REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2021/13962

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED NO

14 May 2021

In the matter between:

LORENZA TOMMA (in her capacity as executor of the late estate of Giorgio Tomma)	1ST Applicant
BRIGITTE TOMMA	2ND Applicant
And	
LINDIWE RAMOSHAI	1st Respondent
ASANDA NAMBA	2nd Respondent
MICHELLE NANDA SNYMAN	3rd Respondent
ELIZABETH MKETHI	4th Respondent

NOMVUYO AGNES NDIBI	5th Respondent
SINIKIWE CHAKANUKA	6th Respondent
DANIEL MVULA	7th Respondent
THOBEKILE NDLOVU	8th Respondent
MLUNGISI KHUMALO	9th Respondent
THOKOSANI DUBE	10th Respondent
TYMON SIBANDA	11th Respondent
NOLWANDLE GWENDALINE NGCOBO	12th Respondent
LUNGA MAGOPENI	13th Respondent
MARY MOYO	14th Respondent
KHOMOTSO KHEMETSWE	15th Respondent
SITHEMBILE NDLOVU	16th Respondent
MAXWELL GONES	17th Respondent

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 14h00 on the 14h of May 2021.

DIPPENAAR J:

[1] The applicants seek urgent relief under section 18(3) of the Superior Courts Act[1] ("the Act") for leave to execute pending an application for leave to appeal lodged by the second to eighteenth respondents in the original application on or about 20 April 2021. They are cited in this application as the first to seventeenth respondents. They seek an order that an eviction order granted by Justice Twala ("the eviction order") on 25 March 2021 in the urgent court be declared to be operative and executable pending the respondents' application for leave to appeal and pending any further appeal or application for leave to appeal to any other court. The remaining respondents in the proceedings before Twala J, being the first respondent and the nineteenth to twenty first respondents in the main application, did not participate in the urgent proceedings on 25 March 2021 and are not cited in these proceedings as respondents. They are also not parties to the application for leave to appeal.

[2] The respondents seek the dismissal of the application and raised three grounds of opposition: The respondents disputed the urgency of the application and raised the non- joinder of the Economic Freedom Fighters ("EFF") (a political party cited as first respondent in the proceedings before Twala J). The main ground of opposition to the merits of the application was that the applicants did not meet the requirements of s18(3) of the Act.

[3] The matter was initially heard as an urgent application. The eviction order was granted on 25 March 2021 in the following terms:

[1] 10 of 2013

"1. This application is enrolled, treated, heard and determined as an urgent application as envisaged in 6(12) of the Uniform Rules of this Honourable Court and that the usual forms and time limits and requirements for service as provided for in terms of such uniform rules of court, Practice manual and National Regulations to address, prevent and combat the spread of Coronavirus (Covid-19) be dispensed with and/or that any non-compliance with such rules, practice manual and National Regulations be condoned and/or waived by this Honourable Court;

2. The First, Second and Third Respondents, those acting in concert with or through them or pursuant to instructions from them, are interdicted and restrained from:

2.1.1. Intimidating, threatening, assaulting the Applicants' and restrained from entering the premises of the Applicants' situated at ERF [....] RANDPARKKRIF EXT 31, PROVINCE OF GAUTENG, held under Deed of Transfer Number: T[....] (hereinafter referred to as "the property");

2.1.2. Inciting violence against the Applicants', the property, the dwellers and/or the tenants in good standing residing in the property; and

2.1.3. Instituting, inciting and executing in whichever way the monthly rental boycott by dwellers and/or the tenants due to the Applicants'.

2.2. The Third to the Eighteenth Respondents and all persons holding occupation through them (collectively referred to as "the unlawful occupiers") at the property; be evicted from the property within 30 (thirty) days (or immediately thereafter) of granting of the order in terms of the provisions of section 5(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (hereinafter referred to as "PIE");

2.3. The Third to the Eighteenth Respondents and all the unlawful occupiers are ordered to vacate the property within 30 (thirty) days of granting of the court order; and

2.4. In the event, the Third to the Eighteenth Respondents and all persons who claim occupation through and under them, fail to vacate the property within 30 (thirty) days of granting of the court order, then the Sheriff or his lawfully appointed Deputy as far as it is necessary, is hereby authorised and directed to evict therefrom and further be authorised to request the assistance of the Johannesburg Metropolitan Police department to assist him/her in the eviction and removal of the Third to Eighteenth Respondents and all persons who claim occupation through and under them from the property.

