABANANG MAKOFANE

First Respondent

MLONYENI NOZIBIELE

Second Respondent

Coram: Dippenaar, Crutchfield JJ *et* Pullinger AJ

Heard: 03 September 2025

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via e-mail and by being uploaded to the electronic

platform. The date and time for hand-down is deemed to be 10h00 on 2 October 2025.

Summary: Automatic appeal in terms of s 18(4) of Superior Courts Act, 2013 – principles pertaining to “exceptional circumstances” and “irreparable harm” restated and analysed – the nature and ambit of the court’s discretionary powers under section 18(3) considered and found to be the weight to be afforded to the unsuccessful party’s prospects of success on appeal as part of determining whether either of the parties faced irreparable harm - exceptional circumstances - appellants’ attempt to undermine the Rule of Law in respect of the earlier spoliation order by contriving to create a defence of impossibility and resulting in the respondents’ effective eviction without a court order - irreparable harm to respondents – no irreparable harm to appellants – the appellants have lawful remedies that negate any contentions of irreparable harm -principles pertaining to spoliation restated and analysed – principles relating to joinder of alleged co-occupiers and the application of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act, 1998 considered - no misdirection on part of court a *quo*

ORDER

Automatic appeal in terms of section 18(4)(a)(ii) of the Superior Courts Act, 2013
from: the Gauteng Division of the High Court, Johannesburg (De Lima Jorge AJ sitting as the court of first instance).

1. The appeal is dismissed;
2. The appellants are directed to pay the respondents’ costs, with the costs of counsel to be taxed on scale B.

JUDGMENT

PULLINGER AJ (DIPPENAAR J AND CRUTCHFIELD J CONCURRING)

INTRODUCTION

[1] This is an appeal in terms of section 18(4)(a)(ii) of the Superior Courts Act, 2013 (“the Act”) against the judgment and order of De Lima Jorge AJ (“the court *a quo*”) made pursuant to an application launched by the respondents in terms of section 18(3) of the Act.

[2] The court *a quo* uplifted the suspension of the order it granted in an earlier spoliation application between the parties in which the respondents were successful and in respect of which, the appellants’ had applied for leave to appeal.

THE FACTS

[3] At all material times prior to 1 August 2025 the respondents had enjoyed peaceful and undisturbed possession of the immovable property situate at 8[...] B[...] Drive, J[...] View, Midrand (“the property”). A dwelling house is erected on the property. The respondents lived in the dwelling – it was their home.

- [4] The appellants are the registered owners of the property. A mortgage bond is registered over the property in favour of The Standard Bank of South Africa Limited.
- [5] There is other pending litigation between the parties concerning the property. The pending litigation is not material to this appeal. It is clear, nonetheless, that there is significant acrimony between the parties and the appellants have made demand on the respondents to vacate the property.
- [6] The appellants are in arrears with their obligations to the mortgagor. On 15 July 2025, the appellants' mortgagor gave notice as contemplated in section 129(1)(a) of the National Credit Act, 2005 to the appellants.
- [7] On 1 August 2025 the appellants, accompanied by two unidentified men¹ and an unidentified woman attended at the property. They forced entry into the property using power tools and changed the locks to the main door and the security gate of the dwelling. At this time, the appellants informed the respondents that the unknown men would immediately move into the dwelling and "pay rent" to the appellants "... even if that meant living with [the respondents]."

¹ These two individuals would later be identified as Nishlan Morobela Mohala and Thomas Simon Monate. The respondents suggested that Mohala and Monate are related to the appellants. As this arose in the replying affidavit in the section 18(3) application, we do not have regard to this suggestion (*Associated Institutions Pension Fund and Others v van Zyl and Others* 2005 (2) SA 302 (SCA) at [35]). For purposes of this judgment, we shall refer to them as "the unknown men".

- [8] After changing the locks to the dwelling, the appellants allowed the respondents re-entry to the dwelling on the condition that they withdraw all pending court proceedings by Sunday, 3 August 2025.
- [9] On the evening of 4 August 2025, the appellants returned to the property with the unknown men.
- [10] The appellants, together with these two unknown individuals accessed the dwelling and ignited some or other substance inside the dwelling causing it to fill with dense noxious smoke. This smoke caused the respondents to experience acute breathing difficulties and, fearing for their safety, they fled the property. They spent the night of Monday 4 August 2025 in their vehicle.
- [11] The following morning, the respondents found the two unknown men asleep on mattresses in the living room of the dwelling.
- [12] Since that date, the appellants, through the unknown men, have been in possession and control of the dwelling.
- [13] The respondents' furniture, effects and possessions remain inside the dwelling.
- [14] As a result, the respondents have been constrained to find shelter in guest houses and hotels at a cost to them.

[15] The appellants' conduct aforesaid, caused the respondents to launch an urgent application on 6 August 2025 for the restoration of peaceful and undisturbed possession of the property and the removal of the unknown men through whom the appellants exercise possession and control of the dwelling ('the spoliation application').

