

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 2024-112065

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES:NO
(3)	REVISED: YES (20/11/24)
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DATE	SIGNATURE

In the matter between:

Executive Mobility Financial Solutions (PTY) LTD

Applicant

And

Gulf oils and Fuels (PTY) LTD (In Liquidation)

First Respondent

Eugene Nel N.O

Second Respondent

Abraham Masango N.O

Third Respondent

Tendayi Tinashe Jacob Mawoko

Fourth Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 8 November 2024.

Summary-application for leave to appeal and an application in terms of section 18 of the Superior Courts Act 10 of 2013. Leave to appeal dismissed and order not suspended.

JUDGMENT

MUDAU, J:

[1] There are two applications before me. Firstly, the Fourth Respondent (Mr Mawoko) seeks leave to appeal to the Supreme Court of Appeal, alternatively to the Full Court of this Division against the whole of the judgment and order handed down by the Court. This Court granted its order *ex tempore* on 15 October 2024. It handed down its judgment on 30 October 2024. Secondly, an urgent application, brought in terms of section 18 of the Superior Courts Act 10 of 2013 (the Act) wherein the applicant asks that the order remains operational and effective, and is not suspended, pending the decision in the appeal brought by Mr Mawoko. For convenience, I shall refer to the parties as they were cited in the main application.

[2] The order's genesis is from an urgent application instituted by the applicant wherein it sought the return of its vehicle, based on the *rei vindicatio*. Mr Mawoko had refused to return the applicant's vehicle to it in circumstances where the Rental Agreement, which originally afforded Mr Mawoko a right of possession of the vehicle through the first respondent, had terminated. the Rental Agreement had been entered into between the applicant and the First Respondent (Gulf Oils), which has since been placed under final liquidation.

[3] The grounds on which Mr Mawoko seeks leave to appeal are foreshadowed in his notice of application for leave to appeal. There are three grounds relied upon. These are that firstly, this Court misdirected its inquiry on the assessment of affidavits to determine the facts and thus erred in its quest to establish the correct facts. Secondly, the Court incorrectly applied the law upon both the incorrect facts

and including on correct facts. Thirdly, the Court misdirected its exercise of discretion, as the Court exercised discretion on the wrong facts and on the backdrop of an incorrect application of the law.

The law

[4] Section 17(1)(a) of the Superior Courts Act provides that leave to appeal "may only be given" where the Judge concerned is of the view that the appeal would have reasonable prospects of success; or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[5] Dlodlo JA in *Ramakatsa and Others v African National Congress and Another*¹ put it as follows.

"The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist"

[6] In my judgment, I found that it was common cause between the parties that the applicant is the owner of the vehicle in issue based on FA 5-ENatis, which is the registration of the vehicle in the applicant's name. Mr Mawoko put up no evidence to refute the objective evidence that the vehicle is registered in the applicant's name entitling it to the relief sought. This is despite the factual position that Mr Mawoko's solitary defence to the *rei vindicatio* claim by the applicant is that he and the applicant allegedly entered an "oral agreement" for the sale of the motor vehicle.

¹ [2021] ZASCA 31 at para 10 (31 March 2021). See also *Smith v S* 2012 (1) SACR 567 (SCA); *MEC Health, Eastern Cape v Mkhitha* [2016] ZASCA 176 at para 17.

[7] I could not find any material dispute of fact as regards the cause of action on which the applicant, as dominus litis, relied. But as pointed out in the main judgment he failed to plead the elements of the conclusion of the alleged sale agreement. In this regard, Mr Mawoko never pleaded, inter alia, that a purchase price was agreed to between him and the applicant; nor that he has paid a purchase price for the vehicle to the applicant.

[8] It is common cause that rental agreement entered into between the applicant and Gulf Oils, the rental Agreement which expired on 25 July 2024, made provision that, the agreement is exclusively a Rental Agreement and as such Gulf Oils will not assume ownership of the vehicle upon expiry of the agreement but that the vehicle would be returned to the applicant upon termination of the Rental Agreement as per clause 17. Mr Mawoko took possession of the motor vehicle as the representative of Gulf Oils (in liquidation). Ownership is retained by the applicant upon the termination of the Rental Agreement as per clause 8. The rental Agreement constitutes the whole agreement between the parties (per clause 24.1).

[9] Reference was made by counsel on behalf of Mr Mawoko to *Absa Bank Ltd v Van Eeden and Others*² per Willis J. In that case, the applicant, Absa bank as the owner of the vehicle had approached the court by way of motion proceedings for an order setting aside the sale in execution in terms of which a Nissan X-trail motor vehicle was sold to the fifth respondent. Absa was unaware of the notice of attachment and warrant of execution. The background was, the applicant entered into an instalment sale agreement with the first respondent, a certain Ms Van Eeden in terms of which it sold the vehicle to her. The transfer of ownership of the vehicle from the applicant to the first respondent was subject to the suspensive condition that Mrs Van Eeden pay the applicant the full amount owing in terms of the agreement.

