IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 1160/2021

Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO

In the matter between:

WIM JACOBS	First Applicant
GAO XIA QIANG	Second Applicant
HUANG FENG	Third Applicant
MIKE BESTER	Fourth Applicant

And

ZINVOMAX (Pty) Ltd (Registration Number: 2018/323652/07)	First Respondent
GA-SEGONYANA LOCAL MUNICIPALITY	Second Respondent
COPY CENTRUM JOINT VENTURE (Joint Venture between fourth and fifth Respondents)	Third Respondent

BILY PURUSHOTHAMAN	Fourth Respondent
BUILT-IT GREEN CONSTRUCTION (PTY) LTD (Registration Number: 2017/492769/07)	Fifth Respondent
And in the matter of:	
ZINVOMAX (PTY) LTD	Applicant
And	
WIM JACOBS	First Respondent
GAO XIA QIANG	Second Respondent
HUANG FENG	Third Respondent
MIKE BESTER	Fourth Respondent

Coram: Lever J

JUDGMENT

Lever J

1. In this matter, I have two applications before me, both brought under the same case number. Firstly, an application for leave to appeal a judgment in an application for eviction handed down on the 19 January 2024. Secondly, an application for leave to carry into effect the order of eviction granted in terms of the judgment handed down on the 19 January 2024 under the provisions of section 18(1) and (3) of the Superior Courts Act[1] (the Act) despite the application for leave to appeal, any subsequent appeal or petition for leave to appeal the eviction judgment.

[1] Act 10 of 2013.

2. For the sake of convenience, I shall refer to the parties as they were referred to in the eviction application. In the eviction application four of the named respondents, being the twelfth, twenty-first, twenty-second and twenty-third respondents opposed the eviction application. They were referred to as the opposing respondents in the original judgment, which is now the subject of this application for leave to appeal (the main judgment). These opposing respondents in the eviction application are respectively the first to the fourth applicants in the application for leave to appeal.

3. The first applicant in the eviction application is the applicant in the section 18(1) and (3) application.

4. I heard the application for leave to appeal and the application under section 18(1) and (3) as separate applications on the same day. It is convenient to deal with both applications in one judgment.

5. The main judgment in this matter sets out the factual background in much greater detail. To make this judgment readable I will summarise the factual background to the extent required.

6. The second applicant, being the Ga-Segonyana Local Municipality, is the registered owner of a commercial property being erf 2[...] K[...]. The property was bought from Transnet in 2011. The opposing respondents occupied various premises in which various businesses were conducted on such property.

7. Historically, various occupants had leases of one form or another. However, it is clear from the papers that at the time that the eviction application was launched none of the respondents could claim any form of lease. In fact, and with particular reference to the opposing respondents, none of them claimed any form of lease. It will become relevant later that the twenty-third respondent conducted a business selling gas and petroleum products on a portion of this premises.

8. The second applicant issued a tender to develop the said property. At the conclusion of this tender process, the tender to develop the said property was awarded to the third applicant. In return for developing the property, the third applicant was awarded a long-term lease that was registered against the title deed of the property concerned. The third applicant, being a joint venture, then ceded such long-term lease to the first applicant. This cession was reduced to a notarial deed of cession and was also registered against the title deed of the said property.

9. The application for eviction from the property concerned was launched on the 8 June 2021. The twenty-third respondent who has deposed to all the main affidavits throughout this process then realised he would have to take certain of the second applicant's decisions and processes on review. The twenty-third respondent launched this review application on the 21 June 2022.

10. Then the opposing respondents were granted a stay of the eviction proceedings pending the outcome of the review application. The review application was dismissed on the 10 March 2023.

11. In the main judgment I found: "As a direct consequence of the dismissal of the said review application, the only basis upon which the opposing respondents could continue to oppose the eviction application was on the question as to whether the three main (applicants)[2] had *locus standi* to bring this application for eviction. Indeed, this was the only basis upon which the opposing respondents opposed the eviction application at the hearing hereof."[3]

12. In the main judgment I decided that the eviction order could be granted if any one of the three main applicants established their *locus standi* to bring the said application. This finding in the main judgment has not been challenged.

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[2] I see from the main judgment that I erroneously referred to the respondents at this point in the main judgment. The context makes it clear that it could only have been the applicants whose *locus standi* to bring the application for eviction was in question. This is consonant with the rest of my judgment and my finding on *locus standi*. Indeed, the parties hereto dealt with the matter as if it was the *locus standi* of the main 'applicants' which was relevant. In these circumstances, nobody can be prejudiced by my correcting this obvious mistake for present purposes.

