

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 010700/2023

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

18/12/2023
DATE

SIGNATURE

In the matter between:

MANGO AIRLINES SOC LIMITED
(IN BUSINESS RESCUE)

First Applicant

SIPHO ERIC SONO N.O.

Second Applicant

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA
(INTERVENING)

Third Applicant

and

THE MINISTER OF PUBLIC ENTERPRISES

First Respondent

DEPARTMENT OF PUBLIC ENTERPRISES

Second Respondent

SOUTH AFRICAN AIRWAYS SOC LTD

Third Respondent

THE MINISTER OF FINANCE

Fourth Respondent

NATIONAL TREASURY

Fifth Respondent

INTERNATIONAL AIR SERVICE COUNCIL	Sixth Respondent
AIR SERVICE LICENSING COUNCIL	Seventh Respondent
THE AFFECTED PERSONS OF MANGO AIRLINES SOC LIMITED (<i>IN BUSINESS RESCUE</i>)	Eighth Respondent

Delivered: This judgment was prepared and authored by the 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 for hand-down is deemed to be 18 December 2023.

SECTION 18(3) JUDGMENT

PHOOKO AJ

INTRODUCTION

[1] This is an urgent application brought in terms of Rule (6)12 by the Applicants for the operation and execution of the order of the court *a quo* delivered on 6 September 2023. The operation and execution of the order are sought in terms of section 18(3) of the Superior Courts Act 10 of 2013 (“the Act”) pending leave to appeal (or petition). The order, in part, reads as follows:

- (a) It is declared that the First Respondent’s failure to take a decision in respect of the application submitted by the Applicants and the Third Respondent in terms of section 54(2) of the PFMA is unlawful and constitutionally invalid.
- (b) The First Respondent’s failure to determine the section 54(2) PFMA application is reviewed and set aside.
- (c) The First Respondent is directed within 30 days after the service of the Court order, to take a decision in respect of the section 54(2) application and communicate the outcome thereof

to the Applicants and the Third Respondent, including furnishing such reasons for the decision made, failing which the Applicants and the Third Respondent may assume that the section 54(2) application has been approved by operation of section 54(3) of the PFMA.

- (d) The First, Second, Fourth, and Fifth Respondents are ordered to pay the costs of this application, including the costs of two counsels, jointly and severally.
- [2] The application for the operation and enforcement of the said decision, pending the outcome of the application for leave to appeal (or petition), is opposed by the First, Second, Fourth, and Fifth Respondents.

THE PARTIES

- [3] The First Applicant is Mango Airlines, a state-owned company currently undergoing business rescue proceedings, with registration number 2006/018129/30 incorporated with limited liability in accordance with the laws of South Africa with a registered address at Mezzanine Level, Domestic Departures Terminal, OR Tambo International Airport, Kempton Park, 1627. As a state-owned entity, Mango Airlines is governed in accordance with the prescripts of, amongst others, the Public Finance Management Act 1 of 1999 (“PFMA”).¹
- [4] The Second Applicant is Siphon Eric Sono who is cited in these proceedings in his capacity as the duly appointed business rescue practitioner (“the BRP”) of Mango Airlines, practicing through his employer, Opis Advisory (Pty) Ltd with registration number 2007/012055/07 whose principal place of business is situated at West Wing, Birchwood Court, 43 Montrose Street, Midrand.
- [5] The Third Applicant is the National Union of Metalworkers of South Africa (“NUMSA”), a trade union registered in terms of section 95 of the Labour

¹ This judgment only cites the relevant parties in the present application to give context. The rest of the respondents have been omitted.

Relations Act 66 of 1995 whose place of business is at 153 Bree Street, corner Gerald Sekoto Street, Newtown, Johannesburg.

