

SOUTH AFRICA / JUDGMENT

## Confuscore (Pty) Limited v Ehlers N.O and Others (2919/2016) [2019] ZALMPPHC 2 (1 February 2019) [2019] ZALMPPHC 2

COURT

Limpopo High Court, Polokwane

BEFORE

E M Makgoba

CASE / FILE NUMBER

2919/2016

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REPUBLIC  
OF SOUTH AFRICA  
IN  
THE HIGH COURT OF SOUTH AFRICA  
(LIMPOPO  
DIVISION, POLOKWANE)  
CASE  
NO: 2919/2016  
In

the matter between:

CORFUSCORE  
(PTY) LIMITED  
THIRD  
RESPONDENT  
(Registration Number:  
2014/049788/07)  
and  
GERT  
HENDRIK EHLERS N.O  
FIRST  
APPLICANT  
DANIEL  
MATTHYS CHRISTOFFEL EHLERS N.O  
SECOND  
APPLICANT  
DANIEL  
FREDERICK EHLERS N.O  
THIRD  
APPLICANT

(In  
their capacities as the Trustees for the time  
being of The Emberbe  
Trust, Registration  
number: IT20074/2000)

In re:

GERT  
HENDRIK EHLERS N.O  
FIRST  
APPLICANT  
DANIEL  
MATTHYS CHRISTOFFEL EHLERS N.O  
SECOND  
APPLICANT  
DANIEL  
FREDERICK EHLERS N.O  
THIRD  
APPLICANT  
LAND  
AND AGRICULTURAL DEVELOPMENT  
FIRST  
RESPONDENT  
BANK OF SOUTH AFRICA  
THE  
SHERIFF OF THE HIGH COURT, BOCHUM  
SECOND  
RESPONDENT  
(Known to the Applicants  
as Mr. Ramaala)  
CORFUSCORE  
(PTY) LIMITED  
THIRD  
RESPONDENT  
REGISTRAR  
OF DEEDS, POLOKWANE  
FOURTH  
RESPONDENT  
ABSA  
BANK LIMITED  
FIFTH  
RESPONDENT / INTERVENING PARTY

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**JUDGMENT**

MAKGOBA JP

- [1] This is an application in terms section 18 of the Superior Courts Act 10 of 2013 (“the Act”) for the operation and execution of a Court Order pending the outcome of the Applicants’ application for leave to appeal including the appeal, if any, to be noted.
- [2] On the 19 January 2018 the Third Respondent (Corfuscore (Pty) Ltd) bought three farms at a sale in execution conducted by the Sheriff of Bochum (the Second Respondent) and registration of transfer of ownership was effected by the Registrar of Deeds into the name of the Third Respondent on 30 April
2018. The First, Second and Third Applicants (the former owners of the said farms) brought an application to set aside the aforesaid sale in execution. Their application was dismissed with costs in a judgment of this Court delivered on 16 August 2018. The Applicants filed an application for leave to appeal against the said Court judgment of the 16 August 2018, which application was dismissed
- on 8 November 2018. The Applicants have since filed a petition to the Supreme Court of Appeal seeking leave to appeal against the Court judgment of 16 August 2018.
- [3] It is against this background that the Third Respondent had brought the present application in terms of section 18 of the Act seeking an order that the operation and execution of the aforesaid judgment of 16 August 2018 is not suspended pending the outcome of the petition to the Supreme Court of Appeal or the appeal itself.
- [4] The effect of this Court’s judgment of the 16 August 2018 is that the sale in execution is lawful and ownership of the farms had duly passed to the Third Respondent who should now have access or occupation of the farms it purchased at the sale in execution. With this application in terms of section 18 of the Act the Third Respondent seeks to enforce its right of ownership pending the outcome of the appeal process sought by the Applicants.
- [5] In terms of section 18 of the Act once an application for leave to appeal has been filed the judgment and the order of the Court is suspended pending the decision of the application for leave to appeal or appeal unless the Court, under exceptional circumstances, orders otherwise.
- [6] The well-established common law rule of practice in our courts has been that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, 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 544 H – 545.

In *South Cape Corporation* at 545 B – C, Corbett JA reiterated that the purpose of the rule was to prevent irreparable damage being done to the intending Appellant by the execution of the judgment pending appeal. However, as further explained by Corbett JA at 545D-G, the Court to which application was made for leave to execute the judgment pending appeal, had a wide general discretion to grant or refuse such leave and would, inter alia, have regard to the following factors:

- (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal.....if leave to execute were to be granted.
- (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal.....if leave to execute were to be refused.
- (3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose.
- (4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.

[7] Section 18 of the Act reads as follows:

*“Suspension of decision pending*

- (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 or of an 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 the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
- (4) If a court orders otherwise, as contemplated in subsection (1)—
  - (i) the court must immediately record its reasons for doing so;
  - (ii) the aggrieved party has an automatic right of appeal to the next highest court;
  - (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
  - (iv) such order will be automatically suspended, pending the outcome of such appeal.