[16] On 8 August 2025 De Lima Jorge AJ heard the spoliation application.

[17] The learned acting judge found for the respondents. He was particularly critical of the appellants concluding that:

"the respondents denials of the key facts averred by the applicants [a reference to the respondents herein] together with facts alleged by the respondents do not raise a real, genuine and *bona fide* disputes [sic]. The facts alleged by the respondents are far-fetched or clearly untenable; and therefore are rejected on the papers;"²

[18] As a result, an order was issued directing the appellants to, *inter alia*, forthwith restore the respondents' peaceful and undisturbed possession of the property and the dwelling and ancillary relief directed at making that order effective.

[19] On the evening of 8 August 2025, the appellants launched an application for leave to appeal.

² Judgment in spoliation application, paragraph 47.4

[20] The appellants' application for leave to appeal was met, on 10 August 2025, with an application in terms of section 18(3) of the Act. De Lima Jorge AJ heard this application on 12 August 2025.

[21] On 13 August 2025, De Lima Jorge AJ handed down judgment in favour of the respondents.

[22] The appellants then exercised their right to an automatic appeal in terms of section 18(4)(a)(ii) of the Act.

[23] It is the appeal against the judgment and order of 13 August 2025 that is now before us.

THE ISSUES

[24] The case argued by the appellants before us was much the same as was argued by them in the court below.³ The appellants' case was summarised by the court *a quo* as follows:

"5. ... the Applicants [a reference to the Respondents herein] still have access and a set of keys to the property, their belongings are still in the property; were seen using the property; consented to co-occupation; have alternative accommodation; the two individuals whom [sic] were placed in the property by the Respondents [a reference to the appellants herein] are in fact co-occupants. Accordingly, the two individuals currently at the premises were not joined to the proceedings and thus cannot be evicted without compliance

³ Judgment in section 18(3) application, paragraphs 5 to 7

with PIE [a reference to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998]. Finally, the Respondents contend that the property faces foreclosure which the two individuals may help prevent through payment of rental.

6. As was the case in the initial spoliation application, the Applicants allege that on 1 August 2025, the Respondents unlawfully changed the locks on the main door and security gate to the main house and installed two unknown individuals on the property. It should be noted that the Applicants alleged that conditional access was granted by the Applicants, by the Respondents from 2 August to 3 August 2025. Namely, the condition being that the Applicants would be permitted to continue to reside at the property if they withdrew any and all pending litigation against the Respondents. The Applicants' contention in this regard is that the aforementioned condition was not accepted by the Applicants, and a result of which on 4 August 2025 the Respondents returned with the unknown individuals and ignited noxious substances, which resulted in the Applicants having to vacate the property. These acts, it is contended, rendered the premises uninhabitable and forced the Applicants to seek emergency accommodation.

7. The Respondents deny the existence of exceptional circumstances contending that the Applicants retain access to the property, the Applicants are by agreement co-occupants of the property together with the unknown individuals. They furthermore have alternative accommodation at their disposal in the form of their property situate at ..., and are employed and therefore have the means to secure alternative accommodation. In support of the first two aforementioned factors the Respondents contend that the Applicants accessed the property on 8 August 2025 without any hinderance or obstruction and were seen doing laundry."

[25] Again, the court *a quo* criticised the appellants for their failure to provide a reasonable explanation for their undisputed conduct and for their failure to lay any basis for the alleged agreement in terms of which the appellants contend

that the respondents agreed to the unknown men co-occupying the property with the respondents.⁴

[26] In the circumstances, this appeal raises the following questions:

[26.1] did the respondents satisfy the requirements for relief in terms of section 18(3) of the Superior Courts Act; and

[26.2] do the appellants enjoy prospects of success on appeal, regard being had to the position of the unknown men as “co-occupiers” of the property who, the appellants argue were necessary parties to the spoliation application and who enjoy the protection of the Prevention of Unlawful Eviction from and Unlawful Occupation of land Act, 1998 (“PIE”) making them impervious to any order requiring them to vacate the property.

DISCUSSION

Section 18 of the Act

[27] The Act came into effect on 23 August 2013. With that came a new regime created by section 18. At first blush, section 18 is a codification of the common law.

⁴ Judgment in section 18(3) application, paragraphs 19 and 21

[28] At common law, the execution or enforcement of a judgment or order⁵ that was final, or final in effect,⁶ was suspended pending an application for leave to appeal or a subsequent appeal, and because of the High Court's inherent power to control its own processes, it could authorise the enforcement thereof pending an application for leave to appeal or a subsequent appeal.⁷ The Rules of Court⁸ provided a mechanism to a litigant seeking this relief that, at its core, permitted a judgment or order to be carried into execution pursuant to the exercise of a wide judicial discretion, fundamentally, on just and equitable grounds.⁹

[29] Section 18(1) of the Act provides for the suspension of a final¹⁰ order pending an application for leave to appeal and any subsequent appeal. Section 18(3) is an empowering provision; as an empowering provision, it empowers a court to authorise the upliftment of the suspension in section 18(1) in exceptional circumstances and stipulates the requirements that must be satisfied for this power to be exercised.

