REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: 1150/2024

(1) REPORTABLE: YES/~~NO~~

(2) OF INTEREST TO THE JUDGES: YES/~~NO~~

(3) REVISED.

DATE: 11 MARCH 2025

SIGNATURE:

In the matter between:

CATERPILLAR FINANCIAL SERVICES SOUTH AFRICA (PTY) LTD **APPLICANT**

Registration number: 2017/486709/07

-and-

MNTK PROJECTS PROPRIETARY LIMITED **RESPONDENT**

Registration number: 2019/091643/07

JUDGMENT – LEAVE TO APPEAL

BRESLER AJ:

Introduction:

[1] The Applicant (Respondent in the Main Application) applies for Leave to Appeal against this Court's judgment and order delivered on the 3rd of February 2025.

[2] Counsel for the Applicant recorded that only the grounds set out in the Amended Application for Leave to Appeal are pursued, and this judgment will therefore be limited to the aspects raised therein.

[3] The Respondent (Applicant in the Main Application) in return applies in terms of Section 18(3) of the **Superior Court Act**, Act 10 of 2013 for the following relief:

3.1 Dispensing with the requirements of the Rules of the Court relating to service and time periods and disposing with the application as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court.

3.2 An order in terms of Section 18(3) directing and declaring that the operation and execution of the judgment and order granted on the 3rd of February 2025, is not suspending pending:

3.2.1 the finalization of the application for leave to appeal launched by the Applicant on the 4 February 2025.

3.2.2 the expiry of the time period for the launching of any subsequent appeal(s) by the Applicant.

3.3 An order directing and authorizing the Sheriff of the High Court to take immediate possession of the Units listed below, from wherever he / she may find it, and to retain possession of the Units until delivered to the Respondent or its duly authorised representative:

3.3.1 a Caterpillar Skid Steer Loader 226 with serial number: D[...] (the 'Skid Steer')

3.3.2 a Caterpillar Articulated Truck 730 with serial number: 3[...];

3.3.3 a Caterpillar Articulated Truck 730 with serial number: 3[...]2; and

3.3.4 a Caterpillar Articulated Truck 730 with serial number: 3[...]3.

(the 'Units')

3.4 An order authorising the Respondent to retain possession of the Units at its location to be elected by the Respondent, where the Units shall be held in safekeeping and shall not be sold by the Respondent until the appeal process has been finalised, alternatively, until the prescribed time period for any future or subsequent appeals has lapsed.

3.5 Costs on attorney and client scale.

[4] During the course of argument this Court indicated that the relief prayed for, to the extent that it provides for a preservation of the Units, is not contemplated in Section 18(3). Counsel for the Respondent recorded that, in the event of the relief being granted, an undertaking is provided that the Units will be preserved pending finalization of the Appeal process in due course.

Issues that require determination:

[5] Having regard to the amended Application for Leave to Appeal, this Court is only called upon to determine essentially two issues:

5.1 If the agreement was properly cancelled entitling the Respondent to claim repossession of the Units; and

5.2 If the Respondent should be entitled to execute the order pending finalisation of the appeal as contemplated in Section 13(3).

The Applicable Legal Principles:

Leave to Appeal

[6] From the onset, it must be noted that the cancelation of the agreement was common cause between the parties. Counsel for the Applicant opined that cancelation is a legal question that may be raised for the first time on Appeal. Contrary hereto, the counsel for the Respondent was adamant that it is not a point of law but rather common cause facts between the parties and the contrary can thus not be argued on Appeal.

[7] This Court tends to agree with the Respondent. It was, after all, conceded at least three times during argument in the Court *a quo* that the agreement was indeed cancelled. Be that as it may, this Court finds it apposite to provide reasons why the alleged grounds of Appeal, as per the Amended Application for Leave to Appeal, can in any event not succeed on the merits thereof.

[8] The Applicant submitted that Leave to Appeal should be granted as the Respondent failed to properly terminate the agreement. In the Amended Application for Leave to Appeal, the approach is enunciated as such:

'Nowhere in the agreement is it stated that the mere default may result on (sic) termination without prior notice or demand that in the event of default, termination will follow.'

[9] The Applicant further submits that once a party has exercised its election to either terminate or enforce, and it elects to enforce, the party may not change that election without acquiring another right to terminate.

[10] This is correct to a certain extent. As correctly stated by the Respondent in its heads of argument, the Supreme Court of Appeal held as follows in the case of ***Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality***[1]:

'...even where the aggrieved party had elected to abide by the contract, in the face of persistent breach despite the opportunity to relent, the aggrieved party may elect to cancel. Where the defaulting party is clearly determined not to purge the breach, and shows and unequivocally intention not to be bound by the contract, the aggrieved party may abandon his or her futile attempt to claim performance and change the election, claiming cancelation and damages. …'

[11] The Applicant was therefore at liberty to change its election from enforcement to cancellation, as it effectively did on the 29th of August 2023.

[12] During argument in Court, Counsel for the Applicant stated that the common law position is that, in the absence of an explicit indication in the agreement that breach will result in termination without further notice, a letter of demand requiring the breach to be purged, is a necessity.

