REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO/YES

(2) OF INTEREST TO OTHER JUDGES: NO/YES

(3) REVISED TO BE

(4) Signature 11/04/18 Date

CASE NO: 2121/2017

11/4/2017

DOREEN VENTER	**1ST APPLICANT/RESPONDENT**
JACOBA JOHANNA DOROTHEA DU PLESSIS	**2ND APPLICANT/RESPONDENT**
COLOSSEUM ARABIAN STUD (PTY)	**3RD APPLICANT/RESPONDENT**
DOREEN VENTER N.O (as trustee of the Doreen Venter Family Trust)	**4TH APPLICANT/RESPONDENT**
COLOSSEUM REALE (PTY) LTD	**5TH APPLICANT/RESPONDENT**
and	
ANDRIES GERHARDUS VAN RENSBURG	**1ST RESPONDENT/APPLICANT**
MILLENIUM BODY GUARDS	**2ND RESPONDENT/APPLICANT**
JOHAN LEMMER	**3RD RESPONDENT/APPLICANT**

JUDGMENT

KHUMALO J

INTRODUCTION

[1] This is an Application for leave to appeal to the full bench of this court brought by the Respondents in the main Application against the whole judgment and order I delivered on 6 and 9 March 2017 granting a spoliation order against the 1ST , 2nd and 3rd Respondents restoring possession of a property and a dwelling situated at Portion 16 Kameeldrift, 298 JR,

Gauteng ("the property") to the Applicants and an interim interdictory relief restraining the 1st Respondent from certain actions that may impede on the Applicants' possession or access to the property and the running of their businesses from the property and from disposing of and or encumbering in any way the 40% (forty per cent) shares in Portion 16 Kameeldrift 298 (Pty) Ltd ("the company) which 1st Respondent purports to have transferred to his name.

[2] The judgment was granted pending the finalisation of an application or action for final relief to be instituted by the Applicants within 30 days of the granting of the order.

[3] The Applicants have simultaneous with the Respondent's Application for leave to appeal, launched an application in terms of s 18 of the Superior Court Act 10 of 2013 ("the Act") for an order directing that the judgement and order not be suspended pending the finalisation of the appeal process or steps undertaken by the Respondents. I agreed to the simultaneous hearing of the Applications as I had found both to require urgent adjudication notwithstanding the lengthy documentation.

[4] The parties are referred to as cited in the main application. Reference to "Applicants" is to the 1st and 2nd Applicants.

AD LEAVE TO APPEAL

[5] The Respondents' ground for seeking leave to appeal is that there are reasonable prospects of another court coming to a different conclusion for the court erred in one or all of the respects summarised as follows (highlighted and set out as subparagraphs):

> **[5.1] by failing to consider the defence raised by the Respondent that of impossibility of return to *status quo ante*, since the undisputed facts were that the property consists of a farm with stables and a dwelling on top of the stables in which the 1st and 2nd Applicants previously resided, and that the 1st Respondent had since November 2016 been building a "venue" which included the stables and the residence occupied by the Applicants. The court did not consider that it might be impossible for the 1st Respondent to return the dwelling to the Applicants because it does not exist anymore.**
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> **[5.2] The court failed to consider that no venue existed prior to the Applicants vacating the property and this was objectively established from the valuation report, that the main structure comprises of an arena, stables and two cottages which were being turned into a venue since November 2016 when the Applicants were still occupying the residence. The 1st and 2nd Applicants admitted that the stables and the residence in which they resided were being refurbished and reconstructed to be turned into rooms and a venue. The walls were being broken down and another structure being built.**
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> **[5.3] The court should have found that the residence that the Applicants wanted restored no longer exists in the form it was when they vacated same and their possession of such residence cannot be restored as the residence is an uncompleted building site. If repossession of the same thing is not possible than the *mandament* can in principle not be applied. By ordering restoration of possession to the 1st and 2nd Applicants it was ordering possession of a different *merx* in its place and not the original residence.**

[6] The Respondents had conceded that the main structure comprises of an arena, stables and two cottages, one of which is the dwelling that 1st and 2nd Applicants occupied. The Applicants had indicated that they have been running a venue business in the property prior to their eviction, seemingly being the arena in the valuation report. The fact that the 1st Respondent has decided to refurbish the arena and some of the stables to a venue and broken down and repaired the walls of residences now referred to as "rooms" did not create a new structure and render the previous residence non-existent making it impossible for the 1st Respondent to restore the Applicants in the property. Respondent had not alleged that he could not make the necessary arrangement to restore the property to the Applicants, therefore not a true case of impossibility of performance; see *Painter v Strauss; City of Tshwane v Mamelodi Hostel Residents* .