3. Interdicting and restricting the Third to Eighteenth Respondents collectively from unlawfully occupying the property, alternatively any part thereof from date of this court order and contrary to the Applicants' decision to close access thereto post the eviction; and

4. No order as to costs."

[4] In the application for leave to appeal, the respondents were represented by a Mr Zuko Madikane, a representative of Lawyers for Black People (NPC) ("LBP"). Mr Madikane is not a qualified attorney. The applicants contended that the application for leave to appeal was thus a nullity. It was argued that the respondents were not properly represented and the application was unopposed. I do not agree with the latter submission. A notice of intention to oppose had been filed by attorneys representing LBP, representing the respondents prior to the hearing. At the hearing, the respondents were represented by counsel on brief from those attorneys. The application thus proceeded on an opposed basis.

[5] The order in the urgent Court was granted on an unopposed basis. No intention to oppose or answering papers were delivered. It was argued that an application for leave to appeal was thus not competent.

[6] The applicants relied on substantially the same grounds of urgency raised in the urgent proceedings before Twala J. They contended that those same grounds rendered the current application urgent as there was still a rental boycott by tenants, the applicants were still under threat of physical attack and intimidation pursuant to a severe physical attack on the second applicant and they were still in fear as a result to return to the property and were in hiding at an undisclosed location.

[7] The respondents dispute urgency on the grounds that the respondents were being made to suffer for the conduct of the EFF and the applicants' reliance on the same grounds of urgency as in the proceedings before Twala J was misplaced.

[8] The primary question which must be answered is whether the applicants have illustrated that they will not obtain substantial redress at a hearing in due course.[2] In my view, the applicants made out such a case. Considering all the facts and the ongoing risk of harm, I am not persuaded that there is merit in the respondents' contention and I am satisfied that sufficient urgency has been illustrated to entertain the application. The applicants further illustrated sufficient urgency, both commercial[3] and otherwise to justify the enrolment of the matter on the urgent roll.

[9] I am further not persuaded that there is merit in the respondents' contention that the EFF should have been joined as a party to the present application. The EFF, although served with the original application, did not oppose it. Interdictory relief was granted against the EFF. There is merit in the applicants' contention that the EFF has

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[2] East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767) [2011] ZAGPJHC 196 (23 September 2011)

[3] Luna Meubelvervaardigers (Edms) Bpk v Makin(t/a Makin's Furniture Manufacturers 1977 (4) SA 135 (W) at 137F; IL&B Marcow Caterers(Pty) Ltd v Greatermans SA Ltd; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd 1981 4 SA 108 (C) at 110G

distanced itself from the conduct of its offending members by not opposing the application.

[10] The application for leave to appeal is aimed against the granting of the eviction order, not against the interdictory relief. I am not persuaded that the EFF thus has a direct and substantial interest in the present application, having elected not to oppose the interdictory relief sought and obtained against it in the Twala order.

[11] It was common cause that the first applicant is the executrix of her late husband, the registered owner of an immovable property, Erf [....] Randparkrif, bordering on John Voster Road entrances 31a 31b and 31c, Randparkridge, Johannesburg ("the property"). The second applicant is her daughter. The applicants both resided on the property and let out rooms on the property to tenants.

[12] The respondents, with exception of the first respondent, all occupied the property in terms of partly oral partly written leases. The applicants confirmed that the lease agreements have been cancelled. This averment was not disputed by the respondents.

[13] The first and second respondents are the main agitators in commencing a rental boycott by the respondents, resulting in payment not being received from the respondent tenants for a period of some five months since December 2020. One of the respondents is operating an illegal crèche from the property. Intimidation is ongoing amongst the remaining tenants. Due to intimidation, it is likely that tenants in good standing may join the rental boycott. The first respondent is not an occupier on the property but is an EFF member who has attended the property on numerous occasions. One of the respondents has caused damage to the property in respect of which a charge of malicious damage to property was laid with the South African Police Services, which is currently pending. An assault has taken place on the premises when certain armed EFF members attacked and assaulted the applicants, especially the second applicant, resulting in her hospitalization and an operation for a fractured nose. The applicants have vacated the property and are staying in an undisclosed location, too

fearful to return as they have been threatened with further attacks, rape and murder. The respondents have associated themselves with the intimidation and threats made against the applicants and have persisted in illegal gathering both inside and outside the property.

[14] The requirements for the exceptional relief under s 18 (3) are more onerous than at common law[4]. In terms of section 18 (1) and (3) of the Act, the applicant must meet the following requirements to be successful: (i) the presence of exceptional circumstances; (ii) in addition, that on a balance of probabilities, they will suffer irreparable harm if the eviction order is suspended, and conversely that the respondents will not suffer irreparable harm if the eviction order is not suspended.

