



**IN THE HIGH COURT OF SOUTH AFRICA,**  
**FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case Number: 201/2020

In the matter between:

**THE LAND AND AGRICULTURAL DEVELOPMENT  
BANK OF SOUTH AFRICA**

Applicant

And

**NICOLAAS CORNELIUS EKSTEEN**

Respondent

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**HEARD ON:**

WRITTEN HEADS OF ARGUMENT DELIVERED ON 12, 20 & 24 MAY 2021. This matter was determined on the basis of written arguments instead of an oral hearing as provided for in Rule 16.5 of this court's practice directives relating to the conduct of the hearings during the Covid-19 pandemic.

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**JUDGMENT BY:**

DANISO, J

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**DELIVERED ON:**

17 AUGUST 2021

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- [1] On 27 February 2020, the applicant a credit provider for agricultural enterprises obtained an order against the respondent in terms of which the applicant was authorized to take possession of all the respondent's movable assets in order to perfect the notarial bond and to hold the movable assets in its possession until such time that all amounts owed to it by the respondent are repaid.
- [2] On 17 March 2021 the respondent launched an urgent application to suspend the execution of the said order and the return of the movable assets attached by the applicant. The application was premised on the provisions of Rule 45A of the Uniform Rules of Court.
- [3] The application was opposed by the applicant and having heard the parties on 01 April 2021, Wright AJ delivered a judgment and made an order in favour of the respondent in the following terms: -

- "1. Execution of the order as confirmed on 27 February 2020 is suspended until 30 September 2021;*
- 2. The vehicles and farming implements listed in prayer 2.2.1. of the Notice of Motion ("the assets") are to be returned to the Applicant;*
- 3. The Applicant will be entitled to use the assets for the purposes of harvesting, contractual harvesting and transport during this time;*
- 4. The applicant shall report to the respondent's attorney of record on a weekly basis regarding the following:*
  - 4.1. which specific assets are currently in use;*
  - 4.2. the location where such assets are used;*
- 5. Representatives of the respondent may inspect the assets at reasonable times and in such a manner that it does not interfere with the applicant's harvesting, contractual harvesting and transport activities;*
- 6. The applicant shall return and deliver the assets to the respondent by no later than 30 September 2021 at his own costs;*

7. *The applicant is to pay the costs of the application, including the respondent's costs of opposition."*

- [4] The applicant seeks leave to appeal to the full bench of this division or to the Supreme Court of Appeal against that judgment and the order.
- [5] The application is based on the provisions of s17(1) (a) (i) of the Superior Act<sup>1</sup> which have heightened the threshold of the test applicable in applications for leave to appeal. Leave can only be granted where a Judge is of the opinion that the appeal would have a reasonable prospect of success. The use of the word 'would' indicates a measure of certainty that another court will differ from the court whose judgment is impugned. See *Acting National Director of Public Prosecutions & others v Democratic Alliance* in *Re: Democratic Alliance v Acting National Director of Public Prosecutions & others* **(19577/09) [2016] ZAGPPHC 489** (24 June 2016); **[2016] JOL 36123 (GP)**.
- [6] It is the applicant's case that the court erred in not striking off the respondent's application with costs for lack of urgency or self-created urgency and for not dismissing the main application with costs.
- [7] The application is opposed by the respondent on the grounds that a finding pertaining to the urgency of an application is un-appealable and so is the order granted in terms of Rule 45A. The appeal is also moot. By the time the appeal is heard there would be no purpose to proceed with the appeal as in terms of the order being appealed the respondent was ordered to return the farming equipment to the applicant by 30 September 2021. The respondent would have also settled the debt by that time.
- [8] As a general rule a procedural order which directs how the proceedings should be heard and does not dispose of a substantial portion of the relief claimed in the main application nor definitive of the rights of the parties is un-

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<sup>1</sup> Act 10 of 2013.

appealable,<sup>2</sup> however, the rule regarding the characteristics of an appealable order has since evolved. It is similarly of paramount importance that the interests of justice be given due consideration in the determination of whether the judgment or order is appealable.<sup>3</sup>

[9] In terms of Rule 45A the court may suspend the execution of any order for such a period as it may deem fit. A court will grant a stay of the execution of an order where real and substantial justice requires such a stay. An injustice will obviously be done if the execution is not stayed where the causa of the judgment debt is in dispute and the respondent ultimately succeeds in rescinding the judgment.<sup>4</sup> In this matter the judgment debt is not disputed and there is also no suggestion that the respondent intends rescinding the judgment.

[10] Having regard to what is deliberated in the judgment, I'm of the view that the issues raised by the applicant in its grounds of appeal would have reasonable prospects of success.

[11] In the result the following order is made:

1. The applicant is granted leave to appeal to the Full Bench of this division.
2. The costs of this application shall be costs in the appeal.

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**NS DANISO, J**

For the applicant:

**EG COOPER MAJIEDT INC**

Bloemfontein.

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<sup>2</sup> Zweni v Minister of Law and Order 1993 (1) SA 523 (A) at paragraph 536B.

<sup>3</sup> Director-General, Department of Home Affairs and Another v Islam and Others [2018] ZASCA 48 (28 March 2018) at para. 10 & Health Professions Council of South Africa and Another v Emergency Medical Supplies and Training CC t/a EMS 2010 (6) SA 469 (SCA).

<sup>4</sup> Gois t/a Shakespeare's Pub van Zyl 2011 (1) SA 148 (LC) at 155H-156B, Firm Mortgage Solutions (Pty) Ltd v Absa Bank 2014 (1) SA 168 (WCC) at 170 F/G.

For the respondent

**PIET KOTZE & PARTNERS**

**C/O SPANGENBERG ZIETSMAN &**

**BLOEM ATTORNEYS**

Bloemfontein