REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2022-035571

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. YES

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B.C. WANLESS 22 August 2023

In the matter between:

NDUMISO SIYABULELA MDLETSHE First Applicant

SIPHELELE MBONGI DUNYWA Second Applicant

and

YOUTUBE CHANNEL First Respondent

AMBITIOUS GROUP (PTY) LTD Second Respondent

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 22 August 2023

JUDGMENT
(SECTION 18 APPLICATION)

WANLESS AJ

Introduction

[1] On the 13th of March 2023 the Applicants in this matter sought an order before this Court (on the Opposed Motion Court roll) in the following terms:-

> ***PART A: URGENT INTERDICTORY RELIEF PENDENTE LITE.***
>
> *1. Dispensing with the forms and service provided in the Uniform Rules of Court and condoning non-compliance with the Rules relating to service and time periods in terms of Rule 6(12);*
>
> *2. That pending final determination of Part B attached to this notice of motion and marked Annexure **"FA1"**, any person or entity acting in concert with the Respondents, are hereby interdicted from removing and/or deleting the account of the Applicants Youtube channel;*
>
> *3. That it be ordered that the Second Respondent be interdicted from raising any copyright/ownership dispute against the works of the Applicants with any other Digital Streaming Platform (**"DSP"**) inclusive of the First Respondent, Spotify, iTunes, Deezer, authored by the Applicants from 15 June 2022, pending final determination of Part B.*
>
> ***PART B***
>
> *4. That it be declared that the Exclusive Management Agreement, the Artist Management Agreement and the Publication Agreement ("**the Agreements"**) entered into between the Plaintiffs and the Defendant on 10 January 2020, be declared terminated as of 7 January 2022 alternatively 15 January 2022 alternatively it be declared that the Agreements are null and void ab initio and hereby terminated;*
>
> *5. That an independent auditor be appointed within 30 (thirty) days of this order to perform a debatement of the accounts in order to determine amounts due to the Plaintiffs from January 2017 to date, in respect of the following;*
>
> *a. The First Schedule of the Exclusive Management Agreement;*
>
> *b. The Second Schedule of the Publication Agreement; and*
>
> *c. Clause 9, 10 and 11 of the Artist Management Agreement.*

6. *That the independent auditor provide the Court as well as the Parties with a report, within 60 (sixty) days of making this order.*

7. *That the Defendant be ordered to pay the costs of the independent auditor.*

8. *That the Defendant be ordered to pay the costs of the action on an attorney and client scale, inclusive of the costs of counsel.*

9. *Further and alternative relief.*

10. *Ordering the Respondents opposing Part A of this application to pay the costs thereof; and*

11. *Further, and/or alternative relief.*

[2] Thereafter, on the 12th of June 2023 this Court delivered a judgment (revised on 23 June 2023) and made the following order (in terms of a Draft Order handed in on behalf of the Applicants), namely:-

[1] That pending final determination of Part B attached to this application, any person or entity acting in concert with the Respondents, are hereby interdicted from removing and/or deleting the account of the Applicants' Youtube channel;

*[2] That it be ordered that the Second Respondent be interdicted from raising any copyright/ownership dispute against the works of the Applicants with any other Digital Streaming Platform ("**DSP**") inclusive of the First Respondent, Spotify, iTunes, Deezer, authored by the Applicants from 15 June 2022, pending final determination of Part B.*

[3] The Second Respondent is ordered to pay the costs of this application including the costs of two Counsel, one of which is Senior Counsel.

[3] Pursuant thereto and on the 27th of June 2023 the Second Respondent *(hereafter referred to as "the Respondent")* lodged an application for leave to appeal against the judgment and order of this Court.

[4] On the 26th of July 2023 the Applicants released one audio and one music video on the YouTube channel (*"the First Respondent"*). Shortly thereafter, on the 31st of July 2023, the First Respondent issued the Applicants with a notice that both of the aforesaid works had been removed from YouTube at the instance of the Respondent.

[5] The Applicants instituted this application on an urgent basis and the matter was set down for hearing on the Urgent Court roll on Tuesday the 15th of August 2023.In terms of the relevant Practice Directive the matter was referred by the Judge hearing urgent applications to this Court. Since this Court was hearing Special Motions on Monday; Tuesday and Thursday of that week the matter first came before this Court on Wednesday the 16th of August 2023. When it did, this Court raised the issue as to whether or not the interim order made by this Court was one which had the effect of a final judgment, thereby falling within the provisions of subsection 18(1) of the Superior Courts Act 10 of 2013 *("the Act")* and hence which this Court could indeed order otherwise in terms of subsection 18(3) of the Act. Under the circumstances the matter was postponed, by consent, to Friday the 18th of August 2023 to enable the parties to fully consider the issue raised and address this Court thereon.