[7] The 1st Respondent's Counsel Ms Strauss referred to *Fredericks v Stellenbosch Divisional Council* 1977 (1) SA 526 (W) at 535 A-B which was criticized for Diemont J's statement that: "if the original sheets of corrugated iron cannot be found or if they had been so damaged by the bulldozer that they cannot now be used there is no reason why other sheets of iron of similar size and quality should not be used." Also to the sentiments in *Rikhotso v Northcliff Ceramics (Pty) Ltd 1997 (1) SA 526 (W) at 535A-B* 'that a spoliation order cannot be granted if the property at issue has ceased to exist. Also at 521E where he states that:

> "... while the *mandament* clearly enjoins breaches of the rule of law and serves as a disincentive to self-help, its object is the interim restoration of physical control and enjoyment of specified property- not its reconstructed equivalent."

[8] The difference is that in *Frederick* the corrugated iron was so demolished that the structure did not exist anymore which is different to the situation *in casu*. The structure that comprises of the Plaintiffs' residence still exists whether with or without refurbishment. It has not been totally demolished and a new structure built in its stead. The Respondents has in his argument alleged the merx to have been either destroyed and therefore non-existent or to be now in a different form. He has to allege and prove that he in good faith is in no position to be able to restore the property to the Applicants. The two authorities confirm that impossibility is usually accepted where the property is either destroyed or damaged beyond repair or transferred to an innocent party. In the unreported matter of *City of Tshwane Metropolitan Municipality v Mamelodi Hostel Residents* 2011 ZASCA 277, after the city agreed with the residents of the Mamelodi Hostel that they will be removed and placed in alternative accommodation for a redevelopment and renovation of their hostel, the residents afterwards refused to vacate the hostel. The city proceeded with the help of the police to demolish the roof covering and roof structures whilst the residents were in occupation. On a *mandament van spolie* application for the repossession of the destroyed property, the city was ordered to restore the roof structures and roof covering to the condition they were prior to the destruction thereof. The order was confirmed at the Gauteng High Court. On appeal to the SCA the city raised a defence that the demolishing was by consent, the residents consented to the demolition of the hostels whilst on the other hand conceding that the residents were dispossessed and were in peaceful possession. The SCA dismissed the contention that dispossession lawful because of consent and granted the spoliation order with the court satisfied that the requirements thereof complied with.

[9] The Respondent has also pointed out that he informed the Applicants to vacate the premises by end of November 2016, the reason being that he had to negotiate with the majority shareholder to refurbish the property and to turn it into a lodge and venue. Due to the pending negotiations he is in no position to totally demolish the buildings without having secured the necessary approval for the refurbishment and reconstruction. At the same time he has alleged to have started refurbishing and reconstructing the buildings by the time the Applicants vacated the property. In that instance the Applicants were spoliated from a refurbished and reconstructed residence and therefore there is no new merx. Accordingly from the dictum in *Mamelodi Hostel Residents* a conclusion may be drawn that the *mandament van spolie* is available in instances where the parts of the property have been destroyed and the spoliator is required to do something to ensure that the status quo ante is restored.

[9.1] The court failed to consider that due to the "sms" it should have arrived at a conclusion that she left on her own as per agreement with the 1st Respondent. That there has been an arrangement about her vacating the premises prior the 1st Respondent's visit at the premises. The court also erred in not finding that 1st Applicant admitted in the sms that the "place" being the residence was regarded by the 1st Applicant as the 1st Respondent's place and not her own.

