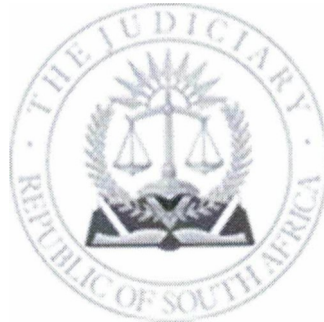


Editorial note: Certain information has been redacted from this judgment in compliance with the law.



IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 042335/2023

REPORTABLE: / NO	
(2) OF INTEREST TO OTHER JUDGES: ¥ES/NO	
(3) REVISED: NO	
10 NOVEMBER 2023	
DATE	SIGNATURE

In the matter between:

H[...] K[...]

Applicant

and

A[...] K[...]

Respondent

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JUDGMENT

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Coram NOKO J  
Introduction

[1] The applicant brought an application for leave to appeal the judgment and order I made on 21 August 2023 in terms of which the applicant was ordered to, inter alia, pay for the expenses for the oncology treatment prescribed for the respondent, applicant's adult dependent daughter.

[2] The applicant further sought leave to supplement his papers, first, to demonstrate that the financial circumstances of the respondent has improved. Secondly, to tender evidence his partner obtained from the respondent's private journal which will demonstrate that the respondent had always been dishonest with the court.

[3] The respondent has also brought an application in terms of section 18(2) and (3) of the Superior Court Act for the interim execution of the order against which leave to appeal is being sought.

#### Background

[4] The respondent was diagnosed with metastatic hepatocellular cancer of her liver and has been taking treatment intermittently for the past 17 years. The applicant has always paid for the cancer treatment. Consistent therewith and as a responsible father the applicant made a written undertaking in December 2022 that he will pay for the cancer treatment prescribed by the respondent's oncologist, Dr Bezwoda.<sup>1</sup> The applicant subsequently took a volte face stance after he was informed by his partner, Ms V[...] G[...], that the respondent informed her that payments made by the applicant for the

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<sup>1</sup>This was her medical practitioner since 2006.

cancer treatment represents guilt money. Being offended thereby, the applicant then penned a letter to the respondent conveying his distraught at such statement and further

informed her that he would no longer pay for the cancer treatment unless she motivates why he should continue paying for the treatment and further indicate as to what is she offering to him for the funding. Immediately thereafter Discovery Medical Aid scheme refused to settle Dr Bezwoda's invoice as there were no funds.

[5] The applicant's other reasons for renegeing on the funding was that he cannot afford to pay for the treatment. Further, that the respondent is abusing drugs, and the respondent can afford to pay for her own medical expenses from the money she is receiving from third parties and as a troll.

[6] The respondent brought an application to order the applicant to pay for the oncology treatment which (application) was postponed twice and subsequently served before me. The applicant contended, inter alia, that there were disputes of facts regarding the treatment regime prescribed by the oncologists and further that the financial records of the respondent need to be interrogated. The disputes, so it was argued, should therefore be referred for trial.

[7] The applicant was previously ordered to disclose his financial records and at the time of arguments before me I decided that in view of the incomplete disclosure, I was constrained to decide without his financials whether the applicant cannot afford to finance the treatment. I therefore decided that applicant should in the interim pay for the medical expenses<sup>2</sup> until the treatment is completed or the court direct otherwise after a comprehensive financial disclosure is made.

[8] The applicant was aggrieved by my judgment and launched application for leave to appeal. The respondent in turn launched the application in terms of section 18(2) and/or

(3). The applicant further sought leave to file a further affidavit to which the respondent raised an objection for the reasons set out below.

Submissions by the parties.

#### Leave to appeal.

[9] The applicant contended that the leave to appeal is predicated on the following grounds, that I erred in not referring the application for oral evidence as there were disputes of facts regarding the respondent's financial disclosure and her alleged inability to pay for oncology costs in respect of which cross examination of the respondent is necessary. Furthermore, the evidence of Dr Bezwoda needed to be interrogated. In addition, since I refused to accept the supplementary record, he was unable to demonstrate that he is unable to afford the expenses associated with the oncology treatment.

