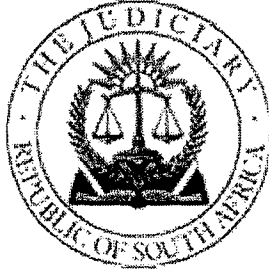


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2019/A5040

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES / NO  
(2) OF INTEREST TO OTHER JUDGES: YES / NO  
(3) REVISED ✓

2.6.2020  
.....  
DATE

[Signature]  
.....  
SIGNATURE

In the matter between:

FOCUS CONNECTION PTY LTD

First Appellant

QIN JIANG

Second Appellant

And

EAGLE CREEK INVESTMENTS 472 PTY LTD

Respondent

THE SHERIFF FOR PRETORIA EAST

Second Respondent

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J U D G M E N T

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LAMONT, J:

[1] This is an appeal brought by the appellants against an order of Twala J dismissing the appellants' application inter alia to stay execution.

### **BACKGROUND**

[2] Summary judgment was granted against the appellants on 10 May 2016. The appellants brought an application for leave to appeal on 15 June 2016. The application was brought out of time. On 9 December 2016 the appellants were directed to bring a condonation application for failure to bring the application for leave to appeal in time. The application for leave to appeal was heard on 11 October 2017 and was dismissed with costs. This was some seventeen months after the application for summary judgment had been granted. On 19 December 2017 the Supreme Court of Appeal granted the appellants leave to appeal the summary judgment. One of the orders was that leave to appeal was granted to this court. The appellants delivered a notice of appeal. The respondent applied for security for costs for the appeal in terms of the provisions of Rule 49(13). On 18 April 2018 the registrar fixed the amount security to be provided and required it to be delivered within 30 days of 18<sup>th</sup> of April 2018. On 17 May 2018 the appellants delivered a notice stating that security had been provided - however no security was actually provided. The time within which the appellants were to deliver the security lapsed on the 1<sup>st</sup> June 2018. On 4 June 2018 the respondent delivered a notice in terms of Rule 30(A) of the Rules. The appellants in reaction to the notice delivered a notice conceding that no security had been provided as no bank guarantee had yet been obtained. On 4 July 2018 the appellants provided an unsigned draft guarantee. No guarantee was provided thereafter.

[3] The appeal, which the appellants had launched against the summary judgment order, lapsed in consequence of the appellant's failure to file security as required.

[4] The respondent brought an interlocutory application in terms of the provisions of Rule 30(A) seeking a declaration that the appeal had lapsed. The application came before Mashile J who held that the appellants had not complied with the provisions of Rule 49(6) (a) and that the appeal had lapsed. He accordingly amongst a variety of other orders issued an order declaring that the appellants appeal against the summary judgment order lapsed.

[5] The appellants applied for leave to appeal against the order of Mashile J.

#### **PRESENT PROCEEDINGS**

[6] During April 2019 the respondent issued a writ of execution. On 10 May 2019, the appellants launched an application as a matter of urgency to interdict the sheriff from executing the writ, which had been issued. The basis for the application was an allegation that the writ of execution had been unlawfully issued and was invalid. This allegation was founded on the premise that the appeal against the summary judgment had not lapsed and that there were appeal proceedings pending against the Mashile J order.

[7] In due course, the urgent application was set down. By the time it came to be heard the writ had been served and the sheriff had delivered a

*nulla bona* return. The urgent application came before Windell J who struck the matter off the roll on the basis it was not an urgent matter. Subsequently the applicants set the matter for hearing in the ordinary course. It was heard by Twala J who dismissed it.

[8] The present proceedings are an appeal against that order. The applicants brought these proceedings without seeking or obtaining the leave of Twala J to do so.

[9] The appellants submit that they are entitled to appeal the order of Twala J without leave first having been obtained by reason of the provisions of section 18(4) of the Superior Courts Act.

[10] The application before Twala J concerned the issue of whether the writ which had been issued and executed upon should be stayed. If the appeal had lapsed then on the authority of *Panayiotou v ShopRite Checkers (Pty) Limited* and others 2016 (3) SA 110 (GJ) at paragraph 15 the writ was lawfully issued. Twala J made no order directing the suspension of any order, he made an order dismissing the application. He ordered:-

- "1 The application is dismissed.
- 2 The first and second applicants are, jointly and severally the one paying the other to be absolved, liable for the costs."

[11] S18 of the Superior Courts Act 10 of 2013 on which the appellants rely for the right to prosecute the appeal without first having sought leave to do so

gives a party the right to appeal without leave if the decision appealed against directs that notwithstanding an appeal the order made is immediately enforceable.

[12] Section 18 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.
- (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.
- (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.
- (4) If a court orders otherwise, as contemplated in subsection (1)

- (i) the court must immediately record its reasons for doing so;
- (ii) the aggrieved party has an automatic right of appeal to the next highest court;
- (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
- (iv) such order will be automatically suspended, pending the outcome of such appeal."

[13] No order was made directing that notwithstanding the existence of an appeal any order is immediately appealable. Hence the provisions relied upon by the appellants do not assist them.

[14] The appeal is irregular as leave to appeal was never granted. It must fail for that reason alone. I would dismiss it with costs, such costs to be paid jointly and severally by the appellants.

[15] I propose the following order:

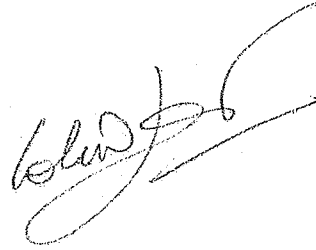
- 1 The appeal is dismissed.
- 2 The appellants are jointly and severally to pay the costs.

  
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**C G LAMONT**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

I agree

I agree

p.p.

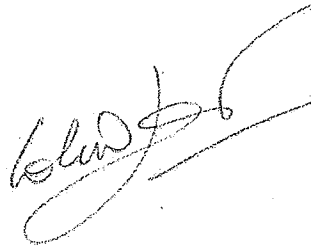


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**A MAIER-FRAWLEY**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

I agree

p.p.



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**A CRUTCHFIELD**  
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**COUNSEL FOR APPELLANTS:**

Mr. Q. Jiang (In person)

**COUNSEL FOR THE RESPONDENT:**

Adv. R. Boucher

**RESPONDENTS ATTORNEYS:**

Craig Berg Inc. Attorneys

**DATE OF HEARING:**

01 June 2020

**DATE OF JUDGMENT:**

02 June 2020