[10] The context of the sms was extensively dealt with in the judgment taking into account the admitted facts in both parties' version. According to the 1st Respondent he demanded that Applicants vacate their residence by the end of November 2016. So there was no arrangement. By the 1st of December she has not left and that evening 1st Respondent and Lemmer came to the property with 5 security guards in a vehicle flashing blue lights, scaring her. She said she therefore sent the sms, to avoid a confrontation, which did not work because the Respondents proceeded to their residence anyway to warn her to leave by the next day, otherwise she will be thrown out. I had found that under the circumstances the Respondent's allegation that they were invited to the residence by the 1st Applicant and had an amicable discussion about her departure was far- fetched. (*National Scrap Metal v Murray & Roberts* 2012 (5) SA 300 (SCA) paras 21-22. They would not have returned the next day and padlocked the premises whilst the 1st and 2nd Applicants were out and give instructions that they should not be let back into their residence. That conduct is instead inconsistent with an amicable agreement but in line with the threat they issued the previous day. They also knew that the Applicants have not vacated their residence that is why they issued instructions that they were not to be let back in.

[10.1] The court failed to consider that the 1st Respondent denied that he attended to the premises with 5 security guards in blue flashing lights vehicles, and that the 1st Respondent stated that he and 3rd Respondent were in one vehicle and only one other vehicle was there being a security vehicle. Also that on her own version 1st Applicant was not scared. She did not vacate the premises due to threats as she did not leave the premises on 2 December 2016, but she went shopping and returned and heard that the premises were locked.

[10.2] The court failed to address in any manner that the 3rd Respondent was involved in threats and or intimidation and or coercion of the Applicants to vacate the premises, if indeed they were spoliated on 2 December on their return from the

shops. 1st Applicant does not set out any facts upon which the 3rd Respondent threatened the 1st and 2nd Applicants to vacate the premises. The court erred in finding the Respondents to be co spoliators as no such evidence exists nor warranted granting costs against the 2nd and 3rd Respondent.

[11] **Venter had** alleged that she found the 1st Respondent and 3rd Respondent arrival at the property with the 5 bodyguards flashing blue lights similar to police vehicles **very intimidating and she was scared**. Neither the 1st Respondent in his answering affidavit nor the 3rd Respondent in his confirmatory affidavit denied that they were accompanied by the 5 body guards. 1st Respondent instead mentioned that only 1 security guard vehicle accompanied the vehicle that conveyed him and 3rd Respondent to the property without mentioning the number of security guards. Also that 1st Respondent and 3rd Respondent came into their residence threatened and warned them to vacate the property by the next morning the 2nd of December 2016, otherwise they were going to be physically removed from the property. It is therefore not correct that Venter said she was not scared and that there was no evidence of the involvement of the 2nd and 3rd Respondents.

[13] Coercion is therefore established from the combination of all these acts by the Respondents. On his own version the 1st Respondent had demanded that the Applicants leave the premises by the end of November. On the night of 1st December 2016, he appeared at their residence in the company of bodyguards and 3rd Respondent, threatened and warned the 1st and 2nd Applicants that they must be gone by the next day. He comes back the next day on 2 December 2016, again with 3rd Respondent, they instruct the padlocking of the Applicants' residence and that they are not to be let back into their residence (see *Painter v Strauss* 1951 (3) SALR 307 (O) at 314B-C).

[13.1] The court failed to take all the combination of the circumstances and the communication between the parties that took place after 2 December 2016 pointed to a business deal that had turned sour between the parties for several reasons that are disputed between the parties, and not spoliation.

[14] There is no merit to the allegation that the court failed to consider all the circumstances and the communication between the parties that took place after 2 December 2016 which pointed to a business deal that for several reasons is in dispute between the parties not spoliation. Any other issues that exists between the Applicants and the Respondent cannot be a subject of adjudication in a spoliation action which only decide the the right of immediate possession pending the resolution of the ultimate right.

[14.1] The court failed to consider that the Respondents are seeking to actually enforce a contractual right or spes to such right by way of mandament van spolie in order to regain possession of the premises, thereby regaining control of the stabling business of the 3rd Respondent by way of interdict.

[15] The Applicants by removing the 1st and 2nd Respondents from the residence they made it impossible for them to run their businesses that are run from the property. The Respondents have as a result in their spoliation of the Applicants also taken over their stabling business that the 1st Respondent is personally running, having technically spoliated the Applicants of the business as well.

[15.1] The court erred in finding that the 1st Respondent sold her shares worth R5M to the 1st Applicant as the 1st Respondent admitted that the amount is due and payable by her to the other shareholder.