[10] In addition, so went the argument, the respondent has unreasonably rejected his limited offer (he made after my judgment) to pay for her cancer treatment and pay for the premiums in respect of the Discovery Medical Aid scheme. The offer was on condition that the respondent should agree not to proceed with the section 18 application and further

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22 Noting that he offered to pay and changed his mind being accused that his payments are guilt money.

not oppose application for leave to appeal. The said tender is still pending and has not been withdrawn, despite that the respondent has rejected it.

[11] The applicant further contended that I still have an opportunity to vary my judgment especially as it does not specify as to how long the order is to obtain lest is sound like a blank cheque. It is also not clear, so went the argument, what would come after the comprehensive financial disclosure is made. Whether the parties would have to file further affidavits and to which court would the parties proceed to argue the case. In this regard the court should consider invoking the provision of rule 42 of the Uniform Rules of court and vary its own order.

[12] In its current form, it is argued that the court order has been crafted in a such a manner that the applicant may be forced to pay R87 000,00 per three weeks which is not affordable. It is still therefore imperative that oral evidence be led.

[13] Finally, the applicant further submitted that the common law position that interim relief cannot be appealed has been changed by the constitutional court in *City of Tshwane Metropolitan Municipality v AfriForum and Another* 2016 JDR 1418 (CC) where Mogoeng CJ stated that the constitutional interest of justice would override all considerations.

[14] To this end applicant submits that another court would come to a different conclusion.

[15] The respondent retorted that the applicant has stated that the private journal found by his partner contains sensitive and disturbing information about the respondent.

Pursuant thereto a threat was made that if the respondent opposes leave to appeal and persist with the section 18 application leave will be sought to file supplementary affidavit which will expose the contents of the private journal. In response the respondent informed the applicant's attorneys that the possession of the respondent's private journal and perusal of the contents thereof amount to an unlawful invasion of privacy and such conduct cannot be countenanced by the court. To this end, so the argument proceeded, the application for leave to accept the said supplementary affidavit should be rejected.

[16] The counsel contended further that interim orders are not susceptible to appeal alternatively if this it is incorrect as submitted by the applicant then it is not in the interest of justice that the interim order in this instance should be appealed. If anything, counsel submitted that, the order is clear that the applicant should make a comprehensive financial disclosure and the matter would be referred to the motion court for hearing. It is therefore not in the interest of justice that this interim order should be referred to appeal.

[17] The counsel argued further that the order which is the subject of the leave to appeal is unambiguous and the applicant is just required to disclose his financials properly including the tax returns and salary advice. The full disclosure should cover information from all his few companies especially A[...]<sup>1</sup> which has been paying for the medical expenses of the respondent's oncology treatment. Attempt has been made by the applicant to attach some financials to this application which are not supported by any source documents and to this end no reliance can be placed on it. It follows, so counsel submitted, that there are no reasonable prospects that another court would come to a different conclusion.

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<sup>1</sup> The company which administers the respondent's medical aid scheme (Discovery) and the gap cover, through Turnberry)

[18] The power of attorney which was granted to the applicant allows him to access all including but not limited to medical records. The applicant is therefore able to access the records he needs to satisfy himself of the nature of the treatment and the extent to which he may challenge the reports by Dr Bezwoda. In any event, Dr Bezwoda has been a treating oncologist for all the years and his advice was never questioned by the applicant.

Legal principles and analysis.

[19] The applicant alleges that he is aware that there is a set aside for cancer treatment in the sum of R500 000.00 with Discovery. Though he claims to be a man of low means he still made an offer to pay to make co-payment for the medical costs and pay for the monthly premiums for the medical aid fund which tender was still open at the time of hearing. The argument advanced that my order decrees that the applicant be liable for the total amount due is unfounded as the order clearly states that the applicant would only be obliged to pay if the medical aid rejects the claims. The applicant's company has access to the medical information to determine what would be payable.

[20] There is also no legal basis for the applicant to contend that the order is indeterminate as it clearly states that it is in the interim and that the high court having been placed in possession of the applicant's comprehensive financial disclosure would make a final decision.

