

SOUTH AFRICA / JUDGMENT

Portion 48 Douglasdale CC v Morgan and Others; In re: Morgan and Another v Portion 48 Douglasdale (16595/2012) [2017] ZAGPJHC 229 (28 April 2017)

[2017] ZAGPJHC 229

COURT

South Gauteng High Court, Johannesburg

BEFORE

D S S Moshidi

CASE / FILE NUMBER

16595/2012

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION,

JOHANNESBURG

CASE

NO: 16595/2012

REPORTABLE

OF

INTEREST TO OTHER JUDGES

28/4/2017

In the matter

between:

PORTION
48 DOUGLASDALE
CC Applicant
and
MORGAN,
SEBASTIAN ROBERT
JOHN First
Respondent
MORGAN,
BRUNHILDE
LIAN Second
Respondent
THE

SHERIFF OF
ROODEPOORT Third
Respondent
In re the matter

between:

MORGAN,
SEBASTIAN ROBERT
JOHN First
Applicant
MORGAN,
BRUNHILDE
LIAN Second
Applicant
PORTION
48 DOUGLASDALE
CC Respondent
SUMMARY
Civil
procedure – application for leave to execute eviction order
pending leave to appeal – operation and execution
of order
suspended pending appeal – new test in terms of provisions of
section 18(1) of the Superior Courts Act 10 of 2013 – when to
be granted – onus
of proof – factors to be considered – the meaning of the
word “pending”
– application to execute order pending appeal dismissed with
costs.

JUDGMENT

MOSHIDI, J:

INTRODUCTION

- [1] This opposed application to execute an eviction order granted in favour of the applicant, brings into direct focus the provisions of Uniform Rule 49(11) under the Supreme Court Act 59 of 1959, now repealed from May 22, 2015 as indicated later below.

THE NOTICE OF MOTION

- [2] In the notice of motion dated 10 August 2016, the relief sought by the applicant is framed in the following terms:

“1. That it be ordered that the eviction order that had been granted against the first and second respondents on 22 May 2013 by the honourable judge Ratshibvumo in terms of annexure ‘PV2’ to the founding papers, is not suspended by the filing of the first and second respondents’ purported application for leave to appeal dated 22 April 2014 (annexure ‘PV5’ to the founding papers) against the order dismissing the application for rescission of the aforesaid eviction order;

2. That it be declared that the eviction order of 22 May 2013 is of full force and effect, is not suspended and may be carried out into execution;
3. Alternatively to prayers 1 and 2 above, that it be ordered in terms of section 18(1) of the Superior Courts Act, No 10 of 2013 that the eviction order granted on 22 May 2013 by the honourable judge Ratshibvumo be carried out into execution despite the delivery of the first and the second respondents of their notice of application for leave to appeal against the judgment granted by the honourable Ms Justice Mphahlele on 14 April 2014;
4. That the third respondent be ordered and directed to forthwith give effect to and carry into execution the eviction order of 22 May 2013 by forthwith evicting the first and the second respondents and any person claiming occupation through or under them from the immovable property known as Erf 880 Constantia Kloof, Extension 4 and situated at No. 3 Willem Wynand Place, Constantia Kloof, Extension 4, Roodepoort and to restore vacant possession thereof to the applicant;
5. That the first and the second respondents be ordered to pay the costs of this application on the scale as between attorney and client ...”[1]

SOME COMMON CAUSE FACTS

- [3] The following facts are either common cause or not seriously disputed: the applicant is a duly registered close corporation. The first and the second respondents are married to each other in community of property, and presently (at least at the time of the application) occupied the property in dispute, situated at No 3 Willem Wynand Place, Constantia Kloof, Extension 4, Roodepoort, Gauteng Province (“the property”). The third respondent is the Sheriff for Roodepoort, Gauteng Province (“the third respondent”).
- [4] The applicant is the registered owner of the property from about August 2006.[2] During May 2012, the applicant launched eviction proceedings against the respondents out of this court, in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (“the PIE Act”).[3] The respondents opposed the application. However, in spite of such opposition, an order for their eviction was granted by the Honourable Ratshibvumo AJ (“Ratshibvumo”) on 22 May 2013.[4] In terms of the eviction order, the respondents had to vacate the property on or before 30 June 2013, and ordered to pay the costs of the application.