- [6] The First Respondent is the Minister of Public Enterprises (“the PE Minister”) cited in his official capacity whose principal place of business is at 80 Hamilton Street, Arcadia, Pretoria, 0007 C/O the State Attorney, Old Mutual Centre, 8th Floor, 167 Andries Street, Pretoria, 0001.
- [7] The Second Respondent is the Department of Public Enterprises whose address is at 80 Hamilton Street, Arcadia, Pretoria, 0007 c/o the State Attorney, Old Mutual Centre, 8th Floor, 167 Andries Street, Pretoria 0001.
- [8] The Third Respondent is the South African Airways SOC Ltd (“SAA”), a state-owned company with limited liability duly incorporated in accordance with the laws of South Africa with registration number 1997/022444/30 whose registered address is at Airways Park, 32 Jones Road, Kempton Park, Johannesburg, 1627.
- [8.1] SAA is the sole shareholder of Mango Airlines and owns 100% of its shares.
- [9] The Fourth Respondent is the Minister of Finance who is cited herein in his official capacity and whose address of service is 40 Church Street, Old Reserve Bank Building, 2nd Floor, Pretoria, c/o the State Attorney, Old Mutual Centre, 8th Floor, 167 Andries Street, Pretoria, 0001.
- [10] The Fifth Respondent is National Treasury whose principal place of business is at 40 Church Street, Old Reserve Bank Building, 2nd Floor, Pretoria, c/o the State Attorney, Old Mutual Centre, 8th Floor, 167 Andries Street, Pretoria, 0001.

THE ISSUE

- [11] The issue to be determined is whether the Applicants have met the jurisdictional requirements for the relief sought.

APPLICABLE LEGAL PRINCIPLES

[12] Section 18(1) and (3) of the Act permits the execution of a final order granted at first instance pending any appeal against it, provided that three jurisdictional requirements have been met. The full provisions of section 18 of the Act are 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.”

[13] Three observations can be made from the aforesaid provisions for the grant of the relief sought. There must be exceptional circumstances, and 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.² The said requirements codify the common law³ position yet are more onerous⁴ as compared to the common law position.

[14] In exercising the discretion to enforce a court order pending an application to the Supreme Court of Appeal for leave to appeal, (or a petition), prospects of an appeal succeeding in another court play a role in deciding whether to grant this exceptional relief.⁵

[15] In light of the above legal position, I now turn to consider the circumstances of this case, taking into consideration the oral and written submissions of the parties before this Court, to ascertain whether the Applicants have made out a case for the relief sought.

EXCEPTIONAL CIRCUMSTANCES

[16] Counsel for the Applicants submitted various grounds to the effect that this matter was “*of an unusual nature*” and therefore exceptional.

Urgency

² *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) at para 35.

³ *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 at 545C-G.

⁴ See *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] 1 ALL SA 60 (SCA); *Johannesburg Society of Advocates and Another v Nthai and Others*, 2021 (2) SA 343 (SCA).

⁵ *Zero Azania (Pty) Ltd v Caterpillar Financial Services SA (Pty) Ltd* [2023] ZAGPJHC 1341 at paras 10 and 41; see also *University of the Free State v Afriforum* 2018 (3) SA 428 (SCA) at para 15.

- [17] The First and Second Applicants relied on various decisions⁶ to contend that, *inter alia*, business rescue proceedings are in their nature, inherently urgent.
- [18] They further argued that the deeming provision in section 54(3) of the PFMA recognises the speedy manner in which the decision-making process had to be made in respect of section 5(4) transactions.
- [19] In addition, the First and Second Applicants contended that the PE Minister was required to act diligently and without delay as per the provisions of section 237 of the Constitution of the Republic of South Africa.
- [20] Counsel for the First and Second Respondents averred that this matter was not urgent. For one, the investor who is said, by the Applicants, to be threatening to withdraw has confirmed continued commitment to the transaction without any conditions. In addition, counsel contended that it was incorrect for the Applicants to state that by “*agreement*” they treat this matter as urgent.
- [21] When counsel for the Fourth and Fifth Respondents was asked about the fact that precedent tells everyone that the proceedings are inherently urgent by nature and that the issue of the investor being on board or not was irrelevant, his response was in the affirmative. However, he insisted that it appeared that the continued commitment of the investor was now brought into the urgency issue and invoked as if the investor would pull out of the transaction.
- [22] Counsel for the First and Second Respondents aligned themselves with the submissions of the Fourth and Fifth Respondents in so far as urgency is concerned.
- [23] In my view, the urgency was not adequately contested, save to state that the investor remains committed to the transaction. This does not put into dispute the inherent urgency associated with insolvency-related cases. In *Ex parte: Nell N.O. and Others*,⁷ the Court, per Tuchten J held as follows in respect of the

⁶ See *Mhlonipheni v Mezepoli Melrose Arch (Pty) Ltd* 2020 JDR 1033 (GJ) at para 6, *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd* 2012 (2) SA 378 (WCC) at para 10. *Black Sheep Capital (Pty) Ltd v H and H Specialised Services (Pty) Ltd* 2021 JDR 3091 (GP) at para 21.

