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**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NUMBER: 01/2024

Reportable: YES

Circulate to Judges: YES

Circulate to Magistrates: YES

Circulate to Regional Magistrates: YES

In the matter between:-

**FS MINING WASH PLANT (PTY)
REG NO 2021/400264/07**

1st Applicant

**DR PRECIOUS THULISILE MABUZA
(ID NO 8[...])**

2nd Applicant

and

**V-FLOW SA (PTY) LTD
REG NO 2012/017043/07**

1st Respondent

JABULANE CALEB MAVIMBELA

2nd Respondent

**JUDGMENT
LEAVE TO APPEAL**

FMM REID J

Introduction:

- [1] This application of the leave to appeal is against the *rule nisi* issued on 9 January 2024 *ex tempore* of which reasons were provided in writing on 31 January 2024. The *rule nisi* was anticipated on 13 March 2024 and was confirmed in a written judgment dated 12 April 2024. The applicants in the application for leave to appeal are FS Mining Wash Plant (Pty) Ltd and Dr PT Mabuza.
- [2] The order forming the subject matter of the appeal, is in the following terms:
- a. The applicants are directed to restore to the respondent its *ante omnia* undisturbed possession of the property and chrome washing plant situated at Matooster-Boshoek, Rustenburg, Stand 58A, Pole: SCM111 Boshoek, Rustenburg.
 - b. In the event that the applicants refuse to restore the possession of the property as directed in (a) above, the Sherriff of the Court is directed and authorised, including the use of locksmiths, South African Police Service and private security providers, to seize and restore to the respondent its *ante omnia* undisturbed possession of the property and plant situated at Matooster-Boshoek, Rustenburg, Stand 58A, Pole: SCM111 Boshoek, Rustenburg.
- ii) This order is to be read together with the order issued on 9 January 2024 to have the effect that both parties are to have

possession of, and access to, the property and chrome washing plant situated at Matooster-Boshoek, Rustenburg, Stand 58A, Pole: SCM111 Boshoek, Rustenburg.

- iii) The cost is to be paid by the applicants, jointly and severally, the one paying the other to be absolved.

[3] The reasons for the judgment and confirmation of the *rule nisi* is contained in detail in the judgments dated 31 January 2024 and 12 April 2024 and will not be repeated herein.

Grounds for appeal

[4] The applicant advances the following grounds in the application for leave to appeal.

[5] That the court erred in substantive law in:

- 5.1. Finding that V-Flow acquired possessory interest acquired by locking of premises, and the application of the *mandament van spolie* was not correctly done;
- 5.2. That there was a procedural misdirection by this Court in failing to refer the dispute for oral hearing;
- 5.3. That the failure to refer the matter for oral hearing constrained this Court and prevented this Court to make proper determination on issues before it;
- 5.4. In finding that the property was deprived when it was locked, as the locking of the premises do not deprive possession of the property;

5.5. By finding that the locking of premises denied V-Flow from access, where V-Flow was not possession of the property as it has never acquired possession;

5.6. This Court confused the clear distinction between access to property and possession of property.

[6] The application for leave to appeal is opposed on the following basis:

6.1. That spoliation is a temporary remedy and as such an interim order. More specifically, that spoliation is an interim order that cannot be appealed against.

6.2. That the execution of spoliation is not suspended unless there is an order to that effect in terms of section 18(2) of the **Superior Courts Act** 10 of 2013.

[7] In determining whether leave to appeal should be granted, this Court is guided by section 17 of the **Superior Courts Act** 10 of 2013, which reads as follows:

“17 Leave to appeal

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) *there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*

(b) *the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and*

(c) *where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.*

(2)(a) *Leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same court or Division.”*

[8] The contract between the parties has been entered into on 11 November 2023 and was for a fixed period of six (6) months. It will thus have come to an end on 11 May 2024, which is four (4) days from today. Having regard to the acrimonious relationship between the parties evidenced by the nature and substance of the litigation, I seriously doubt that the contract will be renewed.

[9] In being terminated *ex lege* by effluxion of time, the question of possession and/or spoliation to the property becomes academic of nature and thus moot. FS Mining Wash Plant (Pty) Ltd is the plant owner of the property and will have sole possession of the chrome washing plant after termination of the contract.

[10] It was established by the Constitutional Court in **Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd** 2015 (3) SA 479 (CC) para

[18] that an appeal that has become moot, will normally only be considered if it is in the interest of justice that the appeal proceed.

[11] In **Agribee Beef Fund Ltd and Another v Eastern Cape Rural Development Agency and Another** 2023 (6) SA 639 (CC) the Constitutional Court considered, *inter alia*, the question of granting leave to appeal where the matter became moot due to a contract expiring *ex lege* by effluxion of time. In paragraph [24] of the judgment, the Constitutional Court classified the circumstances under which a matter that has become moot, would be in the interest of justice to be determined on appeal, as follows:

“[24] A matter is moot 'where issues are of such a nature that the decisions sought will have no practical effect or result'. The factors that bear consideration when determining whether it is in the interests of justice to hear a moot matter include –

- (a) whether any order which it may make will have some practical effect either on the parties or on others;*
- (b) the nature and extent of the practical effect that any possible order might have;*
- (c) the importance of the issue;*
- (d) the complexity of the issue;*
- (e) the fullness or otherwise of the arguments advanced; and*

(f) *resolving disputes between different courts.”*

[12] These requirements set out above were also stipulated by the Constitutional Court in **Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exploration and Exploitation SOC Ltd and Another** 2020 (4) SA (CC).

[13] I do not find that any of the circumstances, or any other aspect that would render it in the interest of justice to proceed with an appeal in this dispute, is present *in casu*.

[14] As such, any appeal is moot and leave to appeal should not be granted.

Costs

[15] The normal principle in costs is that the successful party is entitled to its costs.

[16] I find no reason why this principle should not be applied to the effect that the applicants should pay the cost of this application for leave to appeal.

Order:

In the premise, I make the following order:

- i) The application for leave to appeal is dismissed.
- ii) The applicants are ordered to pay the costs of the application for leave to appeal, the one paying the other to be absolved.

**FMM REID
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG**

DATE OF HEARING: 3 MAY 2024

DATE OF JUDGMENT: 7 MAY 2024

APPEARANCES:

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