[6] On Friday the 18th of August 2023, both parties addressed this Court and presented Heads of Argument to this Court as to whether the order made by this Court was one which fell within the provisions of either subsection 18(1) or 18(2) of the Act. At the outset, it is important to note that both the Applicants and the Respondent were *ad idem* that same was an order that had the effect of a final judgment; was thus not suspended as a result of the Applicants' application for leave to appeal and would not be suspended in the event of this Court dismissing the Applicants' application for leave to appeal which is to be heard on the 28th of August 2023.In other words, both parties agreed that the provisions of subsection 18(1) applied and not those of subsection 18(2). After hearing submissions from both Senior Counsel and having had the benefit of their Heads of Argument, this Court was in agreement therewith. Insofar as was necessary, a ruling was made in respect thereof. This judgment will not be burdened by setting out the reasons therefor. This Court wishes, once again, to record its thanks to Counsel for their invaluable assistance therewith.

The Law

[7] As is clear from the above, this is an application by the Applicants in terms of subsections 18(1) and (3) of the Act. In their Notice of Motion the Applicants sought the following relief:

> *1. Dispensing with the forms and service provided in the Uniform Rules of Court and condoning non-compliance with the Rules relating to service and time periods in terms of Rule 6(12);*
>
> *2. In terms of section 18(1), read with section 18(3), of the Superior Courts Act, Act10 of 2013, it is ordered that the operation and execution of the Judgment and Order of this Court (per Wanless AJ), under case number: 2022/035571, dated 12th June 2023, revised on 23rd June 2023, shall not be suspended pending a decision on the*

second respondent's application for leave to appeal and, in the event of leave to appeal being granted, the outcome of such appeal.

3. That the Respondents opposing this application be ordered to pay the costs thereof, on an attorney and client scale, including the cost of senior counsel.

4. Further and alternative relief.

[8] The relevant subsections of section 18 of the Act for the purposes of this judgment are:

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) …

(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;

[9] The principles applicable to an application in terms of subsection 18(3) are as follows:

…The test is twofold. The requirements are:

16.1 First, whether or not 'exceptional circumstances' exist; and

16.2 Second, proof on a balance of probabilities by the applicant of –

16.2.1 The presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order; and

16.2.2 The absence of irreparable harm to the respondent/loser, who seeks leave to appeal."[1]

[10] In addition, the prospects of success in the appeal are relevant in deciding whether or not to grant the exceptional relief.[2] The SCA approved the following approach by the Western Cape[3]:

> *…the less sanguine a court seized of an application in terms of s 18(3) is about the prospects of the judgment at first instance being upheld on appeal, the less inclined it will be to grant the exceptional remedy of execution of that judgment pending the appeal. The same quite obviously applies in respect of a court dealing with an appeal against an order granted in terms of s 18(3).*[4]

[11] In other words, the more confident a court is about the judgment being upheld on appeal, the more inclined it will be to grant relief in terms of section 18(3).

[12] The first stage of the enquiry, whether "exceptional circumstances" are present, depends on the peculiar facts of each case. The exceptional circumstances must be derived from the actual predicaments in which the litigants find themselves.[5]

[13] The following circumstances have been found to be exceptional:

13.1 The predicament of being left with no relief, regardless of the outcome of an appeal. The forfeiture of substantive relief because of procedural delays, even if not protracted in bad faith by a litigant, ought to be sufficient to cross the threshold of exceptional circumstances.[6]

13.2 If a refusal to put into operation an order, pending the determination of an application for leave to appeal, will result in the "evaporation" of the order because it will never be put into effect.[7]

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[1] *Incubeta Holdings (Pty) Ltd v Ellis and Another 2014 (3) SA 189 (GJ) at para [16]; endorsed by the SCA in Ntlemeza v Helen Suzman Foundation and Another 2017 (5) SA 402 (SCA) at paras [35]-[36] and in University of the Free State v Afriforum and Another 2018 (3) SA 428 (SCA) at paras [9]-[10].*

[2] *UFS v Afriforum 2018 at para [15].*

[3] *Minister of Social Development Western Cape and Others v Justice Alliance of South Africa and Another (20806/2013) [2016] ZAWCHC 34 (1 April 2016) approved in UFS v Afriforum at paras [14]-[15].*

[4] *Justice Alliance at para [27], approved in UFS v Afriforum at paras [14]-[15].*

