

SOUTH AFRICA / JUDGMENT

Motete v Dlamini and Another (2025/040717) [2025] ZALCJHB 155 (24 April 2025)

[2025] ZALCJHB 155

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhamajane

CASE / FILE NUMBER

2025/040717

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: 2025-040717

In the matter between:

MPHO MILDRED

MOTETE

Applicant

and

THEMBA THOMAS CYRIL

DLAMINI

First Respondent

PERFORMING ARTS CENTRE

OF THE FREE STATE

Second Respondent

Heard: 1 April 2025

Delivered: This

judgment was handed down electronically by uploading on Caselines;
circulation to the parties' legal representatives by email;
publication on the Labour Court's website; and released to
Saflii. The date for hand-down is deemed to be on 24 April 2025

JUDGMENT

TLHOTLHALEMAJE, J

Introduction

and background:

[1] The applicant approached the Court on an urgent basis, seeking leave in terms of section 18(3) of the Superior Court Act[1] ('SCA'), to execute the order of this Court dated 15 October 2024 pending a leave to appeal. In accordance with the Court order, the first respondent (Mr Dlamini and CEO), and the second respondent (PACOFs), were found to be in contempt of Court for failing to comply with an arbitration award ordering the applicant's reinstatement and payment of compensation.

[2] The urgent application, which is opposed, came before the Court against the following background;

2.1 The applicant was employed by PACOFs in 2015 and was dismissed in October 2022 on account of various allegations of misconduct following a disciplinary enquiry.

2.2 Having referred an alleged unfair dismissal dispute to the CCMA, an award was issued in her favour in August 2023, in terms of which PACOFs was ordered to reinstate and pay her compensation by September 2023.

2.3 PACOFs had on 16 October 2023, launched an application to review and set aside that award under case number C479/2023. PACOFs had also paid security in the amount of R 510 728-72 in accordance with the provisions of section 145(7) and (8) of the Labour Relations Act (LRA)[2].

2.4 On 16 October 2023 the applicant caused the arbitration award to be certified by the CCMA in terms of section 143(3) of the LRA. On 28 November 2023, she brought an application for contempt of court against the respondents which was opposed

2.5 On 12 December 2023 PACOFs brought an interlocutory application for condonation due to the delays in the prosecution of the review application. At the hearing of the contempt of court application on 1 February 2024, an order was granted by consent between the parties.

2.6 In accordance with the Court order, PACOFs duly executed a bond of security for the amount of R 660 903-28, and filed same at court, to make up the shortfall of the security which had already been paid into the Sheriff's account. The total amounts paid made up 24 (twenty-four) months of the applicant's remuneration, and equalled to R1 171 632,00.

2.7 PACOFS' review application according to the applicant had lapsed as at 24 February 2024 on account of the failure to file the transcribed record of the arbitration proceedings. In view of the applicant's refusal to extend the timeframes, PACOFS subsequently filed an application to revive the review application and sought condonation for the late filing of the transcribed record. It had emailed the transcribed record to the applicant's attorneys in two parts being on 4 April 2024, and on 12 April 2024.

2.8 The revival application was however withdrawn before the Court on 3 July 2024. The basis of the withdrawal according to PACOFS was that the application lacked sufficiency of details regarding the explanation for the delay in filing the record. The PACOFS subsequently filed an application on 16 July 2024, seeking the reinstatement of the withdrawn revival application. The applicant filed a notice to oppose, but has not as yet filed an answering affidavit.

2.9 The applicant contends that notwithstanding the fact that there was now effectively no review application pending before the Court, the respondents nonetheless still refused to comply with the arbitration award despite it having been certified in accordance with section 143 (1) of the LRA) on 22 September 2023.

2.10 In July 2024, the applicant instituted contempt proceedings against the respondents. A rule nisi was issued by the Court on 22 August 2024, requiring the respondents to show cause why a contempt finding ought not be made against them.

2.11 The rule nisi was confirmed on 15 October 2024, with an order that both the respondents were guilty of contempt of court for non-compliance with the terms of the arbitration award. Dlamini was sentenced to a period of six months in prison, while PACOFS was fined an amount of R1m. Both the sentence and the fine were suspended for three years on condition that there was compliance with the arbitration award. The respondents were also ordered to pay the costs of the application on the scale of attorney and client.

2.12 Following the Court's order, the applicant contends that the parties had engaged in settlement discussions. However, in the course of those discussions, the respondents had on 24 October 2024, launched an application for leave to appeal against the contempt order, to which applicant had filed her notice to oppose.