⁷ 2014 (6) SA 545 (GP) at para 55.

urgency of insolvency proceedings:

“Another factor supporting the view I have taken is the inherent urgency of insolvency proceedings. In *Absa Bank Ltd v De Klerk and Related Cases* 1999 4 SA 835 E 838J-839A, the court said:

‘There is frequently a large body of creditors whose rights are affected by sequestration, who may wish to be heard on the return day, and who may be prejudiced by delay. This inherent urgency leads Meskin to make the following recommendation in Insolvency Law at 2.1.7 at 2-34, a recommendation which I endorse and which the Courts in this Division have in fact applied: . . . ’ (own emphasis added).

[24] In my view, precedent informs this Court that proceedings such as the present, are inherently urgent. I do not understand the proposition that seeks to divorce the section 54(2) application and the business rescue proceedings in the context of this case. The two are interconnected. This matter is urgent.

National and Public Interest

[25] The Applicants argued that *“the fact that a state-owned entity is in business rescue is unusual”*. They further averred that the matter has attracted public attention because of its *“impact on Mango’s creditors, its former employees and its customers”*. According to counsel, there is going to be extensive public harm if Mango’s business rescue fails as it will negatively impact Mango’s former employees, the un-flown ticket liability, and job creation.

[26] The Applicants further contended that an expert report compiled by Dr Vermooten, which outlines public interest considerations that show the importance of rescuing Mango, was not challenged.

[27] The Applicants also submitted that the *“national and public interest in the re-launch of Mango renders this case an exceptional one”*.

The Significant Financial Resources Implicated

- [28] The Applicants argued that there were extensive finances, to the sum of R 819 million from the National Revenue Fund, allocated by the government to Mango to reduce its financial dependence on SAA.
- [29] According to the Applicants, SAA has so far only transferred a sum of R 734 million to Mango, and R 430.4 million was allocated *“to settle arrear salaries of Mango employees and cover retrenchment packages”*. To this end, the Applicants contended that the allocation of a huge financial boost to Mango *“signals an intention for Mango’s successful relaunch as a commercially sustainable airline”*. Based on this, the Applicants argued that the financial allocation *“stands out as exceptional and unconventional”*, and that the Respondents’ actions were against *“the Government’s clear objective of rehabilitating Mango”*.

The Prospects of Successfully Rescuing Mango

- [30] Counsel for the Applicants argued that Mango’s affected persons have adopted a business rescue plan which the BRP believes can be implemented as he has identified a buyer, amongst other things.
- [31] Counsel further contended that the absence of Mango in the market deprives customers of competitive prices that would be offered by the airline if it were to return to business.
- [32] According to the Applicants, the *“fact that Mango will be unable to achieve a successful business rescue by virtue of the delays occasioned by the appeals process itself constitutes exceptional circumstances”*. To this end, Counsel referred this Court to *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another*⁸ where it was, *inter alia*, held that exceptional circumstances may arise due to procedural delays which may negatively impact on the substantive relief. Consequently, the Applicants averred that the *“prevention of Mango’s clear*

⁸ 2014 (3) SA 189 (GJ) at para 27.

prospect of successful rescue by virtue of the delays inherent in the appeals process alone constitutes exceptional circumstances”.

[33] NUMSA, in support of the Applicants, also contended that exceptionality was rooted in the fact that if the business rescue plan was to fail, it would effectively deprive NUMSA’s members of the vested right of the guarantee of employment, as outlined in the retrenchment agreement.

[34] The First and Second Respondents contended that the Applicants’ contention that the matter was out of the ordinary because it involved a public entity in business rescue, and that it attracted a significant amount of public interest, were “*not sufficient to meet the definitional requirements of exceptional circumstances*”. To this end, the First and Second averred that the said factors “*are not unique to the parties in this application*” and therefore not exceptional.