[3] Main judgment paragraph 9 thereof.

13. In the main judgment I found that the second applicant had established its *locus standi* and the authority to launch the eviction application.

14. I did not decide the *locus standi* or the authority of the first and third applicants in the eviction proceedings. It was not necessary to do so.

15. Having set out the relevant background facts, I now turn to dealing with the application for leave to appeal.

16. The opposing respondents (applicants for leave to appeal) filed a document titled "SUPPLEMENTARY NOTICE OF APPLICATION FOR LEAVE TO APPEAL". They also filed what was called an Interlocutory Application for leave to file the supplementary Notice of Application for Leave to Appeal. Mr Venter who appeared for the applicants in the eviction matter (current respondents in the application for leave to appeal) considered this to be an irregular proceeding, but in the interests of proceeding did not oppose the Supplementary Notice of Application for Leave to Appeal.

17. Despite the Supplementary Notice of Application for Leave to Appeal being filed, Mr Moeng, who appeared for the opposing respondents (current applicants for leave to appeal) did not rely on any of the grounds set out in the said Supplementary Notice. In fact, Mr Moeng only pursued two broad grounds as a basis for the opposing respondents' application for leave to appeal. It was clear from Mr Moeng's presentation that these were the only grounds that his clients pursued in their application for leave to appeal. Hence, I shall only deal with the grounds argued by Mr Moeng.

18. It was also clear that in pursuing the application for leave to appeal that the opposing respondents only relied upon section 17(1)(a)(i) of the Act[4]. In other words, the opposing respondents, as a basis for their application for leave to appeal, only rely on the contention that "…the appeal would have a reasonable

[4] Superior Courts Act 10 of 2013.

prospect of success." They do not rely on the basis for leave to appeal set out in section 17(1)(a)(ii) of the Act, being that there "…is some other compelling reason why the appeal should be heard."

19. Having regard to the change from 'could' to 'would' brought about by section 17(1)(a)(i) of the Act there existed some differing approaches on how 'reasonable prospects of success' would be determined. Such controversy as might have existed appears to have been settled in the case of RAMAKATSA & OTHERS v AFRICAN NATIONAL CONGRESS & ANOTHER[5], where Dlodlo JA set out the position as follows:

> "…The test for 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] (references omitted)

20. The two grounds of appeal relied upon by the opposing respondents in the argument presented by Mr Moeng are: Firstly, in respect of *locus standi* and authority of the Municipal Manager to launch the eviction application as asserted in paragraph 1.3 of the founding affidavit do not prove that the municipality resolved to institute the eviction application; and Secondly, on a proper interpretation of the Power of Attorney, being annexure "FA2" to the founding affidavit of the eviction application, does not authorise the launching of the application on behalf of the Ga-Segonyana Local Municipality.

21. For the sake of clarity, here we are really dealing with the authority of the municipality's agent to bind the municipality to be a party to the launching of the

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[5] RAMAKATSA & OTHERS v AFRICAN NATIONAL CONGRESS & ANOTHER (Case No: 724/2019)[2021] ZASCA 31 (31 March 2021).
[6] Ramakatsa case above., para [10].

application for eviction. As owner of the relevant property the *locus standi* of the municipality to launch eviction proceedings against occupiers of such property ought not to be an issue.

22. The answers to both grounds of appeal are, to a large extent, the same. The opposing respondents, in the answering affidavits filed on their behalf, are obligated to admit or deny, or confess and avoid the contentions set out in the founding affidavit. If the opposing respondents fail to do so, the court will, for the purposes of the application accept the allegations made in the founding affidavit.[7] Although the authority referred to is old, the obligation of a respondent in dealing with material contentions set out in the founding affidavit is so ingrained on our motion proceedings that it can be regarded as trite. The reason for this is plain.

23. If respondents were not forced to deal with contentions set out in the founding papers explicitly and directly on pain of being deemed to have admitted contentions not explicitly denied or dealt with on the facts to show that despite an admission of a contention in the founding affidavit, there exists some other basis to avoid the consequences of the admission, then motion proceedings would be stymied and courts would be unable to make decisions on papers in motion proceedings.

24. In both grounds of appeal set out above, the opposing respondents in the eviction application, seek to challenge the authority of the Municipal Manager to be a party to launching such application after they have been deemed to have admitted such authority in the answering affidavit filed in the eviction proceedings.