2.13 The respondents had in an email addressed to the Court on 30 October 2024, requested written reasons for the order, to enable them to make submissions in accordance with Rule 67(5) of the rules of this Court. On 8 November 2024, the parties' legal representatives were informed by the Judges' Secretary that the reasons for the order will not be provided.

2.14 On 20 November 2024, the Court had in Chambers, issued an order in granting leave to appeal. The respondents had on 9 December 2024, then filed a Notice to Appeal under Case No: JA 143/24. The complete transcribed record was served on the applicant's legal representatives by email on 30 March 2025. The respondents contend that condonation will be sought for the late filing of the record, and for the matter to be dealt with on appeal in accordance with Rule 6(14) of the Rules of the Labour Appeal Court.

2.15 This urgent application was served on the respondents on 25 March 2025, and uploaded on Caselines on 26 March 2025.

Urgency:

- [3] Other than contesting the merits of the applicant's claim, the respondents denied that this application deserved the urgent attention of this Court. It is not necessary to re-hash the principles applicable to urgent applications as can be gleaned from various decisions of this and other Courts[3]. It can however be reiterated that an applicant that approaches the Court on an urgent basis essentially seeks an indulgence, and to be afforded preference in order to prevent prejudice and harm that may materialise or persist if urgent relief is not granted.
- [4] Central to a determination of whether a matter is urgent in accordance with Rule 38(2) of the Rules of this Court is whether the applicant has in the founding affidavit, set forth explicitly, the circumstances which renders the matter urgent. In addition, the applicant must indicate the reasons why she claims that substantial relief cannot be attained at a hearing in due course. It is further trite that urgent relief will not be granted where it is apparent from the papers that the urgency claimed is self-created. Self-created urgency will be evident in circumstances where an applicant failed to bring the application at the first available opportunity[4]. Effectively, it is expected of litigants to act with the necessary haste to remedy or prevent harm and/or prejudice, rather than enduring the alleged harm and only approaching the Court at their leisure[5].
- [5] Against the above principles, what is immediately glaring from the pleadings is that upon this Court's order of 15 October 2024, this urgent application was launched some five months after that order was issued. Other than the contention that the parties had engaged in settlement discussions after the order until on 24 October 2024 when the respondents filed an application for leave to appeal, there are no reasons as to why even in the face of a leave to appeal, the applicant had only approached the Court on 25 March 2025, and only after the leave to appeal was granted.
- [6] The applicant nonetheless implores the Court to grant urgent relief on various grounds, including that;
 - (i) the issue of urgency is inextricably linked to the issue of a reasonable apprehension of impending harm resulting from the delays including in the leave to appeal before the LAC, which it was submitted, had lapsed on account of a failure to timeously file the record under Rule 6 of the Rules of the LAC. It was accordingly submitted that the prospects of success on appeal therefore fell away as a result of the lapse of that appeal.
 - (ii) Section 18 (4) of the SCA implied that an application to execute was urgent in nature and application.

(iii) She is experiencing financial hardship owing to the delay in the finalisation of the proceedings brought by the Respondents; and suffers from mental issues which include depression and anxiety that require regular visits to a psychologist.

- [7] There is no doubt that since the arbitration award was issued, there have been considerable delays on the part of the respondents, in prosecuting the review application which was launched on 23 October 2023, and which is nowhere near ready for a hearing. Of course, these delays are now a matter of determination by this Court in the light of the reinstatement of the revival application.
- [8] Insofar as there are delays in prosecuting the application for leave to appeal which is a subject of determination by the LAC, the respondents have correctly pointed out that under sub-rule 6(14) of the LAC Rules, the LAC enjoys discretion to hear the appeal despite the late filing of the record, and further that an application to condone non-compliance with any provision of Rule 6 will be heard simultaneously with the appeal.
- [9] To the extent that both the delayed prosecution of the review application and the leave to appeal are matters before both this and the LAC, no more need be said on those issues. Rule 6(15) of the LAC rules[6] relied upon by the applicant in contending that the leave to appeal had lapsed and therefore archived does not find application in instances where condonation has been sought under Rule 6(14) of the LAC Rules.
- [10] The applicant also sought urgent relief on the basis of alleged financial harm. However this factor equally does not qualify for a matter to be accorded urgency. From various authorities, it can be accepted that as a general principle, financial hardship does not establish a basis for urgency. It is equally accepted that the general principle may be departed from if exceptional circumstances are established, depending on the merits of each case. This is particularly so in view of the fact that whether a matter should be treated as urgent is within the discretion of the Court[7]. In this case, the alleged financial harm arose from the date that the applicant was dismissed. That harm has been remedied with an arbitration award issued in her favour, which is the subject of on-going litigation, coupled with the fact that the respondents have complied with the requirements of section 145(7) and (8) of the LRA. In these circumstances, one cannot speak of irreparable financial harm to the extent that the respondents' various applications are disposed of in the applicant's favour.
- [11] Furthermore, the respondents are correct in their contention that the applicant's reliance on her medical condition based purely on a medical report and without an affidavit by the treating medical practitioner, is without merit and therefore ought to be rejected. Accordingly, one cannot speak of exceptional personal circumstances existing for the purposes of according the matter urgency.