[35] Relying on various cases that have dealt with section 18(3) of the Act, counsel argued that in *Knoop NO and Another v Gupta (execution)*⁹ (“Knoop”), it was held that:

“In the context of section 18(3) the exceptional circumstances must be something that is sufficiently out of the ordinary and of an unusual nature to warrant a departure from the ordinary rule that the effect of an application for leave to appeal or an appeal is to suspend the operation of the judgment appealed from. It is a deviation from the norm. The exceptional circumstances must arise from the facts and circumstances of the particular case.”

[36] Consequently, the First and Second Respondents contended that the Applicants have failed to provide “any basis or reasons in support of their alleged exceptional case and/or a case that is out of the ordinary.

[37] The Fourth and Fifth respondents contended that the Applicants’ proposition that the case was one which involved business rescue is incorrect, but the case is one dealing with section 54 of the PFMA. Consequently, they argued that the reliance on urgency was misplaced.

⁹ 2021 (3) SA 135 (SCA) at para 46.

IRREPARABLE HARM

[38] The Applicants contended that the period of between 2 to 4 years to finalise the appeal could be too long to keep the investor waiting, even though the investor remains committed to investing in Mango. To this end, the Applicant argued that the loss of the investor due to appeal processes will leave the BRP with no other option but to wind-down Mango as per the Amended Business Plan.

[39] Counsel for the Applicants further argued that the inability to implement the amended business plan and winding down constitutes irreparable harm because liabilities amounting to R 183 million would remain unpaid, and that there would be no jobs re-created, amongst other things.

[40] NUMSA aligned itself with the submissions of the Applicants but further highlighted that their members would suffer “prejudice” if the order was not granted. The basis for this was that Mango’s former employees would receive preferential treatment with respect to future jobs as an investor has been found.

[41] The First and Second Respondents contended that the threat of the investor withdrawing from the transaction has been allayed by the commitment of the investor to continue with the transaction. According to the First and Second Respondents, *“the letter sent by the investor it is apparent that the investor appreciates the processes involved in this matter including the pending appeal”*.

[42] The First and Second Respondents submitted that the Applicants have not raised “other prejudice or harm except for the misconceived threat that the investor might withdraw”. Consequently, they contended that the Applicants will not suffer harm. The Fourth and Fifth Respondents supported the aforesaid submission.

ABSENCE OF IRREPARABLE HARM TO THE STATE RESPONDENTS

- [43] The Applicants submitted that the State Respondents would not suffer irreparable harm because there was evidence before this Court that the PE Minister's reason for pursuing an appeal was to get legal certainty about how section 54(2) of the PFMA ought to operate.
- [44] Furthermore, the Applicants contended that the Minister of Finance also argued that this matter was novel and involved the proper interpretation of the Companies Act and the PFMA, which have implications on the protection of the public purse. According to the Applicants, the granting of the relief would not prevent the State Respondents from proceeding with their appeal for legal certainty as per section 17(1)(a)(ii) of the Act.
- [45] The Applicants averred that the court carefully crafted its relief, and that the PE Minister still retains the decision of whether to approve the section 54(2) application. Consequently, this was the only practical consequence of immediately executing the order.
- [46] In so far as the *locus standi* is concerned, the Applicants argued that the issue of *locus standi* was resolved in the main application and that the Applicants have an interest in immediately enforcing the decision in the main application.
- [47] The First and Second Respondents contended that the "interim enforcement will result in irreparable harm to the section 54(2) transaction and will prejudice the First Respondent's ability, as government shareholder representative and as the executive authority under the PFMA, to discharge his duties in accordance with the Constitution, the PFMA and in ensuring that governmental policy and priorities are not infringed".
- [48] The First and Second Respondents further submitted that pursuing "an appeal after the fact will render some of the issues raised in the appeal moot, something impermissible or undesirable in law.
- [49] The First and Second Respondents argued that there would be consequences that will flow if the PE Minister was ordered to make a decision, such as

defending a potential review application against his decision. According to the First and Second Respondents, this will take place at the same time as the appeal.

[50] The First and Second Respondents submitted that a *“true construction of the relief sought by the applicants is to close the curtain on the Minister’s entitlement to vindicate his rights, by having his dispute adjudicated by the honourable Court”*.

[51] Relying on, *inter alia*, Baxter¹⁰, the First and Second Respondents averred that once an administrator has made