[5] *UFS v Afriforum at para [13].*

[6] *Incubeta Holdings at para [27].*

[7] *Fidelity Security Services (Pty) Ltd v Mogale City Local Municipality and Others 2017 (4) SA 2017 (GJ) at para [28].*

13.3 When the effect of the appeal is that, even without any consideration of the merits of the appeal, the appellants will have achieved rendering the order nugatory.[8]

13.4 Where interim execution is necessary to prevent an unconstitutional state of affairs from continuing.[9]

[14] In respect of the second stage of the enquiry, the proper meaning of subsection 18(3) was explained by Sutherland J (as he then was) as follows:

> *[24] The second leg of the s 18 test, in my view, does introduce a novel dimension. On the South Cape test, No 4 (cited supra), an even-handed balance is aimed for, best expressed as a balance of convenience or of hardship. In blunt terms, it is asked: who will be worse off if the order is put into operation or is stayed. But s 18(3) seems to require a different approach. The proper meaning of that subsection is 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. A hierarchy of entitlement has been created, absent from the South Cape test. Two distinct findings of fact must now be made, 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'.*[10]

The merits

[15] It was common cause that on the application papers before this Court and in order to succeed with the present application in terms of subsections 18(1) and 18(3) of the Act the onus was upon the Applicants to prove, on a balance of probabilities, that (i) the circumstances are exceptional; (ii) that the Applicants in this particular matter will suffer irreparable harm if this Court does not grant the order, and (iii) that the Respondent in the present matter will not suffer irreparable harm if this Court grants the order.

[16] What was not common cause between the parties was whether this Court should take into account the Respondent's prospects of success in respect of its application

[8] *Actom (Pty) Ltd v Coetzee and Another (A269/2015) [2015] ZAGPPHC 548 (31 July 2015) at para [15].*
[9] *Democratic Alliance and Others v Premier for the Province of Gauteng and Others [2020] ZAGPPHC 330.*
[10] *Incubeta Holdings at para [24]; emphasis added.*

for leave to appeal which, as already noted earlier in this judgment, has been set down for hearing before this Court on the 28th of August 2023. This will be dealt with later in this judgment.

[17] It is now necessary for this Court to turn and examine the facts of this matter in relation to the applicable legal principles as set out above. Of course, this involves not only a consideration of the application papers placed before this Court but also the thorough and detailed arguments placed before this Court by Adv Wesley SC for the Applicants and Adv Baloyi SC (with her Adv Van Nieuwenhuizen) for the Respondent. In doing so, this Court is acutely aware of the provisions of subsection 18(4)(i) of the Act which provides that *"If a court orders otherwise, as contemplated in subsection (1) the court must immediately record its reasons for doing so;….."*.[11] Moreover, in *University of the Free State v Afriforum*[12] it was held, *inter alia*, that proper reasons (that is, not reasons lacking materially in substance) should be furnished.[13] In the premises, this Court has attempted, to the best of its ability, to reach a compromise between providing these reasons on an urgent basis (bearing in mind the limited resources available to it) whilst also ensuring that it provides reasons which are not lacking in substance. With regard to the latter, it must naturally be accepted that, to one degree or another, a certain amount of detail must be lost. Nevertheless, it is trusted that an overview of the evidence and the submissions made on behalf of Counsel representing the respective parties, will do justice to the real issues and, ultimately, the reasons for this Court coming to the decision that it has.

[18] Before dealing with the merits of this application it must also be noted that prior to hearing argument in respect thereof, this Court also heard argument in relation to the issue of urgency and made a ruling in respect thereof. That ruling is a matter of record and this judgment will not be burdened unnecessarily by dealing therewith. Suffice it to say, this Court found, on the grounds set out in the application papers before it, together with the Practice Directive of this Division, that the matter should be heard during the course of the week during which it had been set down for hearing. The last point to note is that Adv Baloyi SC, on behalf of the Respondent, specifically conceded (correctly in this Court's opinion) that the Respondent no longer persisted with the point *in limine* that the Applicants did not have the requisite *locus standi* to institute the present application.

The general approach adopted by the Applicants and the Respondent

[19] It is useful to first summarise the arguments put forward on behalf of both parties (as understood by this Court) before examining those arguments in greater detail. On behalf of the Applicants it was submitted that the Applicants had clearly discharged

[11] *Emphasis added.*
[12] *2018 (3) SA 428 (SCA) at 438A-D.*
[13] *Erasmus: Superior Court Practice ('Erasmus") at D-135.*

the onus incumbent upon them. In this regard, it was submitted that the Applicants' version had been answered by the Respondent with vague and qualified denials. In the premises, the Applicants contend that not only is it clear from the application papers before this Court that exceptional circumstances exist and that the Applicants will suffer irreparable harm should this Court not order that the interim order be put into operation but also, that the Respondent will not suffer any irreparable harm if it is. The Applicants also rely on the case made out in the application giving rise to the judgment and order of this Court and the contents of that judgment, together with the order as a consequence thereof.