- [5] Following the eviction order, the respondents launched an application to stay the execution of the eviction order pending an application for the rescission of the eviction order. That application came before Lamont J, who on 12 July 2013, issued an order as follows:

“Staying the execution of the judgment granted on the 22nd May 2013 by his Lordship Justice Ratshibvumo pending the finalisation of the rescission application to be heard on the 5th day of August 2013. Costs are reserved.”[5]

- [6] Some nine (9) months later, and on 14 April 2014, and apparently due to delays ascribed to the respondents, the respondents’

rescission application came before her Ladyship Mphahlele J. The application for rescission was dismissed with costs.[6]

- [7] The respondents’ attorney of record, i.e. Ngwalala Attorneys, withdrew as attorneys of record on 22 April 2014. On the same day, the respondents served and filed a notice of application for leave “to appeal against the whole judgment as granted by the Honourable Ms Justice Mphahlele on the 14th April 2014” (sic). This application for leave to appeal is somewhat problematic, and severely challenged by the present applicant, and quite correctly so, in my view. I shall, in due course revert to this aspect.

- [8] For present purposes, it is common cause that, as at the date of the hearing of the instant application, (February 2017), the application for leave to appeal had not been finalised for some unknown reasons.

THE IMPUGNED APPLICATION FOR LEAVE TO APPEAL

- [9] I revert to the impugned notice of application for leave to appeal. The applicant asserts that: the application for leave to appeal does not comply with the wording of such application; it was not properly filed since it does not bear the registrar of appeals’ stamp; the stamp now appearing on the face of the notice of application, purports to be an application for leave to appeal; the purported appeal was filed at room number 004, which room number does not deal with applications for leave to appeal; the purported application should have been filed at room 138 of this court building; the basis upon which the purported appeal is premised is founded on grounds not raised in the applicant’s founding papers in the application for the

rescission of the eviction order, nor were such grounds raised in the answering papers to the initial eviction application; and that the respondents are now merely clutching at straws with the allegations made in the purported application for leave to appeal, and which they have not prosecuted since the application was delivered on 22 April

2014. In short, the applicant challenges the authenticity of the notice of application for leave to appeal.

- [10] In the answering papers, the respondents refute the applicant’s assertions regarding the nature of the application for leave to appeal. The refutation, in broad terms, includes that, the application for leave to appeal was properly served on the applicant and filed at court

during which period the respondents were not legally represented; that even though the application was stamped in the wrong offices of the registrar, the person in that office thereafter accompanied the respondents to the correct appeals' office where the application was filed, and it was confirmed by one Estelle at the appeals' office that the appeal was recorded in her register on 24 April 2014; the respondents are currently awaiting for the transcribers to prepare the record of proceedings; and that the respondents are also awaiting for a date for the hearing of the application for leave to appeal.

- [11] I observe that, although the application for leave to appeal is directed at the order of Mphahlele J (dismissing the rescission application), a careful and proper reading of the contents thereof, shows plainly that it is aimed at the order of Ratshibvumo (in granting the eviction order). The respondents cannot, in the circumstances, be penalised for this incorrect reference. The surname "Mphahlele" is handwritten on the application. The matter is further compounded by the respondents suggesting that the notice of application for leave to appeal is in fact directed at both the eviction order and the dismissal of the rescission application

order. In my view, the administrative procedures followed or not followed properly, cannot be laid exclusively at the door of the respondents. Practice has shown that applications for leave to appeal are not always dealt with as expeditiously as they should be, for a variety of administrative reasons. The fact of the matter is that there has not yet been adjudication of the application for leave to appeal whether or not it complies with the rules related thereto. This is not the place for me to pronounce on the merits of such application. I accept for present purposes therefore, in favour of the respondents, that there is a pending application for leave to appeal.

THE PERTINENT ISSUE TO BE DECIDED

- [12] The pertinent question for determination is whether the eviction order granted in favour of the applicant should be allowed to be executed in spite of the respondents' pending application for leave to appeal, as envisaged in section 18(1) of the Superior Courts Act 10 of 2013. Stated differently, whether or not the eviction order should be suspended pending the outcome of the respondents' appeal.

- [13] It is now accepted that prior to May 2015, applications of the nature under discussion were regulated by rule 49(11) of the Uniform Rules of Court which provided that:

"When an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on application of a party, otherwise directs."