- (5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.”
- [8] Section 18 of the Act introduces a fresh test for leave to put into operation and execute an order pending the appeal process and accordingly, judicial authority that predates the section has been overtaken by its enactment.

In *Incubeta Holdings (Pty) Ltd v Ellis* 2014 (3) SA 189 (GJ) at 194 B – D Sutherland J stated the position as follows:

*“The thesis advanced on behalf of the Respondents is that the discretion hereto exercised by the Court is history, and that one must now look exclusively to the text of section 18. Emphasis was placed on the heavy onus on the litigant who seeks to execute an order, pending an appeal, as formulated on ss 18(1) and (3).*

It seems to one that there is indeed a new dimension introduced to the test by the provisions of section 18. The test is twofold. The requirements are:

- First, whether or not exceptional circumstances exist and
  - 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.”
- [9] The test for leave to put into operation and execute an order pending the appeal was authoritatively set out in a more recent judgment of Full Court (per Ranchod, Fabricius and JW Louw JJ) *Gauteng Division, Pretoria in the matter of Member of the Executive Council for Co-Operative Governance, Human Settlement and Traditional Affairs (COGHSTA) and Others v Mogalakwena Municipality and Another* 2017 (2) SA 464 (GP) at paragraphs [24] – [25].

See also, more recently, the Supreme Court of Appeal decision in *University of the Free State v Afriforum and Another* [2016] ZA SCA 165 (17 November 2016) at paragraph [9] – [11], now reported as 2018

(3) SA 428 (SCA).

[10] It is clear therefore that in terms of the present legal dispensation the Applicant must prove three jurisdictional requirements on a balance of probabilities namely:

- 10.1. Exceptional circumstance;
- 10.2. Irreparable harm to the Applicant if the order is not granted; and
- 10.3. That the Respondent will not suffer irreparable harm if the order is granted.

If the above jurisdictional requirements are met, the Court has a discretion to grant or dismiss the application. Such discretion should be exercised in the interest of justice.

- [11] Whether or not exceptional circumstances for the purpose of section 18(1) are present, must necessarily depend on the peculiar facts of each case.

In Incubeta Holdings at paragraph 22 Sutherland J put it as follows:

*“Necessarily, in my view, exceptionality must be fact-specific. The circumstances which are or may be “exceptional” must be derived from actual predicaments in which the given litigants find themselves.”*

- [12] What is immediately discernible upon perusing sub-sections 18(1) and (3), is that the legislature has proceeded from the well-established premise of the common law that the granting of relief of this nature constitutes an extraordinary deviation from the norm that, pending an appeal, a judgment is suspended. Section 18(1) thus states that an order implementing a judgment pending appeal shall only be granted under exceptional circumstances. This exceptionality order to this effect is underscored by section 18(4), which provides that a Court granting the order must immediately record the reasons; that the aggrieved party has an automatic right of appeal; that the appeal must be dealt with as a matter of extreme urgency and that pending the outcome of the appeal the order is automatically suspended. See *University of the Free State v Afriforum and Another* 2018 (3) SA 428 (SCA) at [9].

- [13] It is clear that the requirements introduced in sub-sections 18(1) and

- (3) are more onerous than those of the common law. Apart from the requirements of “exceptional circumstances” in section 18(1), section 18(3) requires the Applicant in addition to prove on a balance of probabilities that he or she will suffer irreparable harm if the order is not made, and that the other party will not suffer irreparable harm if the order is made. See *University of the Free State v Afriforum and Another* supra and *Ntlemeza v Helen Suzman Foundation and Another* [2017] 3 All SA 589 (SCA)

- [14] It is trite that the prospects of success in the pending appeal should play a role in determining whether an order in terms of section 18 of the Act should be granted - *University of the Free State v Afriforum and Another* 2018 (3) SA 428 (SCA) at [14]. In casu I have already made a finding that there are no reasonable prospects of success in the appeal, hence I dismissed the Applicant’s

application for leave to appeal on the 8 November 2018.

- [15] I now turn to examine the facts of the present application in order to determine the predicaments of the litigants herein so as to make a finding as to whether exceptional circumstances do exist and to what extent each party stands to suffer irreparable harm in the event of the application being granted or dismissed.

