IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED.

SIGNATURE DATE: 21 November 2023

Case No. A2023/100001

In the matter between:

ZERO AZANIA (PTY) LTD Appellant

and

CATERPILLAR FINANCIAL SERVICES SA (PTY) LTD Respondent

Case No. A2023/100007

and in the matter between:

AZANIA MONEY GROWTH (PTY) LTD Appellant

and

CATERPILLAR FINANCIAL SERVICES SA (PTY) LTD Respondent

CORAM: OPPERMAN, WILSON AND NOKO JJ

Summary

Interim execution under section 18 (3) of the Superior Courts Act 10 of 2013 – whether requirements for interim execution met – meaning of “irreparable harm” – whether there is a presumption of irreparable harm in favour of an owner seeking possession of property pending appeal – evaluation of prospects of success in interim execution proceedings made to establish exceptional circumstances – existence of court’s discretion considered on finding requirements for interim execution have been met – majority finding that applicant for interim execution had shown irreparable harm on a balance of probabilities having regard to all the

evidence without need for reliance on, or evaluation of, a presumption of irreparable harm in favour of an owner – minority finding that no such harm had been shown on the facts – appeal dismissed.

JUDGMENT

WILSON J (dissenting):

1 The appellants in each of these appeals, to whom I shall refer collectively as "Azania", purchased six construction vehicles from the respondent, Caterpillar. The terms of each purchase were governed by an instalment sale agreement. Caterpillar says that Azania breached the terms of each of those agreements. Caterpillar terminated the agreements. It then sought and obtained an order from the court below for the return of the vehicles.

2 Azania sought leave to appeal against that order. Its application for leave to appeal was refused, but Azania's attempt to challenge the order for the return of the vehicles caused Caterpillar to institute an application under section 18 of the Superior Courts Act 10 of 2013 ("the Act"). Subsections 18 (1) and (3) of the Act permit the execution of a final order granted at first instance pending any appeal against it, provided that three jurisdictional requirements have been met. These requirements are that there are exceptional circumstances justifying such execution; that the applicant for interim execution will suffer irreparable harm if interim execution is not permitted; and that the respondent will suffer no irreparable harm if it is.

3 On 4 October 2023, the court below granted Caterpillar's application for interim execution, because it found that the jurisdictional requirements set out in subsections 18 (1) and (3) had been met. The form of interim

execution Caterpillar sought and obtained from the court below was essentially a preservation order. If the order for interim execution stands, Caterpillar will keep the vehicles safe pending the outcome of any appeals, but it will not be able to deal with them in any other way.

4 Azania now appeals to us against the interim execution order. We must allow the appeal if, and only if, we conclude that Caterpillar has not met any one of the jurisdictional requirements that subsections 18 (1) and (3) of the Act set out.

5 I have no doubt that the court below was correct to conclude that there are exceptional circumstances in this case. I am also prepared to accept that it was established that Azania will suffer no irreparable harm from the form of execution Caterpillar sought. However, in my view, Caterpillar failed to establish that it would suffer irreparable harm unless that relief was granted. It follows that this jurisdictional requirement – that of irreparable harm to Caterpillar – was not met in the court below, and that the appeal should succeed.

6 In giving my reasons for reaching this conclusion, I shall first deal with the requirements of exceptional circumstances and the absence of irreparable harm to Azania. I shall then move on to address why, in my view, Caterpillar has failed to establish that it will be irreparably harmed in the absence of an order for interim execution.

Exceptional circumstances

7 Caterpillar relied upon three circumstances that it said were exceptional. The first was that the vehicles constitute its only security for the substantial debts it says are owing to it under each of the instalment sale agreements at issue in these appeals. In case number 10001 ("the Zero Azania case"), the amount owing is just over R3.4 million. In case number 100007 ("the Azania Money Growth case"), it is in the region of R15.6 million. The second exceptional circumstance alleged is that Azania is, so Caterpillar says, perpetuating an ongoing abuse of process by delaying the proceedings for the sole purpose of hanging on to the vehicles as long as possible. In support of that contention, Caterpillar points to Azania's consistent failure to file its papers in the court below on time. Indeed, one of the reasons why Azania was unsuccessful in the main application in the court below is that it was refused condonation for the late filing of its answering affidavit. The third exceptional circumstance on which Caterpillar relied was Azania's weak prospects of success on appeal.