- [14] In applying the provisions of this rule, the Constitutional Court, per Mogoeng J (as he then was), and in *Betlane v Shelly* Court,[7] said:

“An application for leave to appeal suspends the execution of an order, unless leave to execute is sought and obtained, not from a registrar, but from the court that granted the order. Although the respondent was aware of the pending application for leave to appeal, it nevertheless obtained the writ of execution and executed the eviction order. It is of some significance that the writ was issued by the appeals registrar of the same High Court in which the application for leave to appeal was pending. All this flew in the face of rule 49(11).”

- [15] When rule 49(11) was still operative, the common law in regard thereto was authoritatively stated by Corbett JA (as he then was) in the leading case of *South Cape Corporation v Engineering Management Services*,^[8] where he said the following:

*“Whatever the true position may have been in the Dutch courts, and more particularly the court of Holland (as to which see *Ruby’s Cash Store (Pty) Ltd v Estate Marks and Another* 1961 (2) SA 118 (T) at pp. 120-3), it is today the accepted common law rule of practice in our Courts 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. To obtain such leave the party in whose favour the judgment was given must make special application ... The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant*

either by levy under a writ of execution or by execution of the judgment in any manner appropriate to the nature of the judgment

appealed from. (Red’s case, *supra* at p. 513). The Court to which application for leave to execute is made has wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised (see Voet, 49.7.3; *Ruby’s Cash Store (Pty) Ltd v Estate Marks and Another*, *supra* at p. 127). This discretion is part and parcel of the inherent jurisdiction to which the Court has to control its own judgments (cf. *Fismer v Thornton*, 1929 A.D. 17 at

- p. 19). In exercising its discretion the Court should, in my view, determine what is just and equitable in all the circumstances,

and, in doing so, would normally have regard, *inter alia* to the following factors: (1) the potentiality of irreparable harm or

prejudice being sustained by the appellant on appeal (the respondent in the application) if leave to execute were to be granted;

- (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (the applicant in the application) 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, eg to gain time or harass the other party; and (4) whether 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.”

See also *Incubeta Holdings v Ellis*[9] and *Tenants, Williston Court v Lewray Investments*.[10]

[16] From the above, it is plain that under Uniform Rule 49(11), which essentially restated the common law, a court to which an application for leave to execute is made, had a wide general discretion to either grant or refuse such leave, and if leave be granted, the court could determine the conditions on which the right to execute could be exercised. See for example, *Southgate Corporation (Pty) Ltd (supra)*, and 545C; and *Airy v Cross-Border Road Transport Agency* 2001 (1) SA 737 (T).

SECTION 18 OF THE SUPERIOR COURTS ACT

[18] The relevant parts of section 18 are subsections (1), (3), (4) and (5). These provide, respectively, as follows:

“(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.

- (3) A Court may only order otherwise as contemplated in subsection (1) or in (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 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.” (underlining added)

THE PROPER APPROACH TO INTERPRETATION

[19] As mentioned in paragraph [15] of this judgment, in order to arrive at a just and equitable resolution, it all boils down to a proper approach to the interpretation of the provision under discussion. In cases such as *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[12] the Court at paragraphs [18] and [19] said:

“Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised

in Bastian Financial Services (Pty) Ltd v General Hendrick Schoeman Primary School. The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision provisions in the light of the document as a whole and circumstances attendant upon it coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard to as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or a statutory instrument is to cross the divide between interpretation and legislation ... All this is consistent with the 'emerging trend in statutory construction'. It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in Jaga v Dönges NO and Another, Bhana v Dönges NO and Another namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that the courts in South Africa would now

follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate. The path that Schreiner JA pointed to is now received wisdom elsewhere. Thus, Sir Anthony Mason CJ said:

‘Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have been viewed in isolation, divorced from their contact. The modern approach to interpretation insist that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.’” (footnotes omitted)

(See also *Julies v Speaker of National Assembly and Others*,^[13] and *Tenants, Williston Court v Leroy Investments* (supra).)^[14]

THE AVAILABLE PERSONAL CIRCUMSTANCES OF THE PARTIES

^[20] Prior to applying the above legal principles to the facts of the present matter, and for proper context, I find it befitting to recall the circumstances of the parties and the rather chequered history of the matter. I do this, conscious of the fact that I am not called upon at all to pronounce on the merits of the eviction order, and/or the unsuccessful application for the rescission of such order. I also do so to determine precisely what constitutes “exceptional circumstances”. In fact, I was not placed in possession of the files relating to both the eviction, and the subsequent rescission application proceedings, for whatever reasons. These issues have been dealt with by the court a quo, previously. All I have is a duplicate file relating to the instant application before me. The applicant is a registered

close corporation. It purchased the property during March 2006, for the sum of R1,9 million, and became the registered owner during

August 2006. On the other hand, the respondents are a married couple. They presently occupy the property with their family.