[12] Other than the above, the issue remains whether it can be said that the applicant is deprived of substantial redress in due course. The outright answer is in the negative. The arbitration award for now remains intact, and should all the various applications of the respondents be disposed of in her favour, the award and the Court order would be executed. Should the respondents fail to comply, the consequences of the Court order related to a fine or imprisonment will follow.

[13] Equally, it cannot be correct that any section 18(3) of the SCA enjoys inherent urgency. The concept of ‘inherent urgency’ in any application has been debunked in *Volvo Financial Services Southern Africa (Pty) Ltd v Adamas Tkolose Trading CC*[8], where it was held that there is no class of proceedings that enjoys inherent preference and that effectively, the concept of “inherent urgency” of a

matter was a misnomer. The Court in *Volvo* further appreciated that some types of cases are more likely to be urgent than others. The issue however was that urgency does not arise from the nature of the case itself. It arose from the imminence and depth of harm that an applicant will suffer if relief is not given, and not because of the category of right the applicant asserts.

[14] Thus, more than a mere assertion that a matter is inherently urgent is required. Irrespective of the nature of the case, it is still required of the applicant seeking urgent relief to satisfy the Court that a matter ought to be accorded urgency, and why time frames ought to be abridged[9]. The alleged harm has been addressed in this judgment. The applicant’s argument of inherent urgency based on the provisions of the now repealed Practice Manual[10] of this Court cannot assist her in view of the fact that neither this Court nor the LAC, is called upon to determine the review

application. The issue is whether the order of the Court should be executed pending an appeal within the ambit of section 18(3) of the SCA.

[15] It follows from the above principles, and as correctly pointed out on behalf of the respondents, that the applicant still needs to make out a case for urgent relief. In the light of the grounds relied upon as discussed above having been found to be of no assistance to the applicant, added with the fact that the applicant took about five months to approach the Court some five months after the rule nisi was confirmed, inclusive of the period when leave to appeal was launched and granted, one cannot say that urgency was demonstrated.

In fact, it is safe to conclude that the urgency claimed is self-created, particularly since any alleged harm to the applicant,

was triggered immediately after the rule nisi was confirmed on 15 October 2024, and when the respondents failed to comply with the order at the time. The matter accordingly ought to be struck off the roll.

Exceptional circumstances and irreparable harm:

[16] Notwithstanding the fact that the Court has concluded that the matter ought to be struck off the roll on account of lack of urgency, it needs to be reiterated that to the extent that the application sought urgent relief in seeking the execution of the court order despite a pending leave to appeal, it is trite that the provisions of section 18(3) of the SCA places a substantial onus on the applicant and that sections 18(1) and (3) provide for a twofold enquiry. First, the applicant is required to demonstrate that exceptional circumstances exists, and the second part of the enquiry is for the applicant to discharge proof on a balance of probabilities, that she will suffer irreparable harm if the order is not put into operation, and that the respondents will not. Thus, granting of an order under section 18 to allow a Court order to be executed pending an appeal, when no exceptional circumstances had been demonstrated by the applicant, constitutes an extraordinary deviation from the norm.

[17] The Labour Appeal Court in *NEHAWU v Minister For The Public Service And Administration and Others*[11] reiterated that the provisions of section 18 of the SCA were applicable to this Court, and further confirmed that these provisions

have introduced a higher threshold, in requiring proof on a balance of probabilities that the applicant will suffer irreparable harm if the order is not granted and conversely, that the respondent will not, if the order is granted.