8 I am not convinced that either the amounts of money involved in this case – and hence the nature of security held for their repayment – or Azania's supposed delaying tactics render this case truly exceptional. On the papers it seems that Caterpillar was itself responsible for significant portions of the delays in the court below that it now seeks to attribute to Azania's "tactics".

9 However, it is not necessary to examine these grounds in any detail. It seems to me that what must be taken as Azania's poor prospects of success on appeal constitute in themselves the kind of exceptional circumstances that might justify interim execution.

10 Whether or not the prospects of an appeal succeeding have any role to play in an interim execution case has been a matter of some debate in the cases. The Supreme Court of Appeal's view is that those prospects do play a role. However, it appears that the Supreme Court of Appeal has not yet had the opportunity to consider in what way a party's appellate prospects affect the enquiry, because the record of the main application in each interim execution matter in which it confronted that question was not before it. It was accordingly impossible for the court to form a view on the prospects of each of the appeals involved (see *University of the Free State v Afriforum* 2018 (3) SA 428 (SCA), paragraphs 14 and 15 and *Knoop NO v Gupta (Execution)* 2021 (3) SA 135 (SCA) ("*Knoop*") paragraphs 49 and 50).

11 In this case, we do have the benefit of the record of the main application in the court below, and Azania's prospects of success on appeal can readily be ascertained.

12 Azania's best point on appeal, to the extent that it can be discerned, is that its instalment sale agreements with Caterpillar were novated somewhere along the line, and that Caterpillar mistakenly sued on the initial agreements and not the novated ones. The problems with this contention are, first, that the novated agreement is only relied upon in the Zero Azania case, and not in the Azania Money Growth case, and, second, that there is no evidence that Azania has performed in terms of what it says is the novated agreement. In these circumstances, Azania's prospects are slim.

13 In my view, the weakness of Azania's appellate prospects supply the exceptional circumstances required by section 18 (1) to justify interim

execution, provided that the two additional jurisdictional requirements set out in section 18 (3) are also met.

Absence of irreparable harm to Azania

14 There is no dispute that Azania is presently using the vehicles on construction projects in which it is engaged. To take the vehicles away from Azania for safekeeping would obviously cause it some harm. However, that harm would not be irreparable, for at least two reasons. The first reason is that Azania will not be irrevocably deprived of the vehicles. Because Caterpillar seeks no more than a preservation order, if Azania's appeals are ultimately successful, the vehicles will be returned to it. The second reason is that Azania has not demonstrated that it will be unable to make alternative arrangements for any construction projects on which it is currently using the vehicles. Having been given the opportunity to say, in its affidavits, whether such alternative arrangements are possible, Azania has chosen to say nothing. The probable inference is therefore that alternative arrangements which would obviate any harm to Azania's interests are possible, and that any harm to Azania from being (perhaps only temporarily) deprived of the vehicles is likely to be reparable.

The question of irreparable harm to Caterpillar

15 The final leg of the inquiry is whether Caterpillar will suffer irreparable harm if interim execution is refused. This is a separate and independent requirement. In other words, we could be satisfied that Azania's prospects of

success on appeal are virtually non-existent, and that it would suffer no harm from interim execution, but we would nonetheless be bound to refuse interim execution if Caterpillar itself cannot show that it will be irreparably harmed without interim execution. In my view, this is a purely factual inquiry. The burden is on Caterpillar to show irreparable harm on the undisputed facts.

16 It seems to me that this has not been shown. The clearest indication of this is that Caterpillar itself does not seek to make out much of a case on the facts. It instead departs from what it says is a legal presumption of irreparable harm that operates whenever an owner seeks interim relief to obtain possession of its property. In my view, however, there can be no such presumption.