It is unknown to me under what circumstances, and for how long the respondents have been occupying the property. They allege that, during the time of their residency at the property, they have maintained and upgraded the property.[15] They will now face financial harm and irreparable harm if the eviction order is to be carried out, whilst their application for leave to appeal is pending. All they wish for, is for the hearing of their pending application for leave to appeal, which they argue as having been filed and served genuinely and properly. At the time, they were not legally represented. There are plainly no other details provided about the relevant circumstances of the respondents, save that the first respondent (husband) is “an adult male” of some 51 years, and the second respondent, (his wife), is “an adult female” of some 40 years. Details of their other personal circumstances, occupation and incomes, as well as the number of, and ages, if any, of their dependants and other occupants of the property, are lacking.

[21] I revert to the correct approach to the interpretation of section 18 of the Superior Courts Act. It is plain to me that the provisions of subsection (18)(2) are not applicable here since these relate to “interlocutory orders not having the effect of a final judgment” (cf, for example, *Tshwane City v Afriforum and Another*).[16]

[22] I am concerned here with the bringing into operation of an eviction order, pending what the respondents term a pending application for leave to appeal. It is clear from the reading of section 18 of the Superior Courts Act that, the words, “exceptional circumstances”, have not been defined by the legislature. However, this is not unusual. For example, in respect of the imposition of minimum sentences in regard to criminal offences, and under the Criminal Law Amendment Act,[17] the words “substantial and compelling circumstances” under section 51(3)(b) or (a) thereof are not defined at all. It was left to the courts, without unfettered discretion for that, to identify and find such circumstances. The same applies here although in a different context, i.e. in civil proceedings. The best we have for present purposes, and as set out in *Incubeta Holdings v Ellis* (supra),[18] that:

“What constitutes ‘exceptional circumstances’ has been addressed by Thring J in MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and Another 2002 (6) SA 150 (C), where summation of the meaning of the phrase is given at 156I-157C.”

However, once more, the above summation was made by Thring J in the context of different legislation, namely section 5(5)(a)(iv) of the Admiralty Regulation Act 105 of 1983.

[23] In my considered view, there must have been cogent reasons why the legislature introduced the words “exceptional circumstances” in section 18(1) of the Superior Courts Act, in matters of this nature. If this was not so, then the legislature would have left unaltered the common law rule practice, and simply repealed rule 49(11) of the Uniform Rules of Court, which clearly gave the courts wider discretion in matters of this nature. This is made clear by a proper contextual reading of subsection (18)(1). The starting point is that:

“The operation and execution of a decision which is the subject matter of an application for leave to appeal ... is suspended pending the decision of the application or appeal.”

This is followed by the court ordering otherwise under “exceptional circumstances”. This, in my view, is in accordance with the finding in *Tenants, Williston Court*, supra, that section 18 only provides for the automatic suspension of the operation and execution of a decision pending an application for

leave to appeal or an appeal.[19] However, the *Tenants, Williston Court* case supra, is clearly distinguishable from the facts of the instant matter in that it was concerned with the operation and execution of a decision which was the subject matter of an application for rescission, not pending an application for leave to appeal. Subsection (18)(2) is not applicable to the instant matter since it deals with interlocutory orders. However, it is significant that, prior to section 18 of the Superior Courts Act, and in *Andrew Machelles and Others v William Marofane Mailula* (Case CCT99/08) [2009] ZACC 7 (later reported as *Machelles and Others v Mailula and Others* 2010 (2) SA 257 (CC)), the Constitutional Court granted an application for the stay of an interim eviction order pending the outcome of an appeal. This however was on the strength of the now repealed section 20 of the Supreme Court Act.[20]

[24] Subsection (18)(3) of the Superior Courts Act deals with the procedural aspects, the onus of proof, on a balance of probabilities, on the party who applies to court, “to order otherwise”, and the issue of irreparable harm. Section 18(4) defines the consequences should the court order otherwise. These are that, the court must record immediately its reasons for ordering otherwise; the aggrieved party retains an automatic right of appeal to the next highest court; the court hearing the appeal is obliged to deal with the appeal as a matter of extreme urgency; and that such order will be automatically suspended pending the outcome of such appeal. Subsection (18)(5), on its turn, defines that the operation and execution of a decision becomes the subject of an application for leave to appeal or an appeal, “as soon as application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules”.