[18] Against the above principles, the basis of any exceptional circumstances existing in this case are those addressed under the issue of urgency, and which have already been dealt with and rejected in this judgment. To recap, these related to her dismissal which formed the basis of her favourable award, and the delays in the prosecution of both the review and leave to appeal applications.

[19] There is no dispute that what the applicant seeks is indeed an extraordinary deviation from the norm and there is no basis for any conclusion to be made that the applicant will suffer irreparable harm should the order not be granted. This is so in that irrespective of the merits of the review application, the fact remains that it is before the Court and yet to be determined. Equally so, the applicant cannot claim irreparable harm in circumstances where the provisions of section 145(7) and (8) of the LRA have been complied with. The remedy of compensation as awarded in the arbitration award remains secured and will be released to her should the respondents'

applications fail. Equally so, there is no bar to the award of retrospective reinstatement irrespective of the passage of time since it was granted[12]. Of courts, the exceptions set out in section 193 (2) of the LRA remains applicable

[20] On the opposite end, it is the respondents that stands to suffer harm in view of the nature and extent to which they were found to be in contempt of court, and in circumstances where they are not privy to the reasons upon which that finding was made, or the basis upon which a punitive costs order was made against them. In the absence of reasons for the leave to appeal being granted, this court is equally not even placed in a position where it can be said that the application for leave to appeal enjoys no reasonable prospects of success, and

whether there are other compelling reasons why the appeal should be granted. For this Court to grant the final order as sought by the applicant, will as correctly submitted on behalf of the respondent, diminish the Labour Appeal Court's power and discretion in terms of sub-rule 6 (14) of its Rules, or render ineffectual any order which it might ultimately make in the appeal. Of course, if the LAC finds that the appeal lacks merit, that will be the end of the matter for the respondents

- [21] In the end, other than having failed to satisfy the requirements for urgent relief, it cannot be said that the applicant has discharged the onus resting on her to demonstrate that the respondents will not suffer irreparable harm, nor has she demonstrated that she will suffer any irreparable harm suffered, and that the respondents will not.

Costs:

- [22] The respondents were correctly aggrieved with the manner with which this application was brought before the ` court, coupled with the unnecessary prolix nature of the applicant's pleadings. To compound matters, the arguments of the parties unnecessarily took over two hours of the Court's time on the urgent roll, with the bulk of that time having been utilised by the applicant's counsel. The latter had the notwithstanding the time taken in argument, complained about not being given sufficient time to make his long-winded submissions. He was nonetheless indulged by the Court and both parties were granted leave to file written heads of argument, something which both counsel ought to have done in the first place. The heads of argument filed on behalf of the applicant on 2 April 2025 as directed by the Court, were essentially a regurgitation of what was placed before it at the unduly protracted hearing, and did not take the matter any further.
- [23] Inasmuch as the Court is entitled to show its displeasure at the conduct of counsel, it is nonetheless its view that the circumstances of the applicant and the background to this application, makes any award of costs unwarranted. Accordingly, each party must be burdened with its own costs.

- [24] Accordingly, the following order is made;

Order:

1. The Applicant's application is struck off from the roll on account of lack of urgency.
2. There is no order as to costs.

Edwin Tlhotlhamajje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. E Sepheka instructed by Mahlokoane Attorneys.

For the Respondent: Adv. B.S Mene SC with Adv. AIB Lechwano, instructed by R.C Ishmail

Attorneys

[1] Act 10 of 2013, which provides; "18. Suspension of decision pending appeal: (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."

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- (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.”
- [2] Act 66 of 1995
- [3] See *Jiba v Minister: Department of Justice and Constitutional Development and Others* at para 18; *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another*
- (2016) 37 ILJ 2840 (LC) at para 26; and *East Rock Trading 7 (Pty) Limited and another v Eagle Valley Granite (Pty) Limited and others*
- (2012) JOL 28244 (GSJ) at para 6 and 7.
- [4] See *Association of Mine Workers and Construction Union and others v Northam Platinum Ltd and another* [2016] ZALCJHB 309; [2016] 11 BLLR 1151 (LC); (2016) 37 ILJ 2840 (LC) at para 25 – 26.
- [5] *Valerie Collins t/a Waterkloof Farm v Bernickow NO and Another*
- [2001] ZALC 223 (7 December 2001) at para 8.
- [6] For context, the provisions read as follows; (13) Failure to file a proper record may result in the matter being struck from the roll, with or without costs. (14) If the record has not been filed timeously, the registrar will nevertheless set the matter down for hearing. The Court will then decide whether it will hear the appeal, dismiss the appeal, or strike it off the roll, with or without an order for costs. If condonation or an application to reinstate the appeal is sought for the late filing of the record, it will be considered with the appeal. (15) If the appellant fails to lodge the record within the prescribed period or within the period as agreed to between it and the respondents, the appellant will be deemed to have withdrawn the appeal and it will, ipso facto, be archived.
- [6] For context, the provisions read as follows;
- (13) Failure to file a proper record may result in the matter being struck from the roll, with or without costs.
- (14) If the record has not been filed timeously, the registrar will nevertheless set the matter down for hearing. The Court will then decide whether it will hear the appeal, dismiss the appeal, or strike it off the roll, with or without an order for costs. If condonation or an application to reinstate the appeal is sought for the late filing of the record, it will be considered with the appeal.