[20] The argument on behalf of the Respondent is similarly based on the contents of the application papers before this Court. In that regard, it is submitted that the Applicants have failed to make out their case and plead facts in their Founding Affidavit upon which they rely. As a result thereof it is further submitted that the Respondent is unable to refute the factual allegations upon which the Applicants allegedly rely. In fact, the Respondent says that the Applicants have failed so dismally to do this in respect of exceptional circumstances, that the question of irreparable harm does not even arise.

[21] These then were (in broad summary) the two conflicting approaches adopted by the respective parties when the matter was argued before this Court. In doing so, both Adv Wesley SC and Adv Baloyi SC submitted that certain aspects of the evidence pertaining to exceptional circumstances also applied equally to irreparable harm. Both Counsel also took this Court meticulously through the application papers and referred this Court to specific references to paragraphs in various affidavits and the responses thereto. For obvious reasons and, more particularly, those reasons set out earlier in this judgment,[14] it is simply not possible for this Court to make reference thereto.

The case for the Applicants

Exceptional circumstances

[22] The grounds relied upon by the Applicants to establish exceptional circumstances are, *inter alia*, the following:

22.1 the principal manner in which the Applicants earn an income is by releasing music videos and audios on YouTube. The Respondent's conduct is directly impacting the Applicants' ability to do this and is severely curtailing the income that they can earn. This factor is directly linked to ***irreparable harm*** since this income, once it is not earned, is lost forever;

[14] *Paragraph [17] ibid.*

22.2 the Respondent has not prosecuted the application for leave to appeal with proper diligence thereby allowing the Respondent to strike down any new music the Applicants may release onto various digital streaming platforms *("DSP's")*;

22.3 the merits of the Respondent's pending application for leave to appeal are poor.

Irreparable harm

[23] Insofar as the Applicants allege they are suffering irreparable harm, in addition to the loss of income from YouTube as alleged above the Applicants also aver, *inter alia*,:-

23.1 a monetary loss in respect of planned tours and the like. The investment of money and time into the production and releasing of the songs and videos; and

23.2 a loss of income as a result of less exposure to the marketplace, including the overseas market.

[24] With regard to the irreparable harm being suffered by the Respondent the Applicants aver that the Respondent is suffering none other than that occasioned by its own conduct, that is, removing songs and videos from YouTube which could be earning an income and which, on the Respondent's version, the Respondent is entitled to a share of.

The case for the Respondents

[25] As set out above the Respondent criticizes the Applicants for failing to place any real facts before the Court in substantiation of the aforegoing and what Adv Baloyi SC described as vague assertions lacking in any detail. Further, Adv Baloyi SC, relying on the matter of *Knoop N.O. and Another v Gupta*[15] correctly submitted that the inquiry in an application of this nature is clearly a factual one.[16]

[26] It is the nature of this criticism that deserves close examination for, in a well-presented argument, Adv Baloyi SC certainly does not lack judicial authority (and in certain instances legitimate facts) to support that argument. In the first instance, Adv Baloyi SC attacked any reliance by the Applicants on the Media Statement by the Respondent as being somehow an instrument giving rise to either exceptional circumstances on the part of the Applicants or irreparable harm being experienced by them as a result of a loss of invested time, money and popularity. This Court

[15] *2021 (3) SA 135 (SCA).*
[16] *At paragraphs [55] and [56].*

understands Adv Wesley SC to have conceded that the Applicants no longer rely thereon to assist them in discharging the onus in this application. In the premises, this Court will place no weight on the publication of that statement by the Respondent and the somewhat problematic contents thereof.

[27] Whilst trite, it is obviously nonetheless important to bear in mind, as correctly pointed out by the Respondent's Counsel, that the Applicants must set out all the facts upon which they rely in their Founding Affidavit, not only to justify the relief sought but also in order to make the Respondent aware of the case that it had to meet. If the Applicants did not do so, they cannot attempt to do so in their Replying Affidavit. In this regard, Adv Baloyi SC referred this Court to the often cited decision of *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw*[17] Finally, Counsel for the Respondent placed some considerable reliance on the principles (and findings) in the matter of *KGA Life Limited v Multisure Corporation (Pty) Ltd and Others*[18]*.*In this matter, it was held, *inter alia*, that *Multisure* (the First Respondent) in an urgent appeal in terms of subsection 18(4)(ii) of the Act, had shown a trajectory of financial decline since *KGA* (the Appellant) had stopped its payments to *Multisure*.[19] However, the Court in this matter still held:[20]