[10] Ms Van Eeden failed to maintain regular monthly instalments, as was required in terms of the agreement. Absa bank was awaiting default judgment against Mrs Van Eeden after summons had been issued when the sheriff sold the vehicle to the

² 2011 (4) SA 430 (GSJ).

fifth respondent at a sale in execution. The execution creditor was not Absa bank, but the sixth respondent, who had instituted action against Mrs Van Eeden in the Randburg magistrates' court and obtained judgment against her.

[11] In setting aside the sale in execution, Willis J reasoned that:

“Sales in execution of motor vehicles by the sheriff, without at least giving notice of the intention to do so to both the 'title holder' and the 'owner', as defined in the National Road Traffic Act, will undermine public confidence, not only in the system of sales in execution, but also the system of registration of vehicles provided for in the National Road Traffic Act, as well as the whole system of credit financing of vehicles and the regulatory framework of the NCA.”³

[12] In the definitions section of the as defined in the National Road Traffic Act 93 of 1996 (National Road Traffic Act), 'owner' in relation to a motor vehicle means:

“(a) the person who has the right to the use and enjoyment of a vehicle in terms of the common-law or a contractual agreement with the title holder of such vehicle;
(b) any person referred to in paragraph (a), for any period during which such person has failed to return that vehicle to the title holder in accordance with the contractual agreement referred to in paragraph (a) or;
(c) a motor dealer. . .” My emphasis.

[13] The word 'title holder' is defined as meaning:

“(a) the person who has to give permission for the alienation of that vehicle in terms of a contractual agreement with the owner of such vehicle; or
(b) the person who has the right to alienate that vehicle in terms of the common-law,
and who is registered as such in accordance with the regulations under section 4 . . .”

³ *Id* at para 39.

[14] The submission in this regard being that the applicant did not prove ownership of the motor vehicle. I disagree. The Van Eeden case is clearly distinguishable and does not assist Mr Mawoko. Not only was this never pleaded, but this contention stands in stark contrast to annexure FA 5, the Enatis, depicting the applicant as owner, whereas the title holder is Mercedes Benz South Africa Financial Services. It is the applicant 'case that it is the owner of the motor vehicle in question because it was vested with the right to the use and enjoyment of a vehicle in terms of a contractual agreement with the title holder, Mercedes Benz. For purposes of the *rei vindicatio*, this suffices. The applicant is likely to suffer prejudice than Mercedes Benz under the circumstances. The fact that a financial institution is the title holder does not mean a person in the position of the applicant cannot vindicate its rights flowing from its ownership of the motor vehicle. Besides, the fourth respondent could have joined the latter if it was a material issue.

[15] This court considered the grounds of appeal, and the oral and written submissions made on behalf of the fourth respondent. In my conclusion, there is no prospect that an appeal court, would come to a different conclusion than the one reached by this court. There is no other compelling reason why the appeal should be heard. On the objective evidence, that the applicant is the owner of the motor vehicle and is perfectly entitled to the *rei vindication* absent any legally recognisable right of possession by the fourth respondent. In this case Mr Mawoko failed to establish any such entitlement. I do not think there is any reasonable prospect of another court reaching different conclusions on the issues raised in the application for leave to appeal. I accordingly, conclude that the fourth respondent's application for leave to appeal must be refused.

The section 18 application

[16] It is trite that, the noting of an application for leave to appeal suspended the 'execution' of the order.⁴ The background facts in this regard are not contentious. In terms of the order, Mr Mawoko was required to immediately return the motor vehicle to the applicant's possession. Pursuant to the order, and on 16 October 2024, the

⁴ See *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A)

applicant's legal representatives contacted Mr Mawoko's legal representative and enquired in writing when the applicant could expect delivery of the motor vehicle. Mr Mawoko's attorney responded saying that the vehicle was "available for upliftment" from Mr Mawoko's residential address by arrangement" as per annexure GR4 of the applicant's founding affidavit, further stating that he "assumes" that the motor vehicle had been collected, without providing the address at which the vehicle was located.

[17] On 17 October 2024, the applicant's legal representatives repeatedly on its version, and no less than 14 times, attempted to call Mr Mawoko's attorney telephonically with no success. Concerned for the safety and location of the motor vehicle, the applicant then instructed the Sheriff of the High Court to repossess the vehicle. With the resultant search, the tracking device on the vehicle did not reflect the vehicle being parked at Mr Mawoko's residential address, nor was it an address which the parties had ever agreed the vehicle could be located in terms of the rental agreement. A third-party present at the address at which the vehicle was eventually located refused to give up possession of the motor vehicle, stating that the residence was not Mr Mawoko's, despite the court order. The property is registered in the name of the third party. It is common cause that, Mr Mawoko, a Zimbabwean national, owns no fixed property in the Republic.