25. This can never be allowed. A challenge to the authority of the Municipal Manager deemed to be admitted in the answering affidavit cannot be allowed. It severely prejudices the applicants. The applicants have been deprived of their right and opportunity to deal with such challenge or chose a different course of action

[7] Moosa & Another v Knox 1949 (3) SA 327 (N) at p. 331.

before they invested years and much expense in these legal proceedings. To allow this would be to sanction trial by ambush.

26. For the sake of completeness, I will set out the relevant passages and to the extent required deal with each one.

27. Paragraph 1.3 of the founding affidavit reads as follows:

> "I am duly authorised to depose to this affidavit on behalf of all the Applicants by virtue of resolutions passed and authorities granted, copies of which are annexed hereto marked **Annexures "FA1", "FA2"** and **"FA3"**."

28. In response to this in the main answering affidavit in the eviction application, the respondents state at paragraph 5:

> "**AD PARAGRAPHS 1.3 and 1.4**
> The contents hereof are noted."

29. Mr Moeng argued that the deponent to the founding affidavit does not assert his authority to bring the application on behalf of the applicants but only claims authority to depose to the founding affidavit. In my view reading paragraph 1.3 of the founding affidavit in context and having regard to the powers of attorney annexed as "FA1", "FA2" and "FA3", it is clearly implied that the deponent claims authority to bring the application for eviction on behalf of the affected applicants and asserts their authority to authorise him to do so.

30. In any event, the opposing respondents in the eviction proceedings, chose not to raise this issue in the answering affidavit. They have been deemed to have admitted the authority of the deponent to launch the eviction proceedings on behalf of the relevant applicants.

31. Mr Moeng, also referred to a response to paragraph 2.2 of the founding affidavit. Paragraph 2.2 of the founding affidavit is simply a citation of the second respondent. The paragraph Mr Moeng seeks to rely on reads as follows:

"**AD PARAGRAPH 2**

Save to note the non-existence of a Counsel (sic) Resolution that gives the Municipal Manager authority to sign the Special Power of Attorney, Annexure "FA2" on behalf of the municipality, the rest of the contents hereof are noted."

32. Mr Moeng argues that this is an explicit challenge to the authority of the Municipal Manager set out in the answering affidavit. Firstly, this is raised in relation to the mere citation of a party. Secondly, it is at odds with the deemed admission in relation to the authority of the deponent to the founding affidavit already dealt with. Thirdly, the opposing respondents claim no direct knowledge of the non-existence of the relevant resolution. At most, the opposing respondents can only really be saying the relevant Council Resolution is not annexed to the founding affidavit.

33. Having regard to the provisions of Rule 7(1) and Rule 35(12), as well as the earlier deemed admission being at odds with this assertion, the fact that this issue is raised in the context of the citation of the municipality, this does not amount to an explicit challenge to the authority of the municipalities agent (the municipal manager) to bind the municipality to be a party to the application. In short and in the context set out herein and above, it does not call for an answer.

34. In these circumstances, the opposing respondents ought to have invoked the provisions of Rule 7(1) alternatively Rule 35(12). Accordingly, I do not believe that that the response to this paragraph of the founding affidavit in the eviction application can be classified as a direct and explicit challenge to the authority of the Municipal Manager to sign the relevant power of Attorney.

35. To allow them to raise this issue in this manner is to deprive the applicants in the eviction application of the opportunity of dealing with this issue. The opposing respondents were obliged to raise this issue pertinently and explicitly in their answering affidavit when dealing with the applicants' assertion of authority and *locus standi*. They failed to do so. They cannot raise the issue or rely on it in this application for leave to appeal.

36. Under the second ground for leave to appeal argued before this court, the opposing respondents referred to the wording of “FA2” itself and they assert this power of attorney does not bind the municipality as an applicant in the eviction proceedings but in fact refers to ‘Copy Centrum’, the third applicant. This argument is also made after the deemed admission dealt with above. In these circumstances the applicants in the eviction proceedings did not have an opportunity to deal with this issue. At this stage of the proceedings, this argument cannot be allowed.

37. In these circumstances I cannot find a rational basis to conclude that another court would come to a different conclusion. Although the opposing respondents did not rely on section 17(1)(a)(ii) I cannot in any event find any compelling reason why an appeal in this matter should be heard.