[21] The applicant has correctly argued that interim orders are appealable in the interest of justice but has failed to persuade the court that he would suffer irreparable harm if the order appealed against is put into operation. <sup>2</sup> In fact, on the conspectus of

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<sup>2</sup> Philani Ma-Afrika v Mailula 2010 (2) SA 573 (SCA). National Treasury v Opposition to Urban Tolling 2012 (6) SA 223. United Democratic Movement v Lebashe Investment Group (Pty) Ltd [2021] ZASCA 4 (13 January 2021).

facts before me the respondent will suffer irreparable harm if she is not treated. The contention by the applicant is that he may be required to pay the total amount for the treatment which could be R87 000.00 for three weeks of treatment. This may only apply if the medical aid funds are depleted. The applicant's company is an administrator for the discovery medical aid and knows for a fact that there is R500 000.00 available. As such the submission that the total amount may be payable is without any basis. The applicant's contribution would be for the co-payment and payment for the premium for which he has now conditionally offered to pay.<sup>3</sup> As a father and a parent it would be befitting and compassionate for the applicant to have a generous consultation with his heart and humanity to unconditionally put this offer in operation and pay for the treatment for her daughter whilst exhausting legal avenues at his disposal.

[22] The evidence presented clearly indicates that the private journal of the respondent was not obtained with her consent and therefore the court would not accept affidavit based on the information, which was obtained unlawfully, and which has the effect of invading the respondent's privacy. The applicant has failed to present legal basis upon which it will be justified to invade the privacy. He furthermore failed to present legal basis in terms of which new evidence could be presented during application for leave to appeal.

[23] In general, the applicant's arguments are just the same as previously presented and no other evidence or argument has been presented which would unsettle my judgment.

[24] Section 17 of the Superior Courts Act 10 of 2013 that ...

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<sup>3</sup> This offer for payment is consistent with the offer he made in December 2022 that he would pay for the medical expenses until he reneged on account of the guilty money allegations.



- (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that —
- (a) (i) the appeal would have a reasonable prospect of success; or
  - (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[25] On the basis of the foregoing read together with reasons detailed in my judgment there are no prospects of success and I am not persuaded that another court would come to a different conclusion. In addition, there are no compelling reasons why the leave to appeal should be granted.

[26] I therefore conclude that the application for leave to appeal should fail.

#### Section 18(3) application

[27] For the purposes of this section of the judgment Ms K[...] will be referred to as the applicant and Mr K[...] as the respondent.

[28] The application for leave to appeal launched by the respondent has the effect of automatically suspending the effect of the judgment and order granted in favour of the applicant.<sup>4</sup> The applicant had an option in terms of section 18(3) to approach court for an order to give effect to the order notwithstanding that the opponent has launched the application for leave to appeal.

[29] The applicant has approached this court for the execution of the order despite the leave to appeal process being launched by Mr K[...]. The application was set down to be adjudicated upon at the same time with the leave to appeal referred to above. The court

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<sup>4</sup> See section 18(1) of the Superior Court Act, 10 of 2013.

held in *Downer v Zuma and Another* that ... section 18 applications are by their nature very urgent. This is borne out by the provisions of section 18(4) which provides that an appeal must be dealt with on an extremely urgent basis. " To this end it follows that the application would ordinarily be accorded urgent audience.

[30] It is trite that the requirements to access the remedy provided for in section 18 are that there should, firstly, be exceptional circumstances<sup>5</sup> prior such order could be granted. Secondly the court should also be persuaded on a balance of probabilities that no irreparable harm would visit either of the parties.<sup>67</sup>

[31] In addition to the factors set out above it was held in *University of Free State v Afri-Forum and Another*<sup>9</sup> that the court should have regard to the prospects of the judgment being upheld on appeal. As such if the chances of the appeal succeeding are less than the court should be inclined to grant an order for the execution. On the other hand, where the prospects of upholding the judgment are good then the court should be less inclined to grant an order to execute pending the appeal.

[32] The courts have always been reluctant to prescribe what would be exceptional in any case and the outcome of the exercise to make such a determination is facts specific.<sup>8</sup> It must however be demonstrated to the court that there are facts which are out of the ordinary.