No presumption of irreparable harm to an owner seeking interim possession

17 Mr. Louw, who appeared for Caterpillar before us, set out his case for the existence of the presumption by relying on the decision of the Constitutional Court in *Tshwane City v Afriforum* 2016 (6) SA 279 (CC). In that decision, Froneman J and Cameron J, writing for the minority, held that "in vindicatory proceedings the deprivation in the interim of the right of ownership is presumed to be irreparable" (*Afriforum*, paragraph 146). That *obiter dictum* was based on unelaborated remarks made in passing in two High Court decisions from the 1950s (see *Stern and Ruskin NO v Appleson* 1951 (3) SA 800 (W) 813B and *Olympic Passenger Service (Pty) Ltd v Ramlanan* 1957 (2) SA 382 (D) 384F-G). In *Afriforum* Justices Froneman and Cameron enlisted those remarks in support of a more ambitious argument that the invasion of some types of rights, even for a very short period, will nearly

always be irreparable. The proposition in *Afriforum* was that, like ownership, rights of culture and belonging can be invaded irreparably, even if they are invaded only for a very short period.

18 In *Afriforum* at issue was whether an interim interdict restraining the alteration of street names in Pretoria could be sustained. The majority (led by Mogoeng CJ) held that it could not, partly for the reason that, on the facts, Afriforum could show no irreparable harm that would result from the altered street names being used while the decision to change the names was taken on review. The approach of the majority of the court was purely factual. The majority did not decide the matter on the basis of the kind of right that was being asserted. Nor did it apply any presumptions. It concluded simply that, at the level of practicality, there was no harm if the new street names were used while the decision to change them was taken on review (see *Afriforum* paragraph 60).

19 It seems to me that this purely factual approach is the one that the majority of the Constitutional Court enjoins us to take in applying the irreparable harm test in this case. But even if it was not, I am unable to support the approach taken by the minority of the Constitutional Court – that the invasion of some sorts of rights (including those of ownership) is automatically irreparable unless otherwise proved. First, the idea that harm to ownership rights is inherently irreparable appears to have a somewhat shallow jurisprudential foundation. Second, the proposition in any event runs against the constitutional grain.

20 At the heart of our constitutional order is the commitment to equal protection and benefit of law, entrenched in section 9 (1) of the Constitution, 1996. The very least this must mean is that there is no pre-constitutional hierarchy of rights, some of which are afforded procedural advantages while others are not. I have held elsewhere that the enforcement of ownership rights does not enjoy inherent preference in urgent court (see *Volvo Financial Services Southern Africa (Pty) Ltd v Adamas Tkolose Trading CC* (2023/067290) [2023] ZAGPJHC 846 (1 August 2023), paragraphs 9 to 13). If that is correct, then I do not see how it could be correct to endow the pursuit of vindicatory relief with the advantage of a presumption of irreparable harm, where it is a requirement that an owner shows this in any particular context.

21 If the pursuit of vindicatory relief were to be given some sort of general procedural super-preference, such as the presumption of irreparable harm, then there would have to be constitutional or statutory justification for it. I see none. Neither the Act nor the Constitution provides one. What the Constitution does say about property rights, including those of ownership, is that they may not be interfered with in an arbitrary manner (section 25 (1) of the Constitution, 1996) and that they may only be extinguished against just and equitable compensation (section 25 (3) of the Constitution, 1996).

22 A statutory enactment, such as section 18 (3) of the Act, might, I think, be cast as an interference with ownership rights, insofar as it prevents their vindication pursuant to a court order pending appeal if the owner can show no irreparable harm. But far more onerous procedural limitations on the vindication of ownership rights have routinely been held to be non-arbitrary

and constitutionally valid, without recourse to any ownership-friendly interpretation (see for example, *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC), paragraph 37).

23 It follows from all this that, if we are to be convinced that Caterpillar has shown the kind of irreparable harm the Act requires, then it must do so on the unvarnished facts, without recourse to any legal presumptions.

Caterpillar's harm on the facts

24 On the facts, Caterpillar's harm seems limited indeed. What it really comes down to is the "wear and tear" to which the vehicles will be put while Azania pursues its appeal. But "wear and tear" is little more than an artefact of accounting. It is a form of depreciation which is assumed to occur even when an item is used competently and with care and proper maintenance. There is no dispute that the vehicles are being put to use, and that, in the ordinary course of things, the use of vehicles in general will result in wear and tear depreciation. In the Azania Money Growth case, Azania says that the vehicles are in operation for between a quarter and a half of the average month. It also says, somewhat hyperbolically, that the vehicles are "not being worked to a point of collapse".