⁵ For a discussion on the meaning of "judgment or order" and finality as a condition to appealability see *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 531 B/C to 536 C.

⁶ *Ibid*; *Pitelli v Everton Gardens Projects* CC 2010 (5) SA 171 (SCA) at [27] and [31].

⁷ *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 544 H to 546 A.

⁸ The requirements for relief in terms of Rule 49(11) were, substantially, those of the common law as described by Corbett JA in *South Cape Corporation*. In this regard, see *Tuckers Land and Development Corporation (Pty) Ltd* 1980 (1) SA 691 (W) at 693 I to 694 D; *Minister of Social Development, Western Cape and Others v Justice Alliance of South Africa and Another* [2016] ZAWCHC 24 (1 April 2016) at [16] to [19]. Rule 49(11) was repealed on 17 April 2015.

⁹ *South Cape Corporation* at 545 C/D

¹⁰ Compare section 18(2) of the Act which allows for an appeal against a judgment or order that is not final but may lead to certain desirable results. In circumstances where leave to appeal is allowed in an instance contemplated in section 18(2), the order is not suspended.

[30] The ambit, proper interpretation and application of section 18(3) of the Act has generated substantial judicial precedent as litigants grapple with the effects of the codification of the common law rules concerning the enforcement of court orders pending an appeal.¹¹

[31] While it is long settled that “exceptional circumstances” as required in section 18(1) of the Act and the existence and non-existence of irreparable harm on the part of an applicant and respondent respectively, as contemplated in section 18(3), concern discrete factual findings a court must make before uplifting the suspension,¹² three issues loom large in our developing jurisprudence surrounding these provisions of the Act. These issues concern the role of “prospects of success on appeal”, any residual judicial discretion a court enjoys and the interplay between “irreparable harm” and “exceptional circumstances”.

[32] In *Incubeta*,¹³ Sutherland J held that prospects of success on appeal do not play a role in the adjudication of an application in terms of section 18(3) of the Act because the discretion afforded by the common law was not incorporated therein.

¹¹ On the developing jurisprudence surrounding section 18(3) of the Superior Courts Act, see the discussion in *Zuma v Downer* 2024 (2) SA 356 (SCA) at [16] to [19] and the authorities cited in paragraph [16].

¹² *Incubeta Holdings and Another v Ellis and Another* 2014 (3) SA 189 (GSJ) at [18] to [22] and [29]; followed in, *inter alia*, *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) at [45] to [47]

¹³ *Ibid* at [24]

[33] The full bench in *Justice Alliance*¹⁴, Binns-Ward J (Fortuin and Boqwana JJ concurring), viewed the provision differently. That court considered prospects of success on appeal to remain a relevant factor in granting relief. I understand Binns-Ward J, to say that prospects of success forms part of a residual discretion sourced in the common law meaning that, even if the requirements of irreparable harm and exceptionality are satisfied, a court retains a general wide discretion to grant or refuse leave to execute and to determine conditions upon which the right to execute should be exercised.¹⁵

Binns-Ward J said:

"... the less sanguine a court seized of an application in terms of s 18(3) is about the prospects of the judgment at first instance being upheld on appeal, the less inclined it will be to grant the exceptional remedy of execution of that judgment pending the appeal. The same quite obviously applies in respect of a court dealing with an appeal against an order granted in terms of s 18(3). The position is very much akin to that which pertains when interim interdictory relief pending a judicial review is being considered."¹⁶

[34] The Supreme Court of Appeal in *University of the Free State*¹⁷ held that the prospects of success have a role to play when these are before the court, thus signalling the existence of a continuing judicial discretion. It did not consider the nature of that discretion. In *Ntlemeza*¹⁸ the Supreme Court of Appeal took the same approach and added the caveat that considerations of

¹⁴ *Minister of Social Development Western Cape and Others v Justice Alliance of South Africa and Another* [2016] ZAWCHC 34 at [26]

¹⁵ *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (2) SA 118 (T) at 545B - C

¹⁶ At [27]

¹⁷ *University of the Free State v Afriforum and Another* 2017 (1) All SA 79 (SCA) at [15]

¹⁸ *Ntlemeza* at [44]

prospects of success are important where there is still an appeal pending. In *Knoop*¹⁹ the Supreme Court of Appeal, per Wallis JA, said:

"Our finding that the three requirements for making an execution order were not established means that we did not have to consider whether there is a discretion once they are present and, if so, whether the prospects of success should affect its exercise. There may be difficulties if the High Court takes the prospects of success into account in granting an execution order, because it is not clear that the court hearing an urgent appeal under s18(4) will always be in a position to assess the weight of this factor. As I have noted, in both *UFS v Afriforum* and *Ntlemeza* the court disposed of the appeal by disregarding the prospects of success on appeal. The urgency of the appeal almost inevitably dictates that in this court, and possibly in a full court, the appeal court will not have the record before it and will be confined to assessing the prospects of success in the main appeal from the judgment alone. The usual principle that an appeal court decides the appeal on the record before the High Court cannot apply in those circumstances. If the language of s18(4) confers a discretion, is that a full discretion or a power, combined with a duty to exercise that power on proof of the requirements for its exercise? These issues may warrant a reconsideration of the approach in *Justice Alliance* on an appropriate occasion."