[16] The court did point out that one of the issues between the parties is the purported sale of shares of the 4th Applicant, the Venter Family Trust in Kameeldrift. The interim interdict to stop 1st Respondent from dealing with the 40 % shares whilst the dispute remains is justifiable. In granting the order the court just indicated how improbable it would have been, looking at the documents generated between the parties indicating the value of the shares and what was probable discussed by the parties as a consideration for the payment of the shares that it is unlikely that the R1000000 would have been agreed upon as the amount payable for the shares and the transfer thereof.

[17] In deciding the matter all the relevant facts were duly considered, weighing the probabilities and drawing the possible inferences from the admitted or proven facts as substantially outlined in my judgment.

[18] Even if the 1st Respondent still argues that there was an agreement that the Applicants will vacate the premises. The padlocking of their residence whilst they were temporarily out of the premises with orders not to let them back in amounts to spoliation; see *Painter supra.*

[19] There are therefore prospects of another court arriving at a different conclusion.

INTERIM RELIEF

[20 Ms Strauss, the Respondents' counsel's starting point in arguing the Application was a submission that the interdict granted might be interim, however its effect is the same as that of a final interdict because even though it is granted *pendent lite,* pending the action to be instituted by the Applicants within 30 days of the date of the order, it will take probably about 3 or more years to finalise the pending action. On that basis its effect should not be regarded as temporal but final or permanent. I was implored to consider the Application from that perspective.

[21] The position in regard to an interdict granted temporarily is extensively discussed by EM Grosskopf JA in *Knox D' Arcy Ltd and Others v Jamieson & Others* 1996 (4) SA 348 (A) ([1996] 3 All SA 669) as follows:

> 'In passing it may be noted that the grant of an interim interdict stands, historically on a different footing. As far back as *Prentice v Smith* (1889) 3 SAR 28 the Court held (at 29) **that an order granting an interim interdict "is an interlocutory order, and that consequently there can be no appeal".** On the whole **this view** was followed in the Provincial Division (see *Loggenberg v Beare* 1930 TPD 714; *Davis v Prews & Co* [1994 CPD 108]; and authorities referred to in those cases) and, ultimately, **prevailed in the Appellate Division** (*African Wanderes football Club (Pty) Ltd v Wanderes Football Club* 1977 (2) SA 38 (A) at 46H-47A and Cronshaw's case *supra*). Some judges have questioned the validity of the distinction between the refusal and grant of the interim interdict. This distinction cannot be justified by the nature of the proceedings giving rise to the decision- it is the same in both cases (see for example, *Davis v Press & Co* (*supra* at 118 per Fagan J)). And it may be argued that the prejudice suffered by the unsuccessful party also does not differ in principle. See Davis' case supra at 112 -13 (De Villiers J). However, in *Loggenberg's* case *supra,* Greenberg J expressed the view (at 723) that "there is in fact a real distinction on the question of irreparability between the case of a

granting of a temporary interdict and the refusal of a temporary interdict'. There may also be a difference in the finality of the decision. **Thus, as stated above, the refusal of an interim interdict is final.** It cannot be reversed on the same facts (I disregard the possibility, discussed above, of a refusal on some technical ground). The same may not be true of the grant of **an interim interdict.** It **may be open to the unsuccessful respondent to approach the court for an amelioration or setting aside of an interdict, even if the only new circumstance is the practical experience of its operation.** And, apart from the theoretical differences between the grant and the refusal of an interdict, there is also the practical one, discussed in Cronshaw's case at 12-15, **that an appeal against the grant of a temporary interdict would often be inconsistent with the very purpose of this remedy**. See also *Davis v Press & Co* (*supra* at 119 (Fagan J))." (*my emphasis*)

[22] It is therefore settled by authorities that the granting of an interim interdict generally cannot be a subject of an appeal. In *Metlika Trading Limited and Others v Commissioner, South African Revenue Services* 2005 930 SA 1 (SCA) (2004) JTLR 73; [2004] 4 All SA 410) the court however held that an interim interdict is appealable if it is final in effect and not susceptible to alteration by the court of first instance. In determining whether an order is final in effect, it is important to bear in mind that 'not merely the form of the order must be considered but also, predominantly, its effect (*South African Motor Industry Employers' Association v South African Bank of Athens Ltd* 1980 (3) SA 91 (A) at 96H).