[33] As a guide in the determination of exceptional circumstances *Sutherland DJP*<sup>11</sup> held that where a party would be left without any remedy then such a predicament would

<sup>5</sup> Ibid, Section 18 (2).

<sup>6</sup> Ibid, Section 18(3)

<sup>7</sup> (2) SA 185 (CC).

<sup>8</sup> See *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* [1999] ZACC 8 at paras 75-77. <sup>11</sup> *Incubeta Holdings (Pty) Ltd v Ellis* 2014 (3) SA 1 89 (GJ).

constitute exceptional circumstance warranting putting into effect the order pending the appeal. The applicant would in the long run not have any remedy at all if no treatment is effected immediately. The applicant is no longer a candidate for chemotherapy, and she needs immunotherapy. She has already missed 4 sessions and without the court's intervention the quality of life would be compromised. The right to dignity and subsequently right to life itself would have rendered hollow. A recourse to sue for damage would not restore the dignity or life of the applicant.

[34] Ms K[...] contended that the oncologist stated that if no treatment is carried out her position will be aggravated. As set out above she has already missed 4 sessions since the court process was commenced in May 2023. It has further been argued that the delay in implementing the treatment would lead to the cancer metastasising to other

- essential organs, organ failure, compromised immune system and subsequently death.

This must be arrested immediately.

[35] On the other hand, there is less likelihood of the Mr K[...] being visited with any harm less irreparable harm. Mr K[...] gripe is that he is impecunious. This is not countenanced by utterances and surrounding facts. He made an offer which is still open to pay for the costs in December 2022. His change of heart was purely predicated on his accusation of Ms K[...]' ingratitude having allegedly stated that the payment for the oncology treatment by Mr K[...] is guilt payment.

[36] Despite Mr K[...] offer to pay again for the medical aid premium together with the required co-payment for the treatment he still complains that he would not afford to pay for the whole treatment which could be in the range of R87 000.00 per week. This complaint is unsustainable as my order states that the respondent would pay only when

there are no funds in the medical aid. Mr K[...] has access to the medical benefits set out by the medical aid fund and is aware that there is a set aside of R500 000,00 for cancer treatment by Discovery Medical Aid Scheme. To this end, there is no basis to complain and there is harm which will visit him.

[37] The respondent is also held bound to unnecessarily to delay the finalisation of the lis. The court a quo directed him to file a comprehensive financial disclosure which was not done at the time when the matter served before me. There was however an attempt to serve the supplementary affidavit, allegedly setting out the finances but since the said affidavit was delivered late the attempt was denied. The applicant's counsel having argued that it was a ploy to have the matter postponed. This pattern was repeated during the leave application and section 18 proceeding where the respondent came with another supplementary affidavit in the last hour.

[38] Finally, the prospects of the respondent succeeding with the appeal are weak. The decision made against the respondent is temporary and was predicated on the fact that he did not disclose in full his financial status. It is extremely unlikely that the appeal court would wish to adjudicate over the lis without such disclosure being made. The respondent has an option of just filing a comprehensive financial disclosure and come back to the high court and demonstrate his inability to assist the applicant with the relevant and required funding.

[39] In the circumstances I make the following order:

- (1) The application for leave to appeal is dismissed with costs.

(2) It is ordered that:

2.1. Application for the execution of the interim order of this court dated 21

August 2023 is granted.

2.2. The respondent is ordered to pay the costs of the application.

Mokate Victor Noko  
Judge of the High Court  
Gauteng Local Division, Johannesburg

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 10 November 2023.

COUNSEL FOR THE Ms AB K[...]: ADV N STRATHERN

ATTORNEYS FOR THE APPLICANT: ULRICH ROUX & ASSOCIATES

COUNSEL FOR Mr H K[...]: ADV L METZER

ATTORNEYS FOR THE RESPONDENT: STRYDOM M AND ASSOCIATES

DATE OF THE HEARING: 2 NOVEMBER 2023

DATE OF JUDGMENT: 10 NOVEMBER 2023