[35] The current position is, as stated by Ponnann JA in *Tyte*, that a court is enjoined to have regard to all the facts and then test whether the requisite jurisdictional facts or exceptional circumstances and irreparable harm have been established.²⁰ Ponnann JA held:

"The overarching enquiry is whether or not exceptional circumstances subsist. To that end, the presence or absence of irreparable harm, as the case may be, may well be subsumed under the overarching exceptional circumstances enquiry. As long as a court is alive to the duty cast upon it by the legislature to enquire into, and satisfy itself in

¹⁹ *Knoop and Another NNO v Gupta* 2021 (3) SA 135 (SCA) at 156B - D

²⁰ *Tyte Security Services CC v Western Cape Provincial Government and Others* 2024 (6) SA 175 (SCA) at [10], [13] and [14].

respect of, exceptional circumstances, as also irreparable harm, it does not have to do so in a formulaic or hierarchical fashion.”²¹

[36] This approach gives effect to the purpose for which the provision exists – to afford an effective remedy to a successful litigant that would otherwise be defeated during the interregnum of the appeal process.²²

[37] The Supreme Court of Appeal’s exposition of the interplay between “exceptional circumstances” and “irreparable harm” in *Tyte* explains that the facts that found both elements may be intertwined. The elements of “exceptional circumstances” and “irreparable harm” must separately be present for relief to be granted.²³ And, as relief in terms of section 18(3) remains discretionary, prospects of success on appeal influence the ultimate decision as to whether to grant relief.²⁴ I return to the issue of discretion below.

²¹ *ibid* at [16]

²² On the common law position, and before the position brought about by section 34 of the Constitution of the Republic of South Africa, 1996 see *Reid and Another v Godart and Another* 1938 AD 511 at 513, cited in *South Cape Corporation* at 545 C cited which is, in turn, cited by the Supreme Court of Appeal in *Zuma v Downer and Another* 2024 (2) SA 356 (SCA) at [19]. In *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) the Constitutional Court, at [13] links the section 34 right to dispute resolved by a court of law to execution of that order. Similarly, the Modderklip line of cases conclude that an order which cannot be given effect to defeats a successful litigant’s section 34 rights (*President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (3) SA 3 (CC) at [39] to [51]). See further, *Incubeta* at [27], *Knoop NO v Gupta* 2021 (3) SA 135 (SCA) at [1] citing *Philani -Ma-Afrika and Others v Mailula and Others* 2010 (2) SA 573 (SCA) at [20], *Zuma* at [23] and [24], and *Tyte* at [18] to [21]

²³ *Tyte* at [13] to [15]; *Knoop* at [47]

²⁴ *ibid* at [18], [27] and [28]

The spoliation remedy

[38] The purpose of the spoliation remedy is to restore factual possession to a person who has been unlawfully dispossessed of property or subjected to an unlawful interference in rights that such a person exercises.²⁵

[39] The enquiry undertaken by a court is ordinarily narrow. It concerns two factual issues, the first one being whether the person claiming to have been despoiled was factually and legally the possessor of the property or rights in question and, the second being whether that person's use and enjoyment of that property or rights have unlawfully been taken away or interfered with. Once those factual findings are made, the court restores possession forthwith and without any enquiry into the underlying reason for the possession.²⁶

[40] To this end, the spoliation remedy strongly enforces the Rule of Law principle in section 1(c) of the Constitution. It serves as a bulwark against self-help. The Constitutional Court's decision in *Chief Lesapo*²⁷ holds that self-help is inimical to a society in which the Rule of Law prevails and, thus, taking the law into one's own hands is inconsistent with the fundamental principles of our law.

²⁵ *Nino Bonino v De Lange* 1906 TS 120 at 122; *Plaatjie and Another v Olivier NO and Others* 1993 (2) SA 156 (O) at 157; *Zulu v Minister of Works, KwaZulu Natal and Others* 1992 (1) SA 181 (D) at 187

²⁶ *Ness and Another v Greef* 1985 (4) SA 641 (C) at 647 C to G; *Ngqukmba v Minister of Safety and Security and Others* 2014 (5) SA 112 (CC) at [13]

²⁷ At 415C – D; *Ngqukmba* at 119 A

[41] The central question in the respondents' spoliation application concerned whether the appellants' conduct unlawfully deprived the respondents of their rights in and to the property.