25 But that is neither the point nor what the facts actually show. What is disclosed on the papers is no more than the ordinary use of the vehicles pursuant to the purpose for which they were sold. There is no suggestion that the vehicles will be irreparably damaged, destroyed or spirited away pending appeal. Caterpillar can and does track them. If its monitoring of the

vehicles shows the possibility of them being rendered unusable or of them being placed beyond its reach, it will have its remedies then. But there is simply no suggestion of that at present.

26 It seems to me that what constitutes “irreparable harm” is a highly fact-specific inquiry. On its face, the term denotes no more than some detriment that cannot later be cured. But in the particular statutory context in which it is deployed in this case, “irreparable harm” must mean the sort of harm that will not be cured if the litigant claiming it is ultimately successful in the appeal pending which interim execution is sought. On this test, Caterpillar is plainly unharmed. If and when Azania’s appeal fails, it will get its vehicles back. That will cure its detriment.

27 Given that what interim execution envisages is the inversion of the ordinary rule that an order appealed against is suspended until the appeal runs its course, I think that the harm must also be sufficiently weighty to justify a departure from the ordinary approach. In a strictly trivial sense, there is always some harm done to a litigant who is denied what is rightfully theirs while their opponent pursues an appeal that turns out to be without merit. The time spent in possession of a thing, or without money one is owed, or without a service to which one is entitled, will always be in some sense irrecoverable. In other words, the moments that could have been spent enjoying a particular right while someone else appeals your entitlement to it will always be lost. That is inherent in legal procedure. Section 18 (3) does not address harm of that kind. It strikes instead at a real and substantial injury for which there can be no later remedy.

28 I do not think that the wear and tear depreciation that the vehicles will be put to pending the exhaustion of Azania's appeals is harm of that nature. It can be no more than the cost of doing business that Caterpillar must long ago have factored into its operations. Caterpillar sells heavy construction equipment on credit. Most of its deals, hopefully, go off without a hitch. Others go bad, and legal proceedings are necessary either to collect money it is owed, or to recover vehicles it owns, or both. I do not think that Caterpillar is *per se* entitled to be insulated against the costs to it of having to follow these procedures, but that would be the effect of holding that wear and tear depreciation constitutes irreparable harm. Were Caterpillar able to show a real possibility that its property would be lost or destroyed, then things would be different. But Caterpillar cannot do so on the papers before us.

Order

29 It follows from all of this that this appeal should have succeeded. I am aware that the effect of this conclusion would have been that Azania would continue, at least for a short while, to possess and use equipment for which it has not paid, to which it is probably not entitled, and for which it has shown no essential need, while it pursues an appeal that is very unlikely to succeed. I would not have celebrated that result, but it is the result that section 18 (3) of the Act requires on the facts before us. It is inherent in any rule-based system that the rules will sometimes generate unsatisfactory outcomes. That is no reason to attempt to refashion the rules by resort to

suspect presumptions or factual exaggerations, as I believe Caterpillar has done in arguing what it says is its irreparable harm in this case.

30 The rules that generally forbid execution pending appeal are critical to the protection of often poor and vulnerable people whose arguments are frequently novel; who are not always able to develop their case fully at first instance; and whose claims sometimes require filtration through appellate processes before they are fully recognised. Section 18 was adopted with precisely such people in mind (see *Knoop NO*, paragraph 1 and, generally, *Philani-Ma-Afrika v Mailula* 2010 (2) SA 573 (SCA)).

31 To uphold Caterpillar's claim in this case would require us to presume harm where it has not been shown, or to elevate commercial inconvenience to the status of irreparable harm, simply because Caterpillar is an owner of property. While giving Caterpillar what it wants in this case would cause me no moral anguish, the doctrinal consequences of what we would have to do to get to that result are disturbing. I cannot accept that they are worthwhile.

32 Had I commanded the majority, I would have made the following order –

32.1 The appeal succeeds, with costs.

32.2 The order of the court below is set aside and substituted with the following order -

"The application for interim execution is dismissed with costs."