[18] Section 18(1)(2) and (3) of the Superior Courts Act, 2013 reads as follows:

"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, 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 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.”

[19] It is trite that, such an order will be granted in exceptional circumstances. Our courts have held that exceptionality must be fact-specific and that the circumstances which are or may be exceptional must be derived as Sutherland J (as he then was) puts it "from the actual predicament in which the given litigants find themselves".⁵ As *Incubeta* emphasises, “the proper meaning of that subsection is that if the loser, who seeks leave to appeal, will suffer irreparable harm, the order must remain stayed, even if the stay will cause the victor irreparable harm too. In addition, if the loser will not suffer irreparable harm, the victor must nevertheless show irreparable harm to itself”.⁶

[20] Contemplated by the words "exceptional circumstances" is something out of the ordinary and of an unusual nature.⁷ Essentially, whether exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion. Its existence or otherwise is a matter of fact which the Court must decide accordingly.⁸

[21] In his answering affidavit, Mr Mawoko suggests, without more, that he will suffer prejudice if this application is granted. There is no specificity as to how such purported prejudice may arise. In addition, Mr Mawoko states that he intends to interduce new evidence before the appeal court. Mr Mawoko has not launched an application to introduce such new evidence in the appeal.

[22] The applicant on the other hand, despite Mr Mawoko's undertaking that the vehicle would be stored at his premises, it is evident from the tracker report that the vehicle is in fact not being stored at Mr Mawoko's address in terms of the underlying agreement of rental and is being stored at an unknown address of a third party despite his version, under oath, that the property is "one of his properties". As the

⁵ See *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* 2014 (3) SA 189 (GJ) at para 22.

⁶ *Id* at para 24.

⁷ See *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and Another* 2002 (6) SA 150 (C) at 156I – 157C.

⁸ *Dlamini v Ncube and Others* [2023] ZAGPJHC 379 at para 8.

applicant contend, there is, a real risk that its insurance company will repudiate any claim brought in respect of the vehicle because the vehicle is in the possession of Mr Mawoko, or an unauthorised third party, Mr Meandimayi and not the applicant after the expiry of the rental agreement. Mr Meandimayi lives there with his children.

[23] In addition, as the applicant points out, the motor vehicle is the only meaningful security for the applicant's own debt with Mercedes Benz finance that funded the purchase of the motor vehicle. Indeed, the property where the vehicle was last traced is not listed in the Rental Agreement as an address at which the vehicle could be stored, nor was it listed as a domicile of Mr Mawoko or Gulf Oils.

[24] The applicant in the replying affidavit points out that the applicant, through bitter experience, has lost vehicles driven outside the border, or sold to a third party, where these vehicles are irrecoverable and where this Court had no jurisdiction to order its return with reference to case number 2023-132892. In that case, the applicant instituted action proceedings against Nicoscape (Pty) Ltd, Edmund Chiyangwa and Cecil Mutasa in or during December 2023.

[25] According to the applicant, Mr Chiyangwa and Mr Mutasa, much like the applicant, refused to hand over the applicant's motor vehicle upon termination of the rental agreement. They removed the tracking device from the vehicle and drove it outside the borders of the Republic of South Africa into Zimbabwe where, to the best of the applicant's knowledge, it remains. The matter was defended; however, summary judgement was granted by Windell J in the applicant's favour for the value of the motor vehicle together the arrear rental and costs. The applicant's victory was rendered hollow because the applicant was awarded the above-mentioned order, it has been unable to recover anything from the defendants who have no assets, whether movable or immovable, in their names.

[26] I have no difficulty in concluding that, Mr Mawoko, on the other hand, will suffer no prejudice or harm if the vehicle is returned to the owner, pending the outcome of the appeal. Mr Mawoko has no conceivable right in law to retain possession of the vehicle. It is apparent that the applicant's motor vehicle is at great risk of being concealed and lost forever. The applicant's concerns are thus valid,

founded and based on actual events that have previously occurred. The application succeeds.

Order

[27] In the result, I make the following order:

1. The application for leave to appeal is dismissed.
2. The order of this court dated 15 October 2024, under the abovementioned case number, remains operational and effective, and is not suspended, pending any decision on appeal.
3. The Sheriff of this Honourable Court is authorised to immediately attach and remove the Applicant's Mercedes-Maybach GLS600 motor vehicle with engine number 1[...], chassis number W[...] and registration number K[...] and have it stored at the secure basement parking of the Applicant, pending the outcome of any appeal.
4. The Fourth Respondent shall pay the costs of this application, including the costs of counsel, on the scale C, including the costs of counsel.

MUDAU J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

APPEARANCES

Counsel for the Applicant:	C. Shahim
Instructed by:	Thomson Wilks Inc.
Counsel for the Fourth Respondent:	K. Lavine
Instructed by:	Paul Friedman & Associates Inc.
Date of Hearing:	7 November 2024
Date of Judgment:	8 November 2024