CONCLUSION

[25] From the above contextual reading of the provisions of section 18, I conclude that, not only does the enactment of the provisions of section 18 introduce a topical new dimension to the threshold of the test to be applied in applications of this nature, and tempers with the hitherto common law rule discretion enjoined by the courts, but also renders it more

onerous for the party applying for the order to be put into operation and an order for the execution thereof. The bar has been raised. I can put it no higher. Whether or not this approach passes constitutional muster, is not a matter for me to determine at this stage. The importation of the words “exceptional circumstances” evinces this. In my view, the relief sought in applications of this nature, should no longer be there for the simple “taking”; a court seized with an application of the nature under discussion, and in carrying out its constitutional obligation, and in exercising its inherent power,[21] is obliged to serious consideration to the proper interpretation of the provisions of section 18; and I also conclude that, for the reasons set out in the next paragraph, the applicant in this matter has not succeeded, on a balance of probabilities, to make out a case for the instant relief claimed, as envisaged in section 18(3). This, when all the relevant circumstances are considered objectively.

- [26] The personal circumstances of the parties, as scanty as they are, have been sketched above, precisely to enable the court to arrive at a just and equitable conclusion, and in the interest of justice. The applicant has not shown that it (as a legal entity) will suffer irreparable harm should the order not be suspended, and having in mind that exceptional circumstances must exist. On the contrary, it is the respondents, who are in occupation of the property currently, who will more probably suffer such harm. It is common cause, or not seriously disputed, that the applicant seeks to obtain the execution of the eviction order merely to introduce a new tenant to occupy the property. The respondents indeed face the real prospect of becoming homeless. There is no evidence to the contrary before me – as mentioned above. In *Occupiers, Shulana Court v Steele*, [22] Theron AJA (as she then was), and writing for the Court, said:

“It will, generally, not be just and equitable for a court to grant an eviction order where the effect of such an order would be to render the occupiers of the property homeless. In Port Elizabeth Municipality, the Constitutional Court cautioned that:

‘A court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available.

I am of the view, having regard to the personal circumstances of the Occupiers, and in particular the real prospect that their eviction

could lead to homelessness that they have established a bona fide defence that carries some prospect of success.”

See also *Betlane v Shelly Court CC*, supra, at paragraph [35]. (footnotes omitted). Reference is made to the latter two case law, not at all to refute the eviction order in place in the present matter, but merely to demonstrate the probable irreparable harm that the respondents will suffer. The fact of the matter is that, the respondents’ application for leave to appeal, with all its imperfect administrative characteristics, has yet to be decided. In *Betlane*, supra, it was specifically found that:

“The warrant of execution should not have been granted while the applicant’s application for leave to appeal was pending.”

[27] The pending application for leave to appeal fulfils completely, in my view, the requirements set out in section 18(5) of the Superior Courts Act. It appears to me that, the fact of the respondents’ pending application for leave to appeal, coupled with the probable irreparable harm they will suffer if the eviction order is not suspended, must militate strongly against the presence of “exceptional circumstances” in this case. These factors ought properly be considered in favour of the respondents. The respondents have argued, and quite correctly so in my view, that the contentions of the applicant to the effect that there is presently no proper application for leave to appeal pending, is nothing more than speculation and bereft of substance. It is, in any event, not disputed that, when the respondents served and filed the impugned application for leave to appeal, they were not legally represented, as such they are laypersons as described at paragraph [29] in the Betlane, supra, judgment. It is not in dispute that the impugned application for leave to appeal was served and filed within the timeframes of the rules. It is still legitimately open to the respondents to either amend the alleged defective notice of application for leave to appeal, accompanied with the appropriate condonation application. For example, in *Noah v Union National South British Insurance Co Ltd*, [23] the Court had to interpret the word, “pending” in respect of an insurance claim submitted by the insured (plaintiff) against the insurer (defendant) after the expiration of the prescribed period provided for in the insurance policy. At page 332C-D of the judgment, the Court said:

“There are decisions indicating that the word ‘pending’ is capable of the meaning of something which has not yet started. Thus in Leibrandt v South African Railways 1943 (AD) 14 the Court had to consider the meaning of s 15(5) of the Railways and Harbours Service Act 23 of 1925 which provides that a servant may be suspended from duty ‘pending decision on a charge of misconduct ...’. It was held that the section does not mean that the just quoted words presuppose that a charge has been made. De Wet CJ held (at 18):

‘I do not think it can be contended in this instance that no suspension can take place until the enquiry has actually commenced. The words obviously mean pending the result of the enquiry contemplated by ss (1) and the word “pending” means “until”.’

See also *Nkosi v Barlow NO en Andere* 1984 (4) SA 148 (T) at page 153I-154A, where the Court said:

‘Die normale en gewone betekenis van “hangend” is “nog nie afgehandel nie”, of beslis, of onuitgemaak (HAT) sv “hangend”. Dit geld ook vir die woord “pending” waar die betekenis aangegee word as “remain undecided, awaiting decision or settlement” (Oxford English Dictionary) sv “pending”. Dit dui op ‘n aangeleentheid wat begin het en nog nie gefinaliseer is nie.’”

In addition, the South African Concise Oxford Dictionary defines the word “pending” as “awaiting decision or settlement, about to happen”. The case law cited immediately above refer to instances where a litigant fails to institute proceedings within a prescribed period. However, in the present

matter, that question does not arise. I have here to do with an application for leave to appeal which, although served and filed timeously, contains certain administrative and procedural defects which are curable. I truly do not believe that it was the intention of the legislature to penalise an aspirant appellant such as in the present case, and not regard such pending appeal as material in deciding what constitutes “exceptional circumstances”. From the above authorities, it should, in my view, be readily accepted that there is a pending application for leave to appeal. In my view, to deny the respondents a hearing of their pending application for leave to appeal, would be tantamount to denying them the right to access to courts, as enshrined in section 34 of the Bill of Rights.

[28] For all the foregoing reasons, the application for the execution of the eviction order should be refused with costs. The eviction order should properly remain suspended pending the outcome of the pending application for leave to appeal. The applicant is not precluded from enrolling the pending application for leave to appeal. It follows therefore that prayers 1, 2, 3 and 4 as framed in the notice of motion dated 10 August 2016 must be refused.

ORDER

[29] The following order is made:

29.1 The application is dismissed with costs.

D S S MOSHIDI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE APPLICANT M W VERSTER

INSTRUCTED BY

B M V ATTORNEYS

COUNSEL FOR THE RESPONDENTS P J C KRIEL

INSTRUCTED BY

STRAUSS DE WAAL ATTORNEYS

DATE OF HEARING

2 FEBRUARY 2017

DATE OF JUDGMENT

28 APRIL 2017

[1] See notice of motion, bundle pages 1 to 4.

- [2] See annexure “PV1” bundle.
- [3] Act 19 of 1998.
- [4] See annexure “PV2”.
- [5] See annexure “PV3”.
- [6] See annexure “PV4”.
- [7] 2011
- (1) SA 386 (CC) para [34].
- [8] 1977
- (3) SA 534 (A) at p 544H-545G.
- [9] 2014
- (3) SA 189 (GJ) at paragraph [11].
- [10] 2016
- (6) SA 466 (GJ) at paragraphs [10] and [11].
- [11] 10 of 2013.
- [12] [2012] 2 All SA 262 (SCA) also reported at 2012 (4) SA 593 (SCA).
- [13] [2006] 4 All SA 457 (C) at paragraph [11].
- [14] At paragraph [17].
- [15] See paragraph [34] of the answering affidavit, p 48 of bundle.
- [16] 2016
- (6) SA 279 (CC).
- [17] No 105 of 1997.
- [18] See paragraph [17] p 194.
- [19] See paragraph [20], Tenants, Williston Court case.
- [20] No 59 of 1959.
- [21] See section 173 of Constitution.
- [22] [2010] 4 All SA 54 (SCA) at paragraph [16].
- [23] 1979
- (1) SA 330 (T).

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