OPPERMAN J (with whom NOKO J agrees):

33 Whilst I fully endorse the protection of poor and vulnerable people '*whose arguments are frequently novel; who are not always able to develop their case fully at first instance; and whose claims sometimes require filtration through appellate processes before they are fully recognised*,'[1] I do not agree that what we would have to do to find for Caterpillar is to diminish or take away such protection. I do not agree that finding for Caterpillar on the facts of this case would result in unacceptable doctrinal consequences. I must therefore dissent from the first judgment for the reasons that follow.

34 The parties are an earthmoving plant and equipment supplier (Caterpillar) and construction companies which require earthmoving plant and equipment (Azania). Azania purchased the plant and equipment from Caterpillar, paid a portion of the purchase price and then stopped paying the instalments due to Caterpillar in October 2021. The transactions fall outside the scope of the National Credit Act, 34 of 2005 due to their economic scale. Azania is using the plant and equipment to render construction services at a site in Westcliff, and it can safely be inferred that it is earning an income from the use of the plant and equipment, which I shall refer to as the machinery.

35 Following the cancellation of the instalment sale agreements in respect of the machinery, Caterpillar claimed its return and Azania resisted this. Once the machinery has been valued in its present state Caterpillar will probably institute action for the benefit of its bargain i.e. the prices for which it sold the

[1] Paragraph 30 of the first judgment.

machinery to Azania and related charges, less the value of the machinery returned to it. This would appear, as is conventional in commerce, to be the way in which the supplier, in this instance Caterpillar, does business. It sells its wares for a profit which is built into the contract of sale. When the sale is cancelled it is generally not sufficient for the seller to simply receive return of the goods sold, which is why our law provides for contractual damages, to put the party confronted with default of performance by the other party into the position that they would have been in had the contract been performed. That is the measure of contractual damage in our law.[2] What prospect does Caterpillar enjoy of recovering the benefit of its bargain in its subsequent action? We know that Azania has not paid anything for the use of the machinery since October 2021 during which time it has been using the machinery to generate an income. We know that there is no other security, such as a suretyship or a bank guarantee, available to Caterpillar to which it may be able to turn when it gets the machinery valued and it finds, as it inevitably will, that the value of the machinery returned after so many years of use is insufficient to give it as seller that which our law assures a seller it is entitled to, the benefit of its bargain. If the machinery is inadequate to cover the loss and if there is no other security and if, as is the case, Azania has not honoured its contractual obligations, not even under the alleged 'new agreement' then how does that weigh on the question of whether Caterpillar

[2] In *Trotman v Edwick* 1951 (1) SA 443 (A) 449B Van den Heever JA said: 'A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind.' The nature of damages for breach of contract was stated by Innes CJ in *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 22 as: 'The sufferer by such a breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party.' And Christie's Law of Contract in South Africa 8th ed at p. 680 et seq.

has established irreparable harm, and how should that question be answered? It is against this background that to this enquiry I now turn.

36 The relevant section is section 18 of the Superior Courts Act which reads as follows:

> **"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. (emphasis provided)

37 I have emphasised above that it is up to the party who seeks execution pending appeal to prove that it will suffer irreparable harm on a balance of probabilities. In this case that is Caterpillar. My learned brother has found in the first judgement that this element of Caterpillar's case is not satisfied. In my view the application of the test on a balance of probabilities yields a different conclusion.

38 It is now settled that section 18 did not merely codify the common law position laid out by Corbett JA (as he then was) in *South Cape,*[3] but introduced more onerous requirements.[4] The requirements are, in summary: exceptional circumstances, and that the applicant is to show on a balance of probabilities that it will suffer irreparable harm if the court does not order so and that the other party will not suffer irreparable harm.

39 After these jurisdictional requirements are met, it is presently unclear in our law whether a court has retained a discretion[5] to be exercised and what factors are to be considered in exercising it. It is also unclear whether prospects of success can only be considered at such stage i.e. after the 3 requirements have been met.

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[3] *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd,* 1977 (3) SA 534 (A).
[4] *University of the Free State v Afriforum and Another*, 2018 (3) SA 428 (SCA); *Premier for the Province of Gauteng and Others v Democratic Alliance and Others,* [2021] ALL SA 60 (SCA); *Johannesburg Society of Advocates and Another v Nthai and Others,* 2021 (2) SA 343 (SCA).
[5] *Knoop and Another NNO v Gupta (Tayob intervening*), 2021 (3) SA 135 (SCA) at para [50].