> *Multisure contended that the financial harm to KGA should the execution order be granted, can be undone by a repayment of the premiums to it. It is not evident why the same could not apply in relation to the financial harm it has suffered and will suffer until the finalisation of the appeal. Multisure has not placed evidence about its overall financial position before the court. It is unclear whether it owns assets, what other income it has, what its liabilities are and whether it can raise loans to remain financially afloat pending the appeal. The information before the court is too sparse to make a determination. While Multisure has certainly established that it will suffer harm, it has not proven that harm to be irreparable on a balance of probabilities.*

[28] The aforegoing principles extracted from the abovementioned authorities are relied upon by the Respondent in the following respects.

28.1 The Respondent avers that the Applicants do not state what revenue they have lost and will continue to lose if the order remains suspended;

28.2 It is submitted by the Respondent that the Applicants have not asserted that or explained why, if ultimately successful, they could not calculate the loss of revenue;

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[17] *2008 (5) SA 339 (SCA) at paragraphs [29] and [30]*
[18] *(CA 157/2022) [2022] ZAECMKHC 115 (14 December 2022).*
[19] *At paragraph [54].*
[20] *At paragraph [55]*

28.3 Further, the Respondent submits that since the Applicants have other channels to distribute their music this means that the suspension of the order and any loss of revenue will not cause irreparable harm to the Applicants. Indeed, the Applicants do not deny that radio and television exposure far surpass the exposure of their music on the affected platforms;

28.4 As to whether the Respondent will suffer irreparable harm if the suspension is lifted the Respondent submits the onus rests on the Applicants to prove they will not and point to the fact that on the application papers the Applicants admit they are not persons of means.

Conclusion

[29] With regard to the reliance placed by the Applicants upon the submission that the Respondent has not prosecuted the application for leave to appeal with proper diligence, thereby allowing the Respondent to strike down any new music the Applicants may release on to various DSP's, this Court, during the course of argument, raised with Counsel for the Applicants the regrettable situation that delays are often caused in the hearing of applications for leave to appeal by difficulties in the Appeals Office in this Division and not always by the actions of the litigants themselves. Following thereon, this Court understood Adv Wesley SC not to necessarily abandon the submission in its entirety but, certainly, not to pursue it with any alacrity. At the end of the day, this Court echoes the sentiments of Sutherland J (as he then was) when dealing with the same point in *Incubeta Holdings*[21] when the learned Judge stated *"…I disregard this aspect of the case as presented, since it plays no useful role in the reasoning I offer for my conclusions."*

[30] In respect of the Respondent's prospects of success in having this Court grant it leave to appeal against its judgment and order of the 12th of June 2023 (the application for leave to appeal having been set down for hearing on 28 August 2023) it is clear from that set out earlier in this judgment[22] and upon a proper reading of *Afriforum*[23] that the SCA has definitively decided that the prospects of success in the appeal process are relevant in deciding whether to grant the exceptional relief in an application in terms of section 18 of the Act. In the present matter the relief sought[24] by the Applicants includes that the order granted by this Court is not suspended in the event of leave to appeal being granted by this Court until the outcome of such appeal. In the premises, apart from the directions of the SCA; the nature of the order granted by this Court (an interim prohibitory interdict) and the nature of the relief sought by the Applicants in this application (which this Court is entitled to grant in

[21] *At paragraph [3].*
[22] *Paragraphs [10]; [11] and [16] ibid.*
[23] *Paragraphs [14] and [15].*
[24] *Paragraph [7] ibid.*

terms of section 18 of the Act) it cannot be doubted that the Respondent's prospects of success on appeal must be one of the factors which should be taken into consideration when deciding whether the Applicants have discharged the onus incumbent upon them in the present application.

[31] Perhaps understandably, having regard to the stance taken by the Respondent on this point, Adv Baloyi SC spent no time whatsoever addressing this Court on whether or not there was a reasonable possibility of another Court coming to a different decision in relation to the interim order granted by this Court. On the other hand, Counsel for the Applicants, in submitting to this Court that the merits of the Respondent's pending application for leave to appeal are poor, dealt with each ground relied upon by the Respondent in its Notice of Application for Leave to Appeal. In doing so, Adv Wesley SC submitted that each such ground had either not been argued at the application itself; was incompetent in law or had been properly found to have been proven by the Applicants.