[42] There was no dispute that the property had been occupied by the respondents as their home for an extended period of time prior to the appellants' conduct. It was also not in dispute that the appellants conducted themselves in the manner outlined above. The appellants denied any unlawful conduct on their part, asserting that the respondents still enjoy access to the property and the installation of the unknown men was pursuant to an agreement with the respondents. The ostensible explanation for the alleged agreement was that the unknown men would pay rent to the appellants (i.e. that they had entered into a lease agreement with the appellants). These "rent" payments would allow the appellants to address their arrears to the mortgagor.

[43] The appellants' departure point suggests that the respondents' ability to access the dwelling means that they were not despoiled. I am unable to agree with this contention. In *Mostwagae*²⁸ the Constitutional Court considered whether excavations on a servitude next to the outer wall of the applicants' homes, exposing the foundations of that building, constituted a disturbance of their possession that amounted to an eviction without a court order. It held:

²⁸ *Motswagae v Rustenburg Local Municipality* 2013 (2) SA 613 (CC) at [12]; see further *Afzal v Kalim* 2013 (6) SA 176 (ECP) at [19] and [20]

“The first question to be answered is whether s 26(3) of the Constitution is sufficiently wide to ensure protection of the applicants in their occupation of their homes. In my view, it is. Its provisions would be pointless and afford no protection at all if municipalities and other owners were permitted to disturb occupiers in the peaceful occupation of their homes without a court order. **Section 26(3), by necessary implication, guarantees to any occupier peaceful and undisturbed occupation of their homes unless a court order authorises interference.** The idea that owners are able to do so without offending the provisions of s 26(3) need simply be stated to be rejected. **The underlying point is that an eviction does not have to consist solely in the expulsion of someone from their home. It can also consist in the attenuation or obliteration of the incidents of occupation.**” (emphasis added)

[44] The appellants’ case that the respondents were not spoliated is therefore unsustainable.

[45] Superficially, a factual dispute subsists surrounding the oral agreement that allegedly resulted in the unknown men being installed at the property. Given that the spoliation remedy is final in nature, the appellants argued that this dispute ought to have been resolved in their favour.²⁹

[46] The appellants did not adduce any evidence of the alleged agreements with the unknown men and the respondents respectively. The appellants, further, failed to place any form of corroboratory evidence from the unknown men before the court. No explanation was forthcoming as to why this was not adduced in circumstances where the unknown men are, allegedly, the appellants’ tenants and, it would appear, there was no impediment to adducing this evidence.

²⁹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E - 635C

[47] It is in these circumstances that the appellants' argument loses sight of the principle in *Wightman*,³⁰ that factual disputes cannot be seen in isolation from the greater context of the factual setting. *Wightman* holds that a proper interrogation of all the facts is required to determine whether a material dispute of fact indeed exists. *Wightman* holds further that a litigant must seriously and unambiguously engage with the facts said to be disputed and adduce countervailing facts where those facts are within a party's knowledge. The discussion on factual disputes in *Wightman* concludes with a warning that:

"A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

[48] Ponnan JA, in *Tyte*,³¹ dealing with the question of onus, refers to an evidentiary burden that faces a respondent in section 18(3) proceedings. In this context he said:

"... although s 18(3) casts the onus (which does not shift) upon an applicant, a respondent may well attract something in the nature of an evidentiary burden. This would

³⁰ *Wightman t/a JW Construction v Headfour Pty Limited and Another* 2008 (3) SA 371 (SCA) at [11] and [13]; *Naidoo and Another v Sunker and Others* [2011] ZASCA 216 at [23]

³¹ At [15]

be especially so where the facts relevant to the *third* [a reference to the absence of irreparable harm to the unsuccessful party] are peculiarly within the knowledge of the respondent. In that event it will perhaps fall to the respondent to raise those facts in an answering affidavit to the s18 application, which may invite a response from the applicant by way of a replying affidavit.”

[49] The principal in both *Wightman* and *Tyte* is that bald and unsubstantiated denials will not suffice in circumstances where a respondent fails to adduce facts within its knowledge to rebut a *prima facie* case against it.

[50] At this point, it is necessary to restate certain principles on what constitutes a fact.

[51] In *Swissborough*³² Joffe J restated the distinction between primary and secondary facts. Primary facts were described as those which found the basis for an inference as to the existence or non-existence of further facts which, in relation to primary facts, are inferred or secondary facts.

[52] A secondary fact, unsupported by a primary fact, is a mere conclusion of law and in respect of which, the decision in *Die Dros*³³ holds, are no more than the deponent's own conclusions and do not constitute evidential material capable of supporting a cause of action or defence.

³² *Swissborough Diamond Mines v Government of the RSA* 1999 (2) SA 279 (T) at 324E – F; cited with approval in, *inter alia*, *Quartermark Investments Pty Ltd v Mkhwanazi and Another* 2014 (3) SA 96 (SCA) at [13]

³³ *Die Dros (Pty) Limited and Another v Telefon Beverages CC and Others* 2003 (4) SA 207 (C) at [28]

[53] The appellants' version, when properly tested against the foregoing principles, does not give rise to a factual dispute and advances little more than bald conclusions. Accordingly, the findings of the court *a quo* and its criticism of the appellants' case cannot be faulted.