40 The *University of the Free State*[6] decision suggests (in contrast to the *Knoop*[7] judgment) and following *Justice Alliance*[8] and not *Incubeta Holdings*,[9] that prospects of success are to be taken into account to decide whether the matter is exceptional.

41 I consider myself bound by both the *University of Free State* decision and *Knoop*. Assuming section 18 has not expunged the court's common law discretion, there appears to be no reason, certainly in principle, why prospects of success should not be taken into account both to determine exceptionality and as a factor to be considered in exercising the discretion to enforce a court order pending an application to the Supreme Court of Appeal for leave to appeal (*a petition*).

42 The first judgment accepts that Azania's prospects of success are poor and that such consideration satisfies the requirement of exceptionality. I agree with this finding but need to add this: when the matter came before us Azania's application for leave to appeal had already been heard and dismissed. The record of the proceedings before the court *a quo* served before us and it was clear that the prospects of success were not only weak on the merits of the case but Azania would also have to persuade a court of appeal (and before that, the Supreme Court of Appeal in the pending petition) that the refusal of the condonation application for the late filing of the answering affidavit should be overturned applying the appropriate test for achieving that objective. To be clear: in my view Senyatsi J was correct in

[6] *Ibid.*
[7] *Ibid.*
[8] *Social Development Western Cape and Others v Justice Alliance of South Africa and Another* [2016] ZAWCHC 34.
[9] *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another*, 2024 (3) SA 189 (GJ).

finding against Azania on the merits, was correct in refusing leave to appeal and correct in refusing condonation. In addition, the parties before the court are not of the vulnerable category whose cases are often initially inadequately presented. All parties here are engaged in commerce at the level of multi-million rand contracts, as I have sketched in the introductory passages to this judgment.

43 They are competently legally represented and thus do not fall within the category of litigant which needs particular protection from this court. However, the identity and commercial strength of the litigants is something which in my view, could weigh with a court when exercising its discretion, (should one exist) an argument I will get to later, in protecting the group of litigants about which the first judgment rightly expresses a concern, albeit that we are not dealing with such litigants here.

44 I then turn to the heart of the inquiry.

Irreparable harm to Caterpillar

45 The entire process of fact finding requires that due consideration be had to the test to be applied which is one of a balance of probabilities. The legislature by enacting this as the standard of proof required in matters of this nature, has thus moved away from the approach ordinarily adopted in motion proceedings being either the *Webster v Mitchell* approach applicable where interim relief is sought or the *Plascon Evans* approach which is used to determine motions for final relief.

46 What this court is called upon to do is to select a conclusion which seems to be more natural or plausible a conclusion from amongst several conceivable ones having evaluated the probabilities deduced from all of the affidavits without particularly favouring applicants or respondents version. In this instance there can only be two conclusions – either Caterpillar will suffer irreparable harm or it will not if interim execution is not ordered. The balance of probabilities is an objective test and is dependent on the value to be given to the facts insofar as it relates to relative probabilities.

47 The gravity of a fact should not have any effect on how the evidence is approached as far as the burden of proof is concerned. The English law judgment in *Hornal v Neuberger Products, Ltd*[10] provides the following explanation regarding this:

> 'Though no court and no jury would give less careful attention to issues lacking gravity than those marked by it, the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities.'

48 The court in *Re: H and Others*[11] observed —

> 'The law looks for probability, not certainty. Certainty is seldom attainable. But probability is an unsatisfactorily vague criterion because there are degrees of probability. In establishing principles regarding the standard of proof, therefore, the law seeks to define the degree of probability appropriate for different types of proceedings.'

49 If the probabilities are weighed and found to be equal, the party not bearing the onus will be successful. However, if that scale tips, even slightly in favour of the party bearing the onus, that party will be victorious.

[10] [1957] 1 Q.B. 247 266.
[11] [1996] 1 ALL ER.

50 It seems to me that two aspects were overlooked in the first judgment. The first is the test (being the balance of probabilities) and the second is the application of such test to the facts and circumstances of this case as they emerge from a consideration of all the affidavits which reveal, amongst other things, the nature of the transactions in which the parties engaged, as I have sketched above.