(15) If the appellant fails to lodge the record within the prescribed period or within the period as agreed to between it and the respondents, the appellant will be deemed to have withdrawn the appeal and it will, ipso facto, be archived.

[7] See *Harley v Bacarac Trading 39 (Pty) Ltd*

(2009) 30 ILJ 2085 (LC) at para 8; *Ntefe J Ledimo & others v Minister of Safety and Security & Others* (2242/2003)

[2003] ZAFSHC 16 (28 August 2003) at paragraph 32; *Hultzer v Standard Bank of South Africa (Pty) Limited* (J 469/99) [1999] ZALC 46 (25 March 1999) at para 13; *Jonker v Wireless Payment Systems CC* (2010) 31 ILJ 381 (LC) at para 16.

[8]

[2023] ZAGPJHC 846 (1 August 2023) at para 4 – 8. See also *Chung-Fung (Pty) Ltd and Another v Mayfair Residents Association and Others*

[2023] ZAGPJHC 1162 (13 October 2023) at para 30 where it was held; '[30] Although this court has recently eschewed the use of the phrase "inherently urgent" in relation to certain causes of action, it has recognised that the harm claimed by an applicant is linked to the nature of the right sought to be enforced and protected rather than any category that the "right" may fall into (i.e. the cause of action relied upon). This may well, in appropriate circumstances, render the relief claimed "inherently urgent", but may have little to do with the cause of action. [31] Thus, while it is long established that urgent relief may arise from various and divergent causes including the protection of commercial interests and, I dare say, matters that require expeditious adjudication in the public interest, each case must be determined on its own merits and both the requirement of absence of substantive redress in due course and the reasonableness of the abridgment of time periods must be properly traversed by an applicant approaching the court for urgent relief.'

[8]

[2023] ZAGPJHC 846 (1 August 2023) at para 4 – 8. See also *Chung-Fung (Pty) Ltd and Another v Mayfair Residents Association and Others*

[2023] ZAGPJHC 1162 (13 October 2023) at para 30 where it was held;

'[30] Although this court has recently eschewed the use of the phrase "inherently urgent" in relation to certain causes of action, it has recognised that the harm claimed by an applicant is linked to the nature of the right sought to be enforced and protected rather than any category that the "right" may fall into (i.e. the cause of action relied upon). This may well, in appropriate circumstances, render the relief claimed "inherently urgent", but may have little to do with the cause of action.'

[31] Thus, while it is long established that urgent relief may arise from various and divergent causes including the protection of commercial interests and, I dare say, matters that require expeditious adjudication in the public interest, each case must be determined on its own merits and both the requirement of absence of substantive redress in due course and the reasonableness of the abridgment of time periods must be properly traversed by an applicant approaching the court for urgent relief.'

[9] See also *Macneil Jhb (Pty) Ltd v Cocolaras and Another* (J1722/17)

[2018] ZALCJHB 2 (11 January 2018); *White River Marketing (Pty) Ltd t/a Wizard Polythelene Manufacturers and Another v Rothwell and Another*

[2022] ZAGPJHC 282 (29 April 2022); *Sapcor Harrismith (Pty) Ltd v Horn*

[2016] JOL 35021 (FB).

[10] The now repealed Clause 11.2.7 of the Practice Manual provided that: 'A review application is by its nature an urgent application. An applicant in a review application is therefore required to ensure

that all the necessary papers in the application are filed within twelve (12) months of the date of the launch of the application

(excluding heads of argument) and the registrar is informed in writing that the application is ready for allocation for hearing.