[23] The crucial question however is whether, as argued by the Respondent the interim order granted in this matter is of final effect due to the fact that finalisation of the pending litigation might be delayed. The effect refers to substance rather than the form or procedure.

[24] The substrate of the order granted *in casu* is to prohibit the Respondent from dealing with the 40 % shares in Kameeldrift that were purportedly transferred to him by 1st Applicant and operating Applicants' businesses that were run from the property until the dispute relating to same is finalised. The Respondent had gained control of the businesses and property by spoliation and his claim to holding over on the property and the business is based on the disputed transactions that were allegedly entered into with the 1st Applicant that are to be adjudicated upon in the action to be instituted by the Applicant. The effect of the order granting the interim interdict is therefore temporal being operational only for a certain period and not appealable.

[25] Furthermore, on the granting of an interim interdict it is open to the unsuccessful respondent to approach the court for an amelioration or setting aside of an interim interdict at any time before the final order is made, even if the only new circumstance is **the practical experience of its operation**. The contention therefore that the delayed finalisation of the pending litigation in this matter makes the interim interdict final in effect is not sensible. A final interdict is as a rule granted without any limitation as to time (*Estates Edwards v Sinclair* 1918 EDL 12 at 18).

[26] Ms Strauss had argued the point also during the hearing of the interim interdict application that. in substance the Applicants were seeking a final relief. I had found no merit in the argument, as I have indicated that the substrate of the relief sought is temporary and finality of the issues was to be determined in the pending action. The 1st Respondent has failed to make a proper case for the court to reach a contrary view.. He has not been able to make a case that the effect of the interdict is final.

AD s 18 (1) APPLICATION

[27] It is a well-established common law rule of practice in our courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal. As a result, pending the appeal no effect can be given to the judgment, except with the leave of the court which granted the judgment. See *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 544H-545A. The purpose as noted in the judgment was to prevent irreparable harm that the execution of the judgment might cause to the intending Appellant.

[28] In *University of the Free State* v *Afriforum ad Another [2017 1 All SA 99 (CC)* the SCA elucidated the historical development of the rule with such clarity that the order arrived at in this matter is informed by the decision. The common-law rule of suspension of the decision pending the appeal is now decreed in s 18 of the Superior Court Act 10 of 2013 ("the Act"). It also provides for the granting of an order to the contrary by the court if the Applicant proves that:

(1) exceptional circumstances exists; s 18 (1)

(2) he/she will on a balance of probabilities suffer irreparable harm if the order is not made; s 18 (3)

(3) the Respondent will not suffer irreparable harm if the order is made.

[29] The existence of exceptional circumstances depends upon the peculiar facts of each case; see *University of the Free State* v *Afriforum ad Another [2017 1 All SA 99 (WCC) v Stellenbosch Universiteit.* The SCA referred to Sutherland J statement in *Incubeta Holdings (Pty) Ltd and another v Ellis and another* 2014 (3) SA 189 (GJ) *that:*

> "... exceptionality must be fact specific. The circumstances which are or may be 'exceptional' must be derived from the actual predicaments in which the given litigants find themselves."

[30] In *Afriforum,* Fourie AJA implored the court when evaluating the circumstances relied upon by the Applicant, to bear in mind that what is sought is an extra ordinary deviation from the norm, which in turn, requires the existence of truly exceptional circumstances to justify the deviation.

[31] In considering whether the prospects of success in a pending appeal should play a role in determining whether or not to grant the order Fourie AJA agreed with the approach in *Minister of Social Development Western Cape and others v Justice Alliance of South Africa and another* [2016] ZAWCHC of Binns –Ward J (Fortuin J and Boqwana concurring) that prospects of success in an appeal remain a relevant factor. In relation to an application in terms of s 18 (3) he explained 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)."

[32] The Applicants' case is based on the rationale that the very nature of the remedies or orders granted are of exceptional circumstances. The urgency and the fact that the interdict is of temporary effect.