[54] The ineluctable conclusion in the circumstances is that the respondents were spoliated from the property. This entitled them to an order that they be restored to their possession of the property forthwith. The ancillary relief granted to the respondents by the court *a quo* was necessary for the effective *ante omnia* restoration of their possession.³⁴

Exceptional circumstances and irreparable harm

[55] The respondents have effectively, as a result of the appellants' conduct, been evicted from their home without an order of court. Their undisputed evidence is that they have been unable to secure other accommodation with any degree of security of tenure, are running out of money and face the spectre of living in their vehicle. These facts, when coupled by the presence of the unknown men who use the respondents' furniture, appliances and are consuming their food, compounds the financial loss they are suffering. This, they assert, will occasion irreparable harm to their dignity, health and safety

³⁴ *Zinman v Miller* 1965 (3) SA 8 (T) at 12 C/D; *Eskom Holdings SOC Ltd v Masinda* 2019 (5) SA 386 (SCA) at [10]

and finds the existence of exceptional circumstances as contemplated in section 18(3) of the Act.

[56] In *Machele*³⁵ the Constitutional Court was confronted with an urgent application for direct access for leave to appeal against an order of the then South Gauteng High Court, Johannesburg which granted an eviction order in favour of one Mr Mailula and, simultaneously, granted leave to appeal to the Supreme Court of Appeal while later granting an order authorising the execution of the eviction order pending the appeal.³⁶

[57] In *Machele*, the applicants, much like the respondents herein, contended for irreparable harm if the eviction order were to be executed because they would lose their homes. The case advanced by Mr Mailula before the Constitutional Court was that the applicants were not the "*poorest of the poor*" and could therefore afford rental accommodation if evicted. He contended, further, that the applicants had alternative accommodation available to them. So, Mr Mailula's argument went, the respondents would not suffer irreparable harm if evicted pending their appeal to the Supreme Court of Appeal. The Constitutional Court rejected that argument under the rubric of "*harm to the applicants*" holding that:

"... the sudden loss of one's home is an indignity for anyone, and the protections provided by the Constitution apply regardless of socio-economic status."

³⁵ *Machele and Others v Mailula and Others* 2010 (2) SA 257 (CC)

³⁶ At [3]

[58] The Constitutional Court's approach is instructive of the approach to be taken in this case. It does not matter whether the respondents have been able to sojourn in guest houses and hotels temporarily, nor for that matter is it relevant that they can still have access to the property or that they own other property;³⁷ the appellants' conduct has placed them in an unenviable position that the law does not countenance. This founds the "exceptional circumstances" that section 18(1) of the Act contemplates.³⁸ It also establishes the respondents' irreparable harm that section 18(3) of the Act requires.

[59] The appellants resisted the spoliation application and the section 18(3) application on the further ground that the unknown men had now taken occupation of the property, occupied the property as their "home" and consequently, could not be ordered to vacate it without PIE being followed.

[60] The effect of the argument is to raise a third party's ostensible right to protection against eviction without an order of court as a shield against complying with the order made in the spoliation application.

[61] I find that the appellants' argument to be a contrivance.

[62] In my view, the appellants placed the unknown men into the property with the intention of making the respondents' continued occupation of the property as

³⁷ It appears to be common cause that the immovable property owned by the respondents is inhabitable.

³⁸ *Incubeta* at [22]; *University of the Free State* at [12] and [13]

unpleasant as possible to coerce the respondents into vacating it without the appellants being constrained to seek relief in terms of PIE themselves. This is impermissible.³⁹

[63] To the extent that the respondents could be considered “unlawful occupiers” for purposes of PIE, it appears to me that the appellants’ conduct may offend the prohibition of evicting an unlawful occupier without an order of court and thereby constitute an offence.⁴⁰

[64] It is true that *Betlane*⁴¹ is authority for the proposition that where the premises is already occupied by a *bona fide* third party, that premises is as a matter of fact not available and restitution in terms of the spoliation remedy is impossible. The test, however, is objective.⁴²

[65] I have already addressed the contrivance that is the appellants’ suggestion the unknown men came to occupy the property with the respondents’ consent.

³⁹ *Motswagae* at [16]

⁴⁰ Section 8 of PIE provides:

“(1) No person may evict an unlawful occupier except on the authority of an order of a competent court.

(2) ...

(3) Any person who contravenes a provision of subsection (1) or (2) is guilty of an offence and liable on conviction to a fine, or to imprisonment not exceeding two years, or to both such fine and such imprisonment.”

⁴¹ *Betlane v Shelly Court* CC 2011 (1) SA 388 (CC) at [36]

⁴² *Administrator, Cape and Another v Ntshwaqela and Others* 1990 SA 705 (A) at 720 H; *Schubart Park Residents Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 (1) SA 323 (CC) at [19] and [24]

[66] The position on the papers is that the unknown men are individuals through whom the appellants have gained possession and exercise possession of the property. I agree with the respondents' contention that the unknown men are little more than the appellants' "security guards".