Where this time limit is not complied with, the application will be archived and be regarded as lapsed unless good cause is shown why the application should not to be archived or be removed from the archive.'

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[11](JA19/2023)

[2023] ZALAC 7; [2023] 6 BLLR 487 (LAC); (2023) 44 ILJ 1207 (LAC) where it was held; [31] In *Incubeta Holdings (Pty) Ltd and another v Ellis and another (Incubeta)*, it was recognised that “exceptionality must be fact-specific” and that section 18(3) does not entail a determination of “a balance of convenience or of hardship” but a different approach, namely- ‘that if the loser, who seeks leave to appeal, will suffer irreparable harm the order must remain stayed, even if the stay will cause the victor irreparable harm too. In addition, if the loser will not suffer irreparable harm, the victor must nevertheless show irreparable harm to itself.’ [32] The Court stated that a “hierarchy of entitlement has been created” which requires- ‘(t)wo distinct findings of fact... rather than a weighing up to discern a ‘preponderance of equities’. The discretion is indeed absent, in the sense articulated in *South Cape*. What remains intriguing however, is the extent to which even a finding of fact as to irreparable harm, is a qualitative decision admitting of some scope for reasonable people to disagree about the presence of the so called “fact” of ‘irreparability.’ [33] The Supreme Court of Appeal (SCA) in *University of the Free State v Afriforum and another* approved of the decision in *Incubeta*, recognising that section 18(3) “has introduced a higher threshold, namely proof on a balance of probabilities that the

applicant will suffer irreparable harm if the order is not granted and conversely that the respondent will not, if the order is granted”. As to prospects of success, the SCA noted the contrasting views expressed in *Incubeta*, where it was considered that prospects of success play no role at all, and in *Minister of Social Development, Western Cape and others v Justice Alliance of South Africa and another*, in which prospects of success in the appeal were found to remain a relevant factor, and found that a consideration of “prospects of success in the appeal are relevant in deciding whether or not to grant the exceptional relief” of an order under section 18.”” and, [35] In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and another*, also in a different context, namely an exceptional circumstances enquiry under section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act, it was made clear that “(i)n our constitutional framework, a court considering what constitutes exceptional circumstances must be guided by an approach that is consonant with the Constitution”. The Court emphasised that “the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances”. (All internal citations omitted)

[11](JA19/2023)

[2023] ZALAC 7; [2023] 6 BLLR 487 (LAC); (2023) 44 ILJ 1207 (LAC) where it was held;

[31] In *Incubeta Holdings (Pty) Ltd and another v Ellis and another (Incubeta)*, it was recognised that “exceptionality must be fact-specific” and that section 18(3) does not entail a determination of “a balance of convenience or of hardship” but a different approach, namely-

‘that if the loser, who seeks leave to appeal, will suffer irreparable harm the order must remained stayed, even if the stay will cause the victor irreparable harm too. In addition, if the loser will not suffer irreparable harm, the victor must nevertheless show irreparable harm to itself.’

[32] The Court stated that a “hierarchy of entitlement has been created” which requires-

‘(t)wo distinct findings of fact... rather than a weighing up to discern a ‘preponderance of equities’. The discretion is indeed absent, in the sense articulated in South Cape. What remains intriguing however, is the extent to which even a finding of fact as to irreparable harm, is a qualitative decision admitting of some scope for reasonable people to disagree about the presence of the so called “fact” of ‘irreparability’.

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applicant will suffer irreparable harm if the order is not granted and conversely that the respondent will not, if the order is granted”. As to prospects of success, the SCA noted the contrasting views expressed in *Incubeta*, where it was considered that prospects of success play no role at all, and in *Minister of Social Development, Western Cape and others v Justice Alliance of South Africa and another*, in which prospects of success in the appeal were found to remain a relevant factor, and found that a consideration of “prospects of success in the appeal are relevant in deciding whether or not to grant the exceptional relief” of an order under section 18.”

and,

[35] In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and another*, also in a different context, namely an exceptional circumstances enquiry under section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act, it was made clear that “(i)n our constitutional framework, a court considering what constitutes exceptional circumstances must be guided by an approach that is consonant with the Constitution”. The Court emphasised that “the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances”. (All Internal citations omitted)

[12] See *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* (CCT 72/09) [2010] ZACC 3; 2010 (5) BCLR 422 (CC); (2010) 31 ILJ 273 (CC); [2010] 5 BLLR 465 (CC) at para 52

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