[33] Practically, as discussed in *Cronshaw & Another v Coin Security Group (Pty) Ltd* 1996 (3) SA 686 (A) 9[1996] 2 All SA 435) at 690D-E's case at 12-15, an appeal against the grant of a temporary interdict order would often be inconsistent with the very purpose of this remedy which is to protect the right of the complainant party pending an action or application to be brought by him to establish the rights of the respective parties (See also *Davis v Press & Co* [1994 CPD 108] at 119 (Fagan J)). As it is similar with a Spoliation order, basically a speedy remedy, intended to prevent the continuous harm suffered by the Applicant by remedying, at once, the effects of an unlawful action pending the resolution of the merits of their dispute. So the appeal against a spoliation order would defeat the very purpose of the remedy.

[34] The order granted for an interim interdict has been proven to lack any final effect, therefore not appealable, a fact relevant to the prospects of success of Respondent's appeal.

[34] As the interim interdict granted *per se* is not appealable there cannot be any prospects of success if the Respondents persists on an appeal. The delay in the execution of the order /judgment in such circumstances is reasonably fair and justified.

[36] In the Spoliation order the 1st Applicants have indicated that the Application was brought on an urgent basis due to the ongoing irreparable harm suffered by the Applicants. Furthermore if the Respondent does not restore the possession of the property to the Applicant, the consequences are dire to her.

[37] The facts in brief are that 1st Applicant Venter in her representative capacity as trustee of the 4th Applicant, the Venter Family Trust hold 40 % of the shares in Kameeldrift, a property she and her 73 year old mother occupied and from which she ran a business of studs and stabling of horses through the 3rd Applicant, a company in which she is the sole director. The 3rd Applicant owns the horses with an estimated value of R9 000 000.00. Venter also ran the business of a venue that was managed by her mother through the 5th Respondent. At the beginning of November 2016 negotiations ensued between her and the 1st Respondent who was interested in buying the trust's shares in Kameeldrift valuated to be worth R5 885 000.00. The remainder of the shares belong to one Toebes and carry a value of R8 000.00. The content and the validity of the discussions, agreements or resolutions reached are in dispute. On or about 25 November 2016, the 1st Respondent paid an amount of R1 000 000.00 to the 1st Applicant. The latter alleges that it was a loan the security of which was to be through the transfer of 50 % shares in the 3rd Applicant to be held until the money is paid back. However 1st Respondent alleges that he was paying for the 40 % in Kameeldrift which shares were subsequently transferred to his name by the 1st Applicant. 1st Respondent, as a result demanded that Venter and her mother vacate the premises by the end of November 2016. On their failure to do so 1st Respondent went to the property on the evening of 1 December 2016 accompanied by security guards and the 3rd Respondent whereupon Venter was threatened and warned to vacate the residence by the next day, failing which he was going to throw them out or remove them. On 2 December 2016, Venter and her mother went to the shops and on their return after lunch they learned that 1st Respondent and 3rd Respondent were at the property earlier that day and their residence was padlocked with instructions to the personnel not to let them in.

[38] Venter and her mother have been staying at a guest house. They have not been able to operate any of the businesses which is their only source of income and therefore have not been generating any income. The 1st Respondent has taken over the stud and stabling business of the 1st

and 3rd Respondent and gone to an extent of instructing clients to pay the money meant for the business into his account.

[39] The Applicants allege that the 1st Respondent's unlawful actions will persist, defeating the purpose of the urgent spoliation order and the interdict and giving effect to the prejudice that the court was trying to prevent, causing irreparable harm, since:

> [39.1] They have been thrown into financial difficulties. She is expected to pay for her and her 73 year old mother's accommodation somewhere else whilst she is not making a living therefore with no income. Basically the 1st Respondent continues to interfere with their right to make a livelihood and arbitrarily deprive them of their right to housing or accommodation. They therefore continue to endure true hardship and irreparable harm
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> [39.2] The Applicants continue to suffer a loss as they are unable to continue to run their businesses with the concomitant risk of potential claims against the businesses by clients who have entrusted her with their studs and horses. Already there has been complaints by owners about the neglect of the horses.
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> [39.3] The welfare of the animals and the related business remains at stake as she is, inter alia, unable to prepare the mares scheduled to be inseminated for the breeding that has to take place for the period between October and March. The foals to be borne would carry a value of between R300 000.00 and R750 000.00..
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> [39.4] Horses that take part in the annual championship have not been trained for this year's championships. Some of them have won in 2016 in their classes and therefore have to compete to maintain their status and value. Another foal has been born and nobody informed the Applicants about it. She heard from the vet. The foal and the mother mare costs about R150 000.00.
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> [39.5] The Respondent has not only taken their only source of income but he also has advertised the business under a different name. Which Applicant argues indicates that he is intending a total takeover of her business causing panic amongst clients.
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> [39.6] Business that was to take place at the venue in March 2016 has been lost. It had a potential to bring more business with a lot of enquiries by events and wedding planners.
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> [39.7] Their residence remain padlocked and they are still being refused access. Although alleged to be a building site the integrity of their residence remains and therefore still in a habitable state. Only the roof has been partly removed and could be replaced although the house still habitable without it. The horses can be accommodated the wooden stables