[32] This Court finds that whilst it would appear *prima facie* (at this stage and subject to hearing full argument at the application for leave to appeal) that the prospects of success on appeal appear to be against the Respondent, this is only one factor which is to be considered amongst a number of factors when deciding this application. Just as much as no decision has been reached as to whether or not this Court will grant leave to appeal to the Respondent on the 28th of August 2023 this Court, whilst accepting that it is obliged to consider the Respondent's prospects of success on appeal at this stage of the proceedings, is also alive to the fact that same should not be over-emphasised to the detriment of other pertinent and important factors. It is, as already stated, only one of the relevant factors to be added into the "melting pot" of the various factors to be taken into consideration in each particular case when arriving at a decision as to whether an applicant has discharged the somewhat onerous burden of proof in an application of this nature and proven, on a balance of probabilities, both exceptional circumstances, together with irreparable harm and, at the same time, no such harm to a respondent.

[33] By far the most important factor in the present application, in the opinion of this Court, is that dealt with broadly above, being the Applicants' contentions that the actions of the Respondent in sending take down notices to YouTube in respect of their songs and music videos, constitute exceptional circumstances and are causing them irreparable harm. These contentions have been countered by the Respondent on the basis that the Applicants have failed to place sufficient facts before this Court to support same.

[34] The applicable principles and authorities dealing therewith have all been clearly set out earlier in this judgment. As also dealt with herein, both parties have criticised each other in respect of the paucity of the factual averments and/or the responses thereto. As is so often the case, both skilled Counsel made telling points when

dissecting paragraphs of affidavits drafted by highly competent legal practioners on behalf of their respective clients. However, when one pushes aside the semantics and "legal camouflage", one is left with that as set out hereunder.

[35] The interim order granted by this Court simply protects the rights of the Applicants to continue:

35.1 to have an account on YouTube;

35.2 to earn an income from songs and music videos authored by the Applicants from 15 June 2022 by streaming songs and music videos on any DSP's, including YouTube, Spotify, iTunes and Deezer. [25]

[36] During the course of argument, Adv Baloyi SC focussed particularly on:-

36.1 the fact that the Applicants were not restricted solely to YouTube and had other DSP's via which they could stream their songs and music videos. In addition thereto, the mediums of radio and television were also available to the Applicants; and

36.2 the Applicants had failed to place evidence in respect of their overall financial position before the Court and had not tendered to put up any security pending the finalisation of PART B of the order.

[37] In the first instance, no mention whatsoever was made, either in the application papers before this Court or by the respective Counsel for the parties, to the relief granted in paragraph [1] of the interim order.[26] This is an interim interdict in terms of which "…..*pending final determination of Part B attached to this application, any person or entity acting in concert with the Respondents, are hereby interdicted from removing and/or deleting the account of the Applicants' Youtube channel;".* The relief sought in the present application by the Applicants and opposed by the Respondent[27] is in respect of the entire order granted by this Court on the 12th of June 2023. As such, it includes the relief sought in both paragraphs [1] and [2] of that order, not just paragraph [2] thereof. In the premises, should this Court not order otherwise in terms of subsection 18(1) of the Act and the interim interdict (order) remains suspended pending the finalisation of the appeal process the Respondent *(or any other person or entity acting in concert with YouTube or the Respondent)* can take steps to remove and/or delete the account of the Applicants on the YouTube channel.

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[25] *Paragraphs 1 and 2 of the order of the 12th of June 2023; paragraph [2] ibid; emphasis added.*

[26] *Paragraph [2] ibid.*

[27] *Paragraph [7] ibid.*

[38] The fact that the Applicants have other DSP's via which they are able to stream their music and music videos in addition to YouTube, should not have come as any surprise to the Respondent. This must have been clear from the broad manner in which the relief in paragraph [2] of the Applicants' Notice of Motion was framed in the application and which was granted in the order of the 12th of June 2023. Of course, it must also be remembered that, until fairly recently, the Respondent was the record company responsible for managing and promoting the Applicants. As such, the Respondent would, at the very least, have intimate knowledge of all of the DSP's upon which the Applicants streamed their music and music videos. In addition, it would be a simple exercise to ascertain same, since these DSP's all function in the public domain.

[39] Nevertheless, when disclosed by the Applicants, it transpires that of the six (6) DSP's where the Applicants have followers and/or subscribers, YouTube is ranked fourth (behind Facebook; Instagram and Tiktok).As to the mediums of radio and television, it was common cause between the parties that these mediums did assist the Applicants in essentially growing their brand but it was pointed out by the Applicants that these are limited to a domestic audience whilst a DSP of the nature of YouTube is a global platform with a global audience. Once again, having regard to the prior relationship between the parties, these facts could hardly have come as a shock to the Respondent.