[15] The salient provisions of ss 18(1) and (3) of the Act provide as follows:

> *"18. Suspension of decision pending appeal*
>
> *(1) Subjection to sub-sections (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.*
>
> *…*
>
> *(3) A court may only order otherwise as contemplated in sub-section (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] Ntlemeza v Helen Suzman Foundation and Another [2017] ZASCA 93; [2017] 3 All Sa 589 (SCA)

[16] Under s.18(4)(ii) of the Act, if a court orders that the initial decision will not be suspended, *"…the aggrieved party has an automatic right of appeal to the next highest court.".* Under s.18(4)(iii), *"…the court hearing such an appeal must deal with it as a matter of extreme urgency."*

[17] In terms of s18(4)(i) of the Act, if a court orders that the initial decision will not be suspended, the court must immediately record its reasons for doing so. The phrase "immediately" has not been interpreted by the Supreme Court of Appeal to envisage that reasons be provided immediately once argument on the matter has finished. Rather, it envisages that substantive and considered reasons must be provided at the time judgment is delivered to enable an aggrieved party to appeal to the next highest court.[5].

[18] It is now settled that the respondents' prospects of success in the pending appeal is a relevant factor in considering whether the present application should be granted. As stated by Justice Binns-Ward on behalf of a full court in *Minister of Social Development Western Cape v Justice Alliance*[6], quoted with approval in *University of the Free State v Afriforum and Another*[7]:

> *"It follows that 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".*

[5] University of the Free State v Afriforum and Another 2018 (3) SA 428 (SCA) at paras [27]-[28]; Ntlezema v Helen Suzman Foundation 2017(5) SA 402 (SCA)
[6] [2016] ZAWCHC 34(1 April 2016
[7] Supra at paras [14]-[15]

[19] As a starting point it is apposite to state that exceptionality is fact specific and a conclusion that exceptional circumstances exist in a given case, is not a product of a discretion, but a finding of fact.[8]

[20] Interpretive guidance to the concept of "exceptional circumstances" is provided by the approach adopted by the Full Bench of this court in *Nyathi and Others v Tenitor Properties (Pty) Ltd, In re: Tenitor Properties (Pty) Ltd v Nyathi and Others*[9] , wherein it was stated:

> *"In the context of the present matter we approach the concept of "exceptional circumstances" in the following way.*
>
> *First, by definition, these words have a wide berth. Second, that notwithstanding, it would be wrong to approach the assessment of the concept on the basis that the appeal has or does not have a prospect of success, one way or the other, because all appeals will either succeed or fail. Put differently, the fact that an appeal has a weak prospect of success cannot be exceptional; that happens all the time.*
> *Third, it follows that the circumstances, for them to be exceptional, must as far as possible be neutral in relation to the success prospects. Fourth, since the words have a wide reach, the potential harm that each side will suffer, if the suspension issue goes against that side, is a relevant factor".*

[21] The respondents' answering papers in bald terms raise issues pertaining to the poor living conditions on the property and a principle that no children are allowed. The answering papers are further argumentative and replete with bald denials, devoid of primary facts to sustain them. The respondents do not appear to assert any legal entitlement in relation to anyone to their continued occupation of the property. It is not contended that they are lawful occupiers of the property. No facts are set out regarding

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[8] Incubeta Holdings (Pty) Ltd and Another v Ellis and Another 2014 (3) SA 189 (GSJ) paras [18] and [22]
[9] (06579/2015) [2015] ZAGPJHC 115 (9 June 2015) at paras [29]-[31]

the personal circumstances of the respondents. No case was further made out that any of the respondents would be rendered homeless by the eviction order. It was not denied by the respondents that they are embarking on a rental boycott. To the contrary, they admit that they are not paying any rentals to the applicant. No valid justification was put up for them doing so, other than a vague reference to living conditions being poor.

[22] The applicants have had no compensation for the period of deprivation of the property. Some of the occupants of the property have not paid for their occupation for a period in excess of five months, nor has anyone else been paying for such occupation, whilst enjoying the continuous benefits associated therewith. This represents an *"economical aberration for which there is, objectively no justification"*[10].

[23] Not only have the respondents excused themselves completely from the obligation to contribute to the roofs over their heads and the services which they enjoy, but they have influenced others to join their position.

[24] The respondents have further threatened and harassed the applicants and have on occasion seriously assaulted the second applicant. Threats of further violence, including rape and murder have also been made, resulting in the applicants being too fearful to return to their home. On the papers, it has not been controverted that there has been a level of aggression and intimidation which falls foul of the founding values of the Constitution and the rule of law.

[25] The respondents challenge the existence of exceptional circumstances on the basis that there is no threat of imminent harm because the applicants are not staying on the property. In doing so, the respondents fail to appreciate or address the position of the applicants and the prejudice which they suffer, not only in relation to the fear they experience as a result of the threat of serious future attack and their inability to return home as a result but also in relation to their ongoing financial loss.