51 Caterpillar's harm was considered as though it were separate from all the other facts of the case, almost in isolation and like one would approach a pleading to decide whether it is excipiable. The first judgment contains no balancing or weighing of probabilities.

52 Caterpillar did not rely exclusively on a legal presumption of irreparable harm. Nor did its case on this issue come down only to what the first judgment has labelled '*an artefact of accounting*' being wear and tear of the machinery. It is true that depreciation is an accounting concept which deals with the loss of value of assets subject to wear and tear over time but the facts and circumstances in this case reveal more.

53 Azania owes Caterpillar significant debts – in the Zero Azania case: R3.4 million and in the Azania Money Growth case: R15.6 million. The machinery is Caterpillar's only security. It is undisputed that no payments whatsoever have been made by Azania to Caterpillar since October 2021 either in terms of the cancelled instalment sale agreements, the possible re-instated instalment sale agreements or the alleged new instalment sale agreements. It is now November 2023 and the machinery is still being used without payment. Azania's response to Caterpillar's concerns is not to put up its

financial statements to evidence that it is good for any monetary claim and that the security embodied in the machinery is incidental. Azania seeks to allay Caterpillar's fears by contending that:

> 'The Applicant's purported concerns are without merit, as the units are protected by satellite tracking devices, operational monitors, and remote deactivation systems (as stated by the Applicant under oath), as well as the fact that the Respondent has maintained the units on a comprehensive insurance cover and has given the Applicant an undertaking to continue to do so for as long as the units are in its possession.'[12]

54 This assumes that the machinery is all that is needed to secure Caterpillar's claim. As I have pointed out above, that assumption on the part of Azania fails to take account of the nature of Caterpillar's business as a supplier of plant and equipment for sale in contracts, contracts intended to be profitable to it, which in itself implies that the return of the machinery as second hand goods is unlikely to cover this loss. But even if one ignores Caterpillar's claim for the loss of the benefit of its bargain, however Caterpillar may compute its damages, the value of the machinery is a vital part of any calculation of damages and where there is no evidence of any alternative source of recovery other than the machinery itself, the way in which the machinery is being looked after, if unsatisfactory, weighs in the probabilities in favour of Caterpillar and against Azania.

55 What is immediately apparent is that Azania does not contend that it is maintaining the physical workings of the machinery. More about this feature later though.

[12] Para 24 of Azania Money Growth's answering affidavit.

56 It is common cause that the machinery is being utilised. Caterpillar states that the fact that the machinery is protected by satellite devices is not a safeguard against the utilisation of those devices. Caterpillar cannot de-activate them. All that it can do is to monitor their location for as long as the Unit Monitoring Systems remain in working order but in Caterpillar's experience, similar Unit Monitoring Systems have previously been removed from other units or otherwise been rendered ineffective. Caterpillar points out quite correctly that:

> 'The respondent has not produced a shred of evidence to confirm that the Units are well maintained and comprehensively insured. The allegations ought to be rejected outright.'[13]

57 There is of course no obligation on Azania to produce any proof of any fact but it runs the risk of the court drawing adverse inferences from its failure to do so. Azania was squarely challenged to produce evidence to support its claims of comprehensive insurance cover. It failed to do so. What valid legal objection could Caterpillar have raised to the introduction of a supplementary affidavit annexing the necessary proof in the form of an insurance policy? The most plausible inference to draw from their failure to do so is that no or inadequate insurance exists.

58 To get back to the maintenance issue: no allegations whatsoever have been made that the machinery is properly maintained let alone documentary proof to evidence this. Once again, Azania was challenged directly on this issue but nothing was presented to allay Caterpillar's fears and the only plausible inference this court can draw from this is that the machinery is not

[13] Paragraph 26 of the replying affidavit.

adequately maintained or not maintained at all but there is certainly something being hidden from the Court (and Caterpillar) that will influence the finding of the irreparable harm Caterpillar stands to suffer.

59 Normal '*wear and tear'*, that which is '*an artefact of accounting*' as the first judgment finds, '*is a form of depreciation which is assumed to occur even when an item is used competently and with care and proper maintenance'*. But the facts of this case do not evidence care and proper maintenance. Damage or 'wear and tear' beyond ordinary use is what constitutes 'irreparable' harm because if Caterpillar does get the return of the machinery ultimately, it will have to recover that portion from Azania - who has not paid it since October 2021 and who has not honoured any undertakings given on multiple occasions.