[40] The relevance of the aforegoing, for the purposes of this application is, in the opinion of this Court, the following. The Respondent cannot be heard to say that simply because the Applicants have other means available to them through which they can distribute their music and music videos the Applicants have failed to satisfy the requirements of exceptional circumstances and irreparable harm. This misconception has arisen as a result of the fact that the initial application primarily involved (as a result of the actions of the Respondent) a single DSP, namely YouTube. However, the interim relief sought and granted in the form of a prohibitory interdict, was much wider. The misconception that this application involves one DSP only, or that only YouTube should be considered when examining the principles of exceptional circumstances and irreparable harm, has been perpetuated in the present application. Ironically, this is so, by the continued actions of the Respondent who, after lodging an application for leave to appeal against the judgment and order of this Court, thereby suspending same *(and, in the words of the Respondent, obtaining the "benefit" of subsection 18(1) of the Act)*, elected to obtain a take down order of the Applicants' latest song and music video on YouTube and not in respect of any other DSP upon which the Applicants may be streaming that song and music video or on television or radio. This is so, despite the Respondent's utterances in its Answering Affidavit that the amount earned by the Applicants on YouTube is not substantial and the pointing out by the Respondent (as set out above) that other DSP's used by the Applicant's have far more followers and/or subscribers than YouTube.

[41] As to the amount of damages being suffered by the Applicants and the averments by the Respondent (as dealt with above) that the amount is an insignificant one, this Court finds that, on the basis that each case must be decided on its own particular facts; the fact that it is common cause that the Applicants are not persons of means and the fact that the Applicants are having to fund tours and pay for music videos and the like to promote their music the Applicants have successfully refuted these averments. Most importantly, this Court finds that, in this particular matter, when considering the requirement of irreparable harm the fact that revenue is lost forever and not recoverable when a song or music video is removed from a DSP, is decisive in this matter. Simply because the Respondent has not chosen, as yet, to take action in an attempt to have the songs and music videos of the Applicants taken down from other DSP's used by the Applicants, is no answer to the relief sought by the Applicants. Nor is the fact that the Respondent has not, as yet, sought to have the Applicants' YouTube channel closed pending the finalisation of the entire appeal process.

[42] As to the argument put forward on behalf of the Respondent that the Applicants have failed to place evidence in respect of their overall financial position before this Court and have not tendered to put up any security pending the finalisation of PART B of the order, as set out earlier in this judgment, Adv Baloyi SC relied upon the decision in the matter of *KGA Life Limited.* This matter involved two companies in the insurance industry. An execution order was granted (by a single Judge) in favour of one party *(Multisure)* in terms of subsections 18(1) and (3) of the Act, in respect of certain declaratory relief (payment of premiums by *KGA*) pending an appeal to the Supreme Court of Appeal. In an urgent appeal by *KGA* to the Full Court of the Eastern Cape Division (Makhanda) in terms of subsection 18(4)(ii) of the Act, it was held*, inter alia*, that:[28]

> *Multisure contended that the financial harm to KGA should the execution order be granted, can be undone by a repayment of the premiums to it. It is not evident why the same could not apply in relation to the financial harm it has suffered and will suffer until the finalisation of the appeal. Multisure has not placed evidence about its overall financial position before the court. It is unclear whether it owns assets, what other income it has, what its liabilities are and whether it can raise loans to remain financially afloat pending the appeal. The information before the court is too sparse to make a determination. While Multisure has certainly established that it will suffer harm, it has not proven that harm to be irreparable on a balance of probabilities.*

[43] Based on the aforegoing, Adv Baloyi SC submitted before this Court that the Applicants had failed to prove irreparable harm in that they had not, *inter alia*, placed

[28] *At paragraph [55].*

before this Court financial statements pertaining to their financial position; had not set out their debtors and creditors; had failed to place before this Court any evidence as to their financial situation; failed to list their assets; failed to list their liabilities and also failed to set out whether they could secure any loans pending the finalisation of PART B of the order.