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[10] Nyathi supra para [32].

[26] In considering the issue the Supreme Court of Appeal has confirmed that the prospects of success on appeal is a relevant factor which must be taken into account.[11]

[27] The respondents' application for leave to appeal is part of the record. It is accompanied by an affidavit aimed at explaining why the respondents were not present at the hearing. No explanation is proffered why the application was not formally opposed or why no answering papers were not filed. The application for leave to appeal is irregular in its form and does not conform with r 49(1). It was admittedly drafted by Mr Madikane, who as confirmed by the Legal Practice Counsel, is not a legal practitioner. The validity of the application for leave to appeal is thus in dispute, as at the time, the respondents were not represented by an attorney.

[28] No affidavits were filed by the respondents in the eviction application and determined by Justice Twala. In the application for leave to appeal, numerous issues are further raised which were not raised in the proceedings before Twala J. The high water mark of the application is that certain respondents attended court on the day of the hearing but could not find the court. When they made contact with the applicants' attorneys, they were advised that an order had been granted. It is thus doubtful whether an application for leave to appeal is competent. In the application for leave to appeal, it was contended that the court did not exercise judicial oversight over the proceedings. This contention lacks merit as the respondents, having chosen not to oppose the proceedings, did not place any relevant information before court for consideration.

[29] Considering that the order granted by Twala J was made by default, in the absence of any opposition, answering papers or appearance by the respondents, the prospects of success on appeal are poor. I agree with the applicants that the application for leave to appeal is procedurally defective. No rescission application was launched by the respondents.

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[11] University Free State v Afriforum supra

[30] Whilst individually each of the above circumstances may not qualify as "exceptional", such circumstances, once seen cumulatively, are indeed exceptional for purposes of s18(3).[12] I am thus satisfied that the applicants have illustrated exceptional circumstances.

[31] A consideration of the respective potential harm that each side will suffer if the suspension order is granted adverse to it, envisages two distinct enquiries[13].

[32] On the facts presented and already referred to I am persuaded that the applicants have illustrated irreparable harm if the application is not granted. The respondents' contention that the applicants have not illustrated such harm as they live in a safe location and not at risk for rape or murder, lacks merit and disregards the very fact that they have been forced to live in hiding because of the threats of rape and murder. The argument also disregards the intimidation of the applicants by the respondents.

[33] The respondents did not contend for any prejudice if the present application is granted. It was conceded during argument that the applicants have satisfied this requirement. The respondents have placed no information before the court to determine their personal circumstances. They were afforded an appropriate opportunity to do so. No information is given pertaining to the financial circumstances of the respective respondents. Significantly, none of the occupiers put up any facts justifying a conclusion that they will be rendered homeless if evicted, nor did they contend that they will be rendered homeless if the order sought is granted. They have further not averred that they are indigent and cannot afford to pay rent. The occupiers have organised themselves into a body that has seen fit to take the law into their own hands. Such conduct is repugnant to the Constitution and the Rule of Law[14].

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[12] Nyathi supra para 45
[13] Incubeta Holdings (Pty) Ltd and Another v Ellis and Another 2014 (3) SA 189 (GJ)
[14] Ngqykaumba v Minister of Safety and Security and Others 2014 (5) SA 112 (CC) para [21], as quoted in Teaca Properties (Pty) Ltd and Others v Banza and Others [2018] ZAGP 72 (9 February 2018)

[34] For the reasons stated above, I find that the applicants have satisfied the requirements of ss18(1) and (3) of the Superior Courts Act in demonstrating exceptional circumstances and that they will suffer irreparable harm if the eviction order is suspended whereas the respondents will not suffer irreparable harm if the eviction order is not suspended. It follows that the applicants are entitled to the relief sought.

[35] The normal principle is that costs follow the result. There is no reason to deviate from this principle. Although the conduct of the respondents may well justify the granting of a punitive costs order, as sought by the applicants, I have been persuaded not to accede to such request.

[36] I grant the following order:

> [1] The order granted by Justice Twala under case number 2021/13962 is declared to be operative and executable pending finalisation of the respondents' application for leave to appeal and pending any further appeal or application for leave to appeal to any other court;
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> [2] The respondents are directed to pay the costs of the application jointly and severally, the one paying, the other to be absolved.

EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING : 10 May 2021

DATE OF JUDGMENT	:	14 May 2021
APPLICANT'S COUNSEL	:	Adv. S. Vobi
APPLICANT'S ATTORNEYS	:	Mudenda Inc.
RESPONDENTS' COUNSEL	:	Adv. Mbeki
REDPONDENT'S ATTORNEYS	:	Mndiyata Attorneys