38. Accordingly, this application for leave to appeal stands to be dismissed.

39. On the issue of costs Mr Venter argued that the opposing respondents had deliberately delayed the applicant’s development of the relevant property at every turn and that I should follow the approach set out BOOST SPORTS v SA BREWERIES[8] and award cost on an attorney and client scale despite the fact that the proceedings might not be vexatious, but on the basis that the other party might have been put to unnecessary expense. Cost are in the discretion of the trial court. After considering all of the circumstances of the case I believe the applicants in the eviction application (Zinvomax *et al*) be awarded costs on the basis of scale C of rule 69.

40. I now turn to the application to execute the relevant eviction order despite any contemplated proceedings to appeal such order.

41. Zinvomax, the first applicant in the eviction proceedings applies for an order under the provisions of section 18(1) and (3) that the order of the court handed

[8] 2015 (5) SA 38 (SCA) at para [27].

down on the 19 January 2024 be declared immediately executable and not be suspended pending the respondents' application for leave to appeal. It is necessary to refer to the exact wording as set out in the Notice of Motion dated the 7 May 2024, which reads:

> "That the judgment granted by the Honourable Justice Lever J granted on the 19 January 2024 ("the Judgment") be declared immediately executable and not be suspended, pending the Respondents' application for leave to appeal and/or any further appeal and/or petition proceedings initiated by the Respondents in respect of the Judgment, or the relief granted in terms of this application."

42. The last phrase of prayer 1 of the said Notice of Motion, being "… , or the relief granted in terms of this application.", is clearly contrary to the provisions of section 18(4)(iv). Accordingly, I cannot consider granting such relief.

43. Requirements to be established to declare an order immediately executable are in fact set out in section 18 (1) and (3). The first point to note is that section 18(1) starts by reinforcing the ordinary common law position that pending the outcome of appeal proceedings, including applications for leave to appeal, the order appealed against is suspended.[9] That an order allowing execution of an order of court pending an appeal will only be allowed in exceptional circumstances.[10]

44. The requirements to establish a basis for declaring an order executable despite appeal proceedings has been summarised by Sutherland J (as he then was) in the matter of INCUBETA HOLDINGS v ELLIS as follows:

> "[16] It seems to me that there is indeed a new dimension introduced to the test by the provisions of s 18. The test is twofold. The requirements are:
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> - First, whether or not 'exceptional circumstances' exist; and

[9] UFS v AFRIFORUM 2018 (3) SA 428 (SCA) at para [10] (p433 D-E).
[10] UFS., above at p 433 E.

- Second, proof on a balance of probabilities by the applicant of-

    - the presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order; and

    - the absence of irreparable harm to the respondent/loser, who seeks leave to appeal."[11]

45. The conclusion that 'exceptional circumstances' exist in a particular case is not an exercise of judicial discretion, but a finding of fact.[12] It is not possible to set out an all-encompassing definition of 'exceptional circumstances'.[13] The SCA in the UFS v AFRIFORUM case endorsed the approach of Sutherland J in the INCUBETA case where the approach to determine 'exceptional circumstances' was described as follows:

    "Necessarily, in my view, 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."[14]

46. The prospects of success in the contemplated appeal plays a role in in the analysis of the facts to determine if such facts disclose 'exceptional circumstances'.[15]

47. It seems to me that the irreparable harm the applicant might suffer is also relevant in determining if on the facts 'exceptional circumstances' exist.

48. From the wording of section 18(1) and 18(3) it is clear that the onus of establishing 'exceptional circumstances' and that the applicant would suffer irreparable harm if the execution of the order is not put into effect and conversely

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[11] INCUBETA HOLDINGS v ELLIS 2014 (3) SA 189 (GJ) at para [16].
[12] INCUBETA case., above., at para [18].
[13] INCUBETA case., above., at para [18].
[14] UFS v AFRIFORUM case., above at para [13].
[15] UFS v AFRIFORUM case., above at paras [14] to [15].

that the respondent would not suffer irreparable harm if the order were put into effect, clearly rests upon the applicant (Zinvomax).

49. Zinvomax in its founding papers makes the case that the opposing respondents have to date hereof delayed its occupation and development of the said site for a period of approximately four years. In that time building costs have gone up by a large percentage. The price of structural steel alone has gone up 60% in that period. If the delay had not been caused by the opposing respondents, the contemplated shopping centre would have been built and operational already. Zinvomax would already have been deriving rental income from the property. It is contended that Zinvomax would not be able to recover the increased building costs or the loss of rental income.