[44] In the first instance, this Court wishes to return to the fundamental principle that in applications of this nature it is imperative that it should always be remembered that when evaluating whether or not exceptional circumstances exist (and in this context their relationship to irreparable harm) this must always depend on the facts of each case. In *Incubeta Holdings* it was held:[29]

> *Necessarily, in my view, exceptionality must be fact-specific. The circumstances which are or may be "exceptional" must be derived from the actual predicaments in which the given litigants find themselves.*

[45] Following thereon, the facts and more particularly the "predicaments" in which the litigants find themselves in the present matter compared to that which the litigants found themselves in *KGA Life Limited* are, in the opinion of this Court, very different. On that basis the facts in *KGA Life Limited* are distinguishable to those in the present matter. In this matter it is common cause, as dealt with earlier in this judgment, that the Applicants are not persons of means. As such, they are in a vastly different financial position to that of a company in the insurance industry. To expect the Applicants to be in a position to place before this Court evidence of the calibre as mentioned in *KGA Life Limited* would be, in the opinion of this Court, too onerous a burden indeed. Further, whilst not suggesting for one moment a shift in the onus or even in the evidential burden, the Respondent must be well aware of the financial status of the Applicants (which is in fact common cause). In the premises, it would be unfair to expect the kind of financial disclosure from the Applicants in the present matter as was defined in *KGA Life Limited.*

[46] As to the criticisms by the Respondent that the Applicants do not state what revenue they have lost and will continue to lose if the order remains suspended and the submission that the Applicants have not asserted that or explained why, if ultimately successful, they could not calculate the loss of revenue, the same considerations must, in general, apply. As stated by the Applicants these damages, by their very nature, are difficult to ascertain. Together therewith, is the necessity of having to institute this application on an urgent basis. But possibly the most plausible explanation as to why the Applicants would have grave difficulty in providing such information at this stage of the proceedings (apart from the obvious averments as set out in the application papers) and one which was not dealt with either in argument before this Court or in any of the affidavits placed before this Court, is the nature of the relief as set out in PART B of the order. That relief (essentially a debatement of

[29] *At paragraph [22].*

account) is as relevant at this stage of the proceedings as it will be at the conclusion thereof. This not only clearly illustrates the difficulty in the quantification of damages but once again emphasises the importance of examining the particular facts of each individual case in an application in terms of section 18 of the Act.

[47] Further, as to the passing shot from the Respondent that the Applicants had not tendered any security, it must be noted that none has been formally requested, at this stage, by the Respondent. Once again, it is common cause that the Applicants are not persons of any great financial means. It is also noted that the Respondent, whilst averring that the Applicants will always have a claim for damages, have also not tendered to put up security to negate any claims of irreparable harm that may be suffered on behalf of the Applicants.

[48] Finally, in respect of whether the Respondent will suffer any irreparable harm should this Court grant the Applicant the relief sought, it is correct, as submitted by Adv Wesley SC, that there are no material averments in the present application papers before this Court by the Respondent pertaining thereto. Rather, the Respondent has adopted the attitude that the onus rests upon the Applicants to prove same. Moreover, in the initial application, the Respondent only made bald and vague averments in respect of how it was being prejudiced by the Applicants continuing to stream their music on DSP's after ending their business relationship with the Respondent in that the Respondent's reputation was suffering and other artists may follow the allegedly unlawful actions of the Applicants. Certainly, the Respondent has set out no reasons why this Court could come to the Respondent's assistance and find that the Applicants have failed to prove that, on a balance of probabilities, the Respondent would not suffer irreparable harm if this Court granted the Applicants the relief sought in terms of subsections 18(1) and (3) of the Act.

[49] In light of the aforegoing, this Court holds that the Applicants have discharged the onus of proof incumbent upon them to prove, on a balance of probabilities, the existence of exceptional circumstances in this matter as contemplated by the provisions of subsection 18(1) of the Act and, in addition, in terms of the provisions of subsection 18(3) of the Act, that the Applicants will suffer irreparable harm should this Court not grant the relief sought and that the Respondent will not suffer irreparable harm if this Court makes an order as set out in the Applicants' Notice of Motion. Finally, in the exercise of its general discretion pertaining to costs, this Court grants costs of the application to the Applicant but declines to grant those costs on a punitive scale.

Order

[50] In the premises, this Court makes the following order:-

1. In terms of subsection 18(1), read with subsection 18(3), of the Superior Courts Act, Act 10 of 2013, it is ordered that the operation and execution of the Judgment and Order of this Court, under case number 2022/035571, dated 12 June 2023 and revised on 23 June 2023, shall not be suspended pending a decision on the Second Respondent's application for leave to appeal and, in the event of leave to appeal being granted, the outcome of such appeal;

2. The Second Respondent is ordered to pay the costs of this application, including the costs of Senior Counsel.

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B.C. WANLESS
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard:	16 August 2023
Judgment:	22 August 2023

Appearances

For Applicants:	CP Wesley SC
Instructed by:	Friedland Hart Solomon & Nicolson Attorneys c/o AJ Scholtz Attorneys
For Second Respondent:	MS Baloyi SC (with HP van Nieuwenhuizen)
Instructed by:	Richen Attorneys Inc.