[1] 2017 (5) SA 420 (SCA) at Para 25

[13] This Court respectfully disagrees with the submissions made by Counsel. At the heart of this argument lies an interpretation of Clause 9 and 10 of the Agreement entered into between the parties.

[14] Clause 9 of the Agreement provides *inter alia*:

> *'Each of the following is an event of default ("Event of Default"):*
>
> *(a) you fail to make payment when due, or if we do not receive payment when due for any reason, including any deposit or fees, and including any costs or fees associated with the preparation, drafting, or securing any of the Units, this Master Agreement, or a Schedule;*
> *(b) ...*
> *(c) ...*
> *(d) you fail to observe or perform a covenant, agreement or warranty and the failure continues for ten (10) calendar days after written notice to you.'*

[15] Clause 10 of the Agreement, in return, provides that if an event of default occurs the Respondent will have the remedies available to it in terms of the Agreement and in terms of any law or otherwise. These remedies include enforcing specific performance or declaring the Agreement in default and cancelling same or terminating of the right to use any Unit.

[16] Having a holistic view of the contents of the Agreement, it is evident that the parties intended to draw a distinction between an instance where breach entails a failure to pay in terms of the Agreement as opposed to the failure to observe or perform a 'covenant, agreement or warranty'. Failure to pay in terms of the agreement is a ground for immediate termination.

[17] In the interpretation of this clause, this Court is fortified by the judgment in ***Natal Joint Municipal Pension Fund v Endumeni Municipality***[2] that expounds on the approach generally to be adopted when interpreting a contract as thus:

> *'Interpretation is the process of attributing meaning to words used in a document be it legislation, some statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its 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 unbusiness like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background in the preparation and production of the document".*
>
> (own underlining)

[18] The maxim *expression unius est exclusion alterius* ('the expression of one is the exclusion of the other') will apply *in casu.* In the case of ***Bruwer v Nova Rist Partners Ltd***[3] the Court stated the following:

[2] 2012 (4) SA 593 (SCA) 12 paragraph 18

'Just as the presence of every word of phrase in the contract is relevant to its interpretation, so too may the absence of certain words, phrases or provisions from the contract be relevant in interpretation ... Another way of stating this rule is expressio unius est exclusio alterius, which means that, if a document contains a special reference to a particular thing, it is prima facie assumed that the parties intended to exclude everything else, even that which would have been implied in the circumstances, had it not been for the special reference.'

[19] It could not have been the intention of the parties that every incidence of breach must be met with notification prior to cancelation. For this reason, a failure to pay was specifically excluded and contained in a separate clause.

[20] It is clear from the papers filed on record that the Respondent informed the Applicant on no less than three occasions that the Agreement is cancelled due to the Applicant's default. In this Court's view, the actions of the Respondent accorded with the trite provisions of the Agreement. The procedure adopted by the Respondent cannot be faulted and the Agreement was properly cancelled.

[21] As to the common law position pertaining to demand and cancellation, this was extensively dealt with in the matter of ***Scoin Trading (Pty) LTD v Bernstein N.O.***[4] where the Supreme Court of Appeal said:

'[11] The starting point I therefore an examination of the meaning of mora. The term mora simply means delay of default. The concept is employed when the consequences of failure to perform a contractual obligation within the agreed time are determined. The date may be stipulated either expressly or tacitly and there must be certainty as to when it will arrive. Thus, when the contract fixes time for performance, mora (mora ex re) arises

[3] 2011 (1) SA 234 (GSJ) at par 27
[4] 2011 (2) SA 118 (SCA) at [11] and further

from the contract itself and no demand (interpellatio) is necessary to place the debtor in mora. The fixed time, figuratively, makes the demand that would otherwise be had to be made by the creditor.

[12] In contrast, where the contract does not contain an express or tacit stipulation in regard to the date when performance is due, a demand (interpellatio) becomes necessary to put the debtor in mora. This is referred to as mora ex persona. The debtor does not necessarily fall into mora if he or she does not perform immediately or within a reasonable time. In this situation, mora arises only upon failure by the debtor to comply with a valid demand by the creditor. Mora ex persona is so referred to since it requires an act of a person (the creditor) to bring it into existence.

[13] In this case it has been established that the date agreed for the payment of the balance of the purchase price was 31 December, and that the debt was not paid on this date. It is therefore a situation where mora ex re applies.

[22] The common law position therefore does not assist the Applicant.

[23] In ***MEC Health, Eastern Cape v Mkhitha***[5] the Supreme Court of Appeal stated the following (reference to other authorities omitted):

'[16] Once again it is *necessary to* say *that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of* success. *Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned* is *of the opinion that the appeal would have* a *reasonable prospect of success; or there* is some *other compelling reason why it should be heard.*

[5] ***MEG Health, Eastern Cape v Mkhitha*** (1221/15) [2016] ZASCA 176 (25 November 2016)

[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, *an arguable case or one that* is *not hopeless, is not enough. There must be* a *sound, rational* basis *to conclude that there is a reasonable prospect of success on appeal.'*

[24] This court is of the view that the Appeal has no reasonable prospect or realistic chance of success, nor is there some other compelling reason why the appeal should be heard. The Application for Leave to Appeal therefore stands to be dismissed with costs.