50. Further, Zinvomax contends that due to the fact that a competing shopping centre is being planned that Zinvomax had to secure tenants and bind themselves to leases to ensure a viable tenant mix to ensure the success of their shopping centre development. Zinvomax has to deliver occupation of these premises to the secured tenants by a fixed date in 2025 or suffer penalties or losing the secured tenants and thereby suffer reputational damage.

51. Opposing respondents argue that Zinvomax is the author of its own prejudice or irreparable harm, in that it participated in an unlawful cession of the long-term lease.

52. However, Zinvomax is not seeking an order to enforce the unlawful contract. It is seeking an order to evict the opposing respondents in circumstances where they clearly have no right of tenure to occupy the premises concerned. This conclusion that the opposing respondents do not have a legitimate right to occupy the relevant premises is based on their own version. It cannot be challenged. In fact, it was not challenged.

53. These circumstances are analogous to the circumstances that prevailed in the case of BITLINE SA 951 t/a SASOL ROODEPOORT WEST v SASOL OIL (PTY) LTD & AMRICH 58 PROPERTIES (PTY) LTD.[16]

54. Any prospective right the opposing respondents may have had in relation to the relevant premises vanished when the review application was dismissed. In these circumstances, even if hypothetically they were to succeed on appeal the opposing respondents would still have no right to occupy the relevant premises. In fact, Mr Venter described the opposing respondents as 'commercial squatters', on the facts of this case, such description is fully justified.

55. Furthermore, for the reasons set out above, the opposing respondents have no reasonable prospects of success on appeal.

56. In all of these circumstances, I find that the applicant (Zinvomax) has established 'exceptional circumstances' as contemplated in section 18(1). I also find that Zinvomax has established irreparable harm as contemplated in section 18(3).

57. Furthermore, in these circumstances, the opposing respondents cannot claim irreparable harm if the execution of the eviction order is not suspended. This must be so if the opposing respondents have no right to occupy the relevant premises even if they succeed on appeal. Success on appeal won't conjure up for the opposing respondents a lease or some other right to occupy the relevant premises.

58. The twenty-third respondent claims that he has certain environmental obligations in decommissioning the filling station. That evicting him before such compliance will constitute irreparable harm. Firstly, the twenty-third respondent has known since the dismissal of the review application that he would ultimately have to decommission and vacate the relevant premises as he himself does not assert a right to occupy the relevant portion of the premises concerned. Yet, he has done nothing to give effect to his obligations to decommission the filling station.

[16] BITLINE case., SAFLII., Case No: 2023/052612., 2024 ZAGPJHC390 (2 April 2024).

Secondly, the twenty-third respondent does not have to be in possession of the premises to comply with his environmental obligations in decommissioning the filling station. He merely has to make appropriate arrangements with Zinvomax. In these circumstances I cannot find that the twenty-third respondent would suffer irreparable harm if the eviction order is put into effect. I also cannot find on the facts set out in this application that any of the other respondents will suffer irreparable harm if the eviction order is made executable immediately.

59. Accordingly, Zinvomax has established all of the requirements for an order under the provisions of section 18(1) and (3) of the Act.

60. In respect of costs I believe Zinvomax is entitled to its costs but not on an attorney and client basis. In my view Zinvomax is entitled to costs as provided for on Scale “C” of Rule 69.

Order:

1) The application for leave to appeal is dismissed.

2) The applicants in the application for leave to appeal are to pay the costs of the respondents in the application for leave to appeal on the basis of scale C of Rule 69.

3) Insofar as it provides for the eviction of the respondents and all persons occupying erf 2[...] K[...] through the said respondents, and the assistance of the Sheriff and South African Police Services (if required), the judgment handed down in the eviction application on the 19th January 2024 is declared immediately executable and is not suspended by any application or petition for leave to appeal the said eviction judgment and order, or any subsequent appeal.

4) The respondents in the application to execute the eviction judgment in terms of section 18(1) and (3) of the Superior Courts Act 10 of 2013 are to pay the applicant’s (Zinvomax’s) costs in the section 18 application on the scale provided for in scale C of Rule 69.

Lawrence Lever
Judge
Northern Cape Division, Kimberley

Representation:	
For The Applicants:	*Adv LBJ Moeng*
Instructed by:	*TAYLOR INC ATTORNEYS*
For The Respondents:	*Adv JA Venter*
Instructed by:	*ENGELSMAN MAGABANE INC.*
Date of Hearing:	*13 June 2024*
Date of Judgment:	*18 June 2024*