60 One cannot but agree with Caterpillar that given the history of the relationship between the parties, it is cold comfort for Azania to say 'sue me'. This court has a range of indicators, foremost amongst which is Azania's non-payment, that Azania is not good for the claim. This court knows that Azania has not paid Caterpillar a single cent since October 2021, that Azania has not made payment to Caterpillar in terms of the alleged new agreement, that Azania has not provided a shred of evidence to verify its claims of having comprehensive insurance on the machinery or that they are maintained. Everything points to an unscrupulous exploitation of the benefit of possession with little or no regard for the rights of the counterparty to the contract.

61 Thus, having regard to the fact that the machinery is being used at least in the ordinary course (as Azania rather un-reassuringly says: ‘not to the point of collapse’), the inadequacy of the evidence placed before this court in respect of insurance and maintenance from the only party who could do so being Azania and having regard to all the undisputed facts including the plausible inferences drawn, I conclude that Caterpillar has shown irreparable harm to it on a balance of probabilities as is required in terms of section 18 (3).

62 In my view, Caterpillar need not resort to any presumptions on the facts of this case. I agree with my learned brother that it is a factual question but I arrive at a different conclusion by what I consider to be the way in which section 18(3) requires the determination of the question of irreparable harm to be made. I express no views on whether resort should be had to such presumptions as a matter of principle. I do not see the need to venture into the realm of such presumptions as in my view, Caterpillar has discharged the onus resting on it on the facts.

Discretion

63 The issue of whether there is a discretion once the requirements are met was not dealt with in the most recent Supreme Court of Appeal judgment, *Zuma v Downer and Another,*[14] on section 18(4). In the full court (in the court *a quo*), it was stated that the discretion ‘*in the sense articulated in South*

[14] *Zuma v Downer and Another*, [2023] ZASCA 132 (13 October 2023).

Cape….. is now absent'.[15] This view has also been held in a number of other judgments.[16]

64 In my view, *Knoop* has kept the door open for an argument to retain the discretion as articulated in *South Cape* after a finding that the 3 jurisdictional requirements have been met. I would venture to suggest that the prospects of success would then again come into play and where, like here, the prospects of success are very poor to the point where it can be labelled almost an abuse to pursue the petition to the SCA and in view of this being an urgent section18(4) appeal procedure, such discretion would be exercised against a debtor such as Azania.

Conclusion

65 I am concerned that the strict interpretation of sections 18(1) and (3) which might lead to Caterpillar not establishing 'irreparable harm', despite the overwhelmingly weak prospects of Azania's appeals, coupled with the proven and accepted absence of irreparable harm on Azania's part (and the preservation of the machinery pending the finalisation of the appeal process), would blunt the effectiveness of Senyatsi J's order and substantially undermine public confidence in the courts.

66 A discretion is the means to regulate the process of enforcement of orders pending appeal and to address the concerns raised in the first judgment in respect of the protection of the vulnerable. What is however also important is to recognise that commerce is the backbone of the economy and that we are

[15] *Maughan v Zuma and Another; Downer v Zuma and Another*, [2023] ZAKZPHC 75.
[16] *Chairperson of the Western Cape Gambling and Racing Board and Others v Goldrush Group Management (Pty) Ltd and Another,* [2022] ZAWCHC 223*: In Road Accident Fund and Others v Mabunda and Others,* [2021] 1 ALL SA 255 (GP).

to encourage investment in our economy. Our courts have a role to play and must be seen to enforce our own orders once it is apparent that such order is unlikely to be interfered with on appeal.

Order

67 The instalment sale agreements provide for costs as between attorney and client.

68 In the result the appeal must fail and it is accordingly dismissed with costs as between attorney and client.

pp I OPPERMAN J
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 21 November 2023.

HEARD ON:	31 October 2023
DECIDED ON:	21 November 2023
For the Applicants:	P G Louw Instructed by Werksmans Attorneys
For the Respondents:	J Schoeman Van der Walt Attorneys