[67] Consequently, it is not objectively impossible for the appellants to cause the unknown men to vacate the property because they are in possession of the property (in the loosest sense) through the appellants.

[68] It is in this context that the appellants' contentions surrounding joinder of the unknown men as necessary parties to the spoliation application and their occupation of the property as their home fall to be evaluated.

[69] Mlambo JA, in *Gordon*,⁴³ said:

"The issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject-matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned. In the *Amalgamated Engineering Union* case (supra) it was found that 'the question of joinder should . . . not depend on the nature of the subject-matter . . . but . . . on the manner in which, and the extent to which, the court's order may affect the interests of third parties'. The court formulated the approach as, first, to consider whether the third party would have locus standi to claim relief concerning the same subject-matter, and then to examine whether a situation could arise in which, because the third party had not

⁴³ *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) at [9]. The same test was applied by the Constitutional Court in *Zulu and Others v eThekweni Municipality and Others* 2014 (4) SA 590 (CC) at [16]. In *Zulu*, the facts were quite different to those in this appeal (paragraphs [21] to [29].

been joined, any order the court might make would not be *res judicata* against him, entitling him to approach the courts again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first instance. This has been found to mean that if the order or 'judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests' of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined."

[70] In line with the approach in *Gordon*, we pose the rhetorical question whether the unknown men would enjoy *locus standi* in a spoliation application themselves?

[71] The full bench decision in *Ness*⁴⁴ deals with the "peaceful and undisturbed possession" requirement of the spoliation remedy in the context of counter-spoliation, as asking whether the possession is "sufficiently stable or durable for the law to take cognizance of it". The unknown men's "possession" of the property has never been stable – it has always been the subject of legal challenge. It can also not be said to be durable, in the sense of having endured for any period of time that would render it being established.⁴⁵

[72] The protection in PIE gives effect to the right in section 26(3) of the Constitution. In order to be the bearer of this right, a person must occupy land, or the building erected on the land for the purposes of being their "home".

⁴⁴ At 647 D/E

⁴⁵ *Marlboro Crisis Committee and Others v City of Johannesburg* [2012] ZAGPJHC 187 (7 September 2012) at [57] to [62]

[73] In *Barnett*⁴⁶ the Supreme Court of Appeal gave cogent guidance as to what constitutes a "home", for purposes of section 26(3) of the Constitution. The question before the Supreme Court of Appeal in *Barnett* concerned whether cottages used for purposes of holidaying could be construed as "homes" for purposes of PIE. It found that the concept of a "home", whilst difficult to define, requires the elements of a degree of regular occupation and permanence. The principal in *Barnett* was applied by the Supreme Court of Appeal in *Stay At South Point*⁴⁷ where the question was whether property let for purposes of student accommodation constitutes a home. It held that the features of student accommodation meant that this accommodation was not a "home" as contemplated in section 26(3) of the Constitution and, consequently, PIE did not apply where ejectment from such premises was sought.

[74] In this case, the unknown men cannot claim that they have occupied the property with any degree of regularity or permanence. Put differently, if the unknown men would not succeed in demonstrating "possession" for purposes of any spoliation application they may bring, they cannot establish that the property is their home for purposes of PIE.

⁴⁶ *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA) at [38]

⁴⁷ *Stay At South Point Properties (Pty) Ltd v Mqulwana and Others* 2024 (2) SA 640 (SCA) at [9] to [13]

- [75] Correctly construed, PIE serves to protect the historic fact of the occupation of land or a building erected on such land as one's home, rather than the prospective of intention to occupy such land or buildings as one's home.⁴⁸
- [76] As a consequence, and given the profound absence of any evidence to the contrary, the unknown men have no right of occupation capable of being independently enforced. Their rights, if any, are derived from the appellants' unlawful conduct. In the circumstances, they are not *bona fide* occupiers of the property and in the same way, the property is not their home and they do not enjoy protection in terms of PIE. They were, consequently, not necessary parties to the spoliation application.
- [77] The notice given on behalf of the Standard Bank of South Africa in terms of the National Credit Act, 2005 does not constitute irreparable harm to the appellants as contemplated in section 18(3) of the Act.
- [78] In order for this notice to constitute the sort of harm that the Act contemplates, a causal nexus between the respondents being restored to the possession of

⁴⁸ It is important to distinguish a spoliation application such as that before us from those in cases such as *City of Cape Town v SA Human Rights Commission and Others* 2024 (5) SA 368 (SCA) where one is dealing with extra-judicial counter-spoliation of "invaded" land at the instance of a local authority. In such cases, the peculiar facts are of central importance. As Mocumie JA points out at [16], "... once a person had brought material onto the land to manifest their intention to derive some benefit from it, they *may* have manifested their peaceful and undisturbed possession of the land, and the original breach of the peace would have been completed." (emphasis added) The point made by the Supreme Court of Appeal is that, in the circumstances of those cases, counter-spoliation may not be an available remedy to a local authority.

the property that they had previously enjoyed and the appellants' failure to maintain their (distinct) contractual obligations to their mortgagor is required.