- [16] The Third Respondent avers in its founding affidavit that exceptional and out of the ordinary circumstances exist that indicate and dictate that this application in terms of section 18 of the Act should move this Court to exercise judicial discretion to grant the relief sought by the Third Respondent. Such exceptional circumstances follow hereunder.
- [17] The Third Respondent finds itself in an unusual position wherein the Applicants prevent and frustrate the Third Respondent, as purchaser of the farms, from exercising its ownership and occupational rights and the right to farm its land for which it has paid a substantial amount of money (R 31 000 000.00). The purchase price was raised in a form of a loan from a banker (ABSA Bank). The Third Respondent is obliged to service the bond on the purchased farms in the sum of R 4 181 066.16 per annum with effect from May 2019.
- [18] The Applicants, following judicial attachment of the farms on 3 November 2017 and 13 November 2017, lost all rights to ownership of the three farms in the subsequent sale in execution that took place on 19 January 2018 and transfer of ownership to the Third Respondent on 30 April 2018. The Applicants remain indebted to the execution creditor (Land and Agricultural Development Bank) in a substantial outstanding balance. The Applicants are virtually insolvent and will not be able to pay the outstanding balance of the debt.
- [19] The execution creditor (First Respondent) had obtained default judgment against the Applicants, which judgment remains valid and had led to the sale in execution on 19 January 2018. As matters stand, there are no chances that the ownership of the farms can revert to the Applicants as long as the Applicants are still indebted to the First Respondent. The conduct of the Applicants is extraordinary in that the Third Respondent, notwithstanding the purchase and transfer of the three farms, is prevented from generating income from farming its land. The fact that occupation of the farms could not take place immediately after the purchase date has already caused severe prejudice and placed the Third Respondent at some financial risk.
- [20] In a conversation between the deponent to the Third Respondent's founding affidavit and the Applicants, the latter told the deponent in no uncertain terms that they will continue with appeals and prevent the Third Respondent from farming "for the next two years" irrespective of the outcome. The First Applicant crudely told the deponent that he does not care if they (Applicants) leave the farming property with only their underwears but they will keep on appealing. This in my view, is a clear indication on the part of the Applicants to frustrate the rights of the Third Respondent.
- [21] The circumstances outlined in paragraphs 17 to 20 above constitute, in my view, exceptional circumstances calling for the intervention of this Court by way of implementing the provisions of section 18 of the Act.
- [22] The conduct of the Applicants in refusing the Third Respondent access to the farming property is causing irreparable harm to the Third Respondent. The intention of the Third Respondent was to purchase the farming property to farm the land. This entails producing

food and to contribute to food security for the country and to make profit to pay the loan obtained from ABSA Bank. The Third Respondent had obtained a loan in the sum of R 31 000 000.00 to purchase the three farms. In terms of the sale agreement the Third Respondent would have been entitled to occupation of the farms immediately upon the fall of the hammer at the auction of 19 January 2018. The conduct of the Applicants is prejudicial to the Third Respondent and continues to cause irreparable harm to the Third Respondent.

- [23] The Third Respondent avers that had it received occupation of the farming property immediately upon the purchase thereof on 19 January 2018, the net income from the planned production on the farms would have yielded a nett income of at least R 4 323 537.00. These allegations are not denied by the Applicants in their answering affidavit. The loss of income or profit seriously prejudice the Third Respondent and the Third Respondent will have difficulty to pay the first instalment due and payable in May 2019. This will unfortunately raise the possibility that the Third Respondent's bankers could reconsider the loan, which is a real and extremely serious threat to the continued existence of the Third Respondent as food producer and employer of many workers on the farms.
- [24] To date hereof the Third Respondent has already lost income of no less than approximately R 4 323 573.00. In the event that the Third Respondent is not granted the relief sought in this application, the Third Respondent would suffer further irreparable financial harm in that the Third Respondent would also lose the potential income from farming for 2019. This is so because the finalization of the appeal process could take another year or even more.
- [25] On the evidence before me it has not been shown that the Applicants will suffer any harm if the order sought by the Third Respondent is granted. The First Applicant is a retired farmer who is not involved with or connected with the farming on the three farms. He simply resides with his wife on one of the farms. The Second Applicant together with his wife reside on one of the farms and does not conduct any farming there. The Third Applicant is employed as a reverend and resides in Ermelo. He is not physically involved with the farming on any of the three farms.
- [26] In my view the Applicants do not conduct any feasible or profitable farming on the three farms but they simply continue to frustrate the Third Respondent's ownership rights with continuous litigation aimed at preventing the Third Respondent from proceeding with its planned commercial farming on the farming property. In the event that the relief sought in this application is granted, the Applicants will not be caused any harm whatsoever as they will be allowed in the interim to continue residing on the farm until they take reasonable steps to obtain alternative accommodation.
- [27] The Third Respondent has made out a case for the relief sought in terms of section 18 of the Superior Courts Act, 10 of 2013 and I accordingly grant the following order:

1. The judgment and order of this Court granted on 16 August 2018 shall operate and be executed pending the outcome of the application for leave to appeal including any appeal noted, if at all.
2. The Third Respondent is exempted from furnishing security in terms of Rule 49(12) of the Uniform Rules of Court.
3. The Applicants are to pay the costs of this application jointly and severally, the one paying the other to be absolved.

E M MAKGOBA

JUDGE PRESIDENT OF THE HIGH COURT, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Application heard on : 25 January 2019

## Judgment

delivered on : 1 February 2019

For Third Respondent : Adv JC Kloppe

Instructed by

: Corrie Nel & Co Attorneys

Polokwane

For the Applicants : Adv. F Botes SC

Adv. M Bresler

Instructed by

: Espag Magwai Attorneys

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