The Section 18(3) application:

[25] For an Applicant to succeed in terms of Section 18(3) of the **Superior Courts Act**, the Applicant bears the heavy *onus* to show[6]:

25.1 that exceptional circumstances exist;

25.2 on a balance of probabilities:

24.2.1 the presence of irreparable harm to the applicant if the relief is not granted; and

24.2.2 the absence of irreparable harm to the Respondent if the relief is granted.

[26] The Applicant raised the objection that the matter is not urgent. This Court disagrees. Having regard to the provisions of Section 18, it is evident that applications of this nature should be dealt with as expeditiously as possible and at the earliest opportunity. The Applicant's objection must therefore fail.

[6] ***Incubeta Holdings (Pty) Ltd v Ellis*** 2014 (3) SA 189 (GJ) at Para 16

[27] The Respondent has placed evidence before the Court that they endeavoured to inspect the Units to no avail. The Respondent requires the Court to draw a negative inference from this failure and / or refusal by the Applicant to grant access to the said Units. This Court tends to agree.

[28] The Respondent has also placed evidence before court that the Applicant fails to maintain the Units. This evidence was not rebutted by evidence to the contrary. Once again, the Court shares the view of the Respondent that a negative inference should be drawn from the evasive manner in which the Opposing affidavit was drafted. The Applicant elected to provide a laconic and, more often than not, over technical response to the Respondent's allegations but nonetheless fails to provide any evidence in rebuttal. Especially in respect of the insurance of the Units and the continued effective maintenance which are of great concern to the Respondent.

[29] In this Court's view, exceptional circumstances have been shown to exists – especially since the Respondent's ownership stands uncontested, and the Applicant has the evident intention to continue utilising the Respondent's property.

[30] Insofar as the matter is of a vindicatory nature, irreparable harm is assumed in favour of the Respondent. The Applicant was therefore obliged to provide the Court with the appropriate facts from which the inference can be drawn that it will suffer irreparable harm and to rebut the allegations made by the Respondent in this regard. This was not done. The Applicant essentially alleges that he must continue to make use of the Units although he is not the owner thereof. This places the security of the Applicant at risk.

[31] It cannot be said that the Applicant will suffer irreparable harm. No proof in this regard was submitted, safe to state that the Applicant utilises the Respondent's assets to generate an income, which income will be potentially lost. The threshold to be satisfied is 'irreparable harm' and not simply 'harm'. As such, this Court

agrees with the Respondent that it will suffer irreparable harm, and that the Applicant will not suffer irreparable harm.

[32] The Application in terms of Section 18(3) must therefore be granted. Insofar as the Respondent has provided an undertaking that they will not dispose of the Units pending finalisation of the Appeal, the order will confirm same accordingly.

Costs:

[33] The Respondent is substantially successful in both the opposition of the Application for Leave to Appeal as well as the Section 18(3) application. The Applicant has consented to attorney and client scale costs in the event of legal proceedings being necessitated. Costs is therefore awarded in favour of the Respondent accordingly.

Order:

[34] **In the result the following order is made:**

34.1 Leave to Appeal is refused.

34.2 The requirements of the Rules of the Court relating to service and time periods are dispensed with and the application is heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court.

34.3 An order in terms of Section 18(3) directing and declaring that the operation and execution of the judgment and order granted on the 3rd of February 2025, is not suspending pending:

34.3.1 the finalization of the application for leave to appeal launched by the Applicant on the 4 February 2025.

34.3.2 the expiry of the time period for the launching of any subsequent appeal(s) by the Applicant.

34.4 An order directing and authorizing the Sheriff of the High Court to take immediate possession of the Units listed below, from wherever he / she may find it, and to retain possession of the Units until delivered to the Respondent or its duly authorised representative:

34.4.1 a Caterpillar Skid Steer Loader 226 with serial number: D[...] (the 'Skid Steer')

34.4.2 a Caterpillar Articulated Truck 730 with serial number: 3[...];

34.4.3 a Caterpillar Articulated Truck 730 with serial number: 3[...]2; and

34.4.4 a Caterpillar Articulated Truck 730 with serial number: 3[...]3.

(the 'Units')

34.5 In accordance with its undertaking the Respondent is authorised to retain possession of the Units at its location to be elected by the Respondent, where the Units shall be held in safekeeping and such Units shall not be sold by the Respondent until the appeal process has been finalised, alternatively, until the prescribed time period for any future or subsequent appeals has lapsed.

34.6 The Applicant is ordered to pay the costs of the Leave to Appeal application and the Section 18(3) application on an attorney and client scale.

M BRESLER AJ

ACTING JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

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DATE OF HEARING	:	**3 March 2025**
DATE OF JUDGMENT	:	**11 March 2025**