[79] If I were permitted to infer, notwithstanding that the appellants did not make out such a case, that their failure to have paid the mortgagor is as a result of the respondents' occupation of the property and that the respondents are unlawful occupiers of the property as contemplated in PIE, the appellants are not without a remedy. It is the availability of remedies that results in any potential harm to the appellants not being "irreparable" for purposes of the Act.

[80] In the present instance it cannot be concluded that the appellants would suffer any irreparable harm if the order is enforced pending their application for leave to appeal and any subsequent appeal.

[81] To sum up:

[81.1] The respondents have established irreparable harm to themselves and the absence of irreparable harm to the appellants. The circumstances in which the respondents find themselves are truly exceptional; they arise from constitutionally impermissible conduct that in itself, is likely an offence. The Rule of Law principle, considered together with the right in section 34 of the Constitution, have been egregiously trammelled upon by the appellants.

[81.2] The appellants' contrivance to defeat the myriad of constitutional rights enjoyed by the respondents is deplorable. The unknown men do not occupy the property as *bona fide* or innocent third parties. They were part and parcel of, and the instruments of, the appellants' unlawful conduct. They do not have a direct and substantial interest in this matter. They are not the bearers of the right protected by PIE.

Discretion

[82] Returning to the question of discretion, Binns-Ward J, in *Justice Alliance*,⁴⁹ considered the court's discretion under section 18(3) to be that hitherto exercised by a court at common law. The learned judge refers to the following passage from *South Cape Corporation*⁵⁰ where Corbett JA said:

"The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised. This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments. In exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, *inter alia*, to the following factors:

...

- (3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona*

⁴⁹ At [27]

⁵⁰ At 545 E

fide intention of seeking to reverse the judgment but for some indirect purpose, e.g., to gain time or harass the other party...”

[83] The authorities reviewed above indicate that there is no just and equitable enquiry to be undertaken under section 18(3) of the Act and, the power exercised by a court in terms thereof is now a statutory power distinct from the inherent jurisdiction to control its own judgments. This power can only be exercised where the requirements of section 18(3) read with section 18(1) are satisfied.

[84] As I see the current position, the consideration of prospects of success on appeal are wrapped up in the “irreparable harm” enquiry under section 18(3). In circumstances where a court is able to assess the prospects of success on appeal, and those prospects are poor, the irreparable harm to the party seeking to have the order made effective is all the more acute. Conversely, it is difficult for an applicant to contend for irreparable harm where the prospects of success on appeal are good.

[85] Put differently, the discretion enjoyed by the court is the weight to be accorded to the prospects of success on appeal seen through the prism of the Act’s purpose.⁵¹ Seen in this way, prospects of success on appeal ought to result in an application in terms of section 18(3) being dismissed where they are strong.

⁵¹ Discussed in paragraph [33] above

[86] On this construction, there is little room to argue that a court confronted with an application in terms of section 18(3) of the Act enjoys the discretion it did under the common law.

[87] In any event, even if this conclusion may prove to be incorrect in time, the factual and legal issues raised in the spoliation application were also canvassed in the papers in the section 18(3) application. I have been able to assess the appellants' prospects of success on appeal⁵² and consider them to be weak.

CONCLUSION

[88] On a proper application of the principles applicable to application proceedings, the respondents have proved the elements for relief in terms of section 18(3) of the Act. The court *a quo* found, as I have, that the respondents' case was effectively unanswered, regard being had to the absence of evidentiary material placed before court in the appellants' answering affidavit.

[89] The appellants sought to manipulate the Rule of Law principal by contriving to place the unknown men in the property to found a defence of impossibility and then rely on their contrivance to contend for the unknown men being

⁵² Consider *Justice Alliance* at [2] and *Knoop* at [49] and [50]. In the present case, the papers in the respondents' spoliation application are before us. The factual and legal issues that feature in the spoliation application and the section 18(3) applications and before us are identical.

necessary parties to the spoliation application on the strength of them being entitled to protection under PIE.

[90] A conspectus of the appellants' conduct strongly suggests that the application for leave to appeal is a dilatory stratagem to force the respondents into accepting the *status quo* engineered by the appellants.

[91] It follows that the court *a quo* did not misdirect itself and that its conclusion that the requirements of section 18(3) were met, cannot be faulted. The appeal must thus fail. As the respondents have been successful, costs should follow.

[92] In the result, the following order is granted:

1. The appeal is dismissed;
2. The appellants are directed to pay the respondent's costs, with the costs of counsel to be taxed on scale B.

A W PULLINGER

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

DATE OF HEARING: 04 SEPTEMBER 2025

DATE OF JUDGMENT: 02 OCTOBER 2025

APPEARANCES:

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