[40] The Applicant has indicated that there will be no harm suffered by the 1st Respondent. He has no right to the property since he still has to negotiate to buy Teubes' 60 % shares whilst there is an ongoing dispute about his alleged acquisition of the 40% shares of the 4th Applicant valued at approximately R5 885 000.00 (Five Million Rand). The Applicant has tendered the R1 000 000.00 (One Million Rand) back to him. He also has no right in law to the monies that he is collecting, therefore payment back to the Applicant will cause him no harm.

[41] To counter Applicant's application and allegation on the harm she says she continues to suffer, the 1st Respondent alleges, that:

> [41.1] the stabling business is running at a loss and he is not interested in the stud business.
>
> [41.2] The advertisement of the business under a new name was not true and he was unaware of it, done by a client without his involvement.

[41.3] He, as well has been praised for the efficient running of the stabling of the horses.

[41.4] The building is not habitable as the construction continued right through from the time the urgent application was served until the time they received the judgment. Venter has been informed of the impossibility of performance due to the structure being inhabitable.

[41.5] The newly built area is not risky to her occupation as she has moved the horses to the wooden stables where no building is taking place and therefore no more risk for the animals.

[41.6] **The amount that the stabling business is to make is very small.**

[41.7] The clients have signed an indemnity against the damage or injury to their horses irrespective of the cause.

[41.8] 1st Applicant's studs are available to her to inseminate anytime she wants, just like any stablers, he is not interested in them. He denies that the horses are neglected and argue that the attached photo of the horse alleged to be neglected was taken when it was turning as at its most its ribs would obviously show.

[41.9] The venue has not been so busy as she alleges. The last event happened in December 2016 for an event by a school.

[41.10] Their belongings are still stored in the storeroom under padlock as well as in the residence that Venter wants to occupy.

[42] The contentions by the Applicants are material and with merit. There is a substantial indication of irreparable harm that the Applicants continue to suffer that underscores whatever maybe the harm shown might be suffered by the Respondent. 1t is common cause to the parties that 1st Respondent still has to negotiate for the shares and the refurbishment of the property with the majority shareholder and Venter has tendered to pay back the R1 000 000.00 which he still has to accept.

[43] On the impossibility of performance the 1st Respondent does not deny that their residence is still there as he says that their belongings are still stored in the structure which is still padlocked. Willis' principles of Evidence states that "Where a spoliator deliberately or recklessly destroys or materially damages property to avoid having to restore it, justice is not served when the order is refused on grounds of impossibility of restoration (City of Tshwane *supra*). Respondent has not alleged that he could not make the necessary arrangement to restore the residence to the Applicants therefore not a true case of impossibility of performance.

[44] Considering the non-appealability of the interim interdict and the urgency of the remedy of the spoliation order that they are of exceptional circumstances and decreases the prospects of another court arriving at a different conclusion, it will be appropriate and just to grant the exceptional remedy of execution of the orders pending any further appeal process. The harm as stipulated by the Applicants substantiates the justification of the non-suspension of the execution of the judgment.

Under the circumstances the following order is made:

[1] The leave to appeal the order for both spoliation and the temporary interdicts is refused.

[2] The Application to implement the order of this court delivered on 6 and 9 March 2017 is granted with costs. The judgment and order will not be suspended pending the determination of any appeal process.

[3] The Respondent has an automatic right of appeal; which right of appeal must be exercised and dealt with as a matter of extreme urgency; and pending the outcome of the appeal the order is automatically suspended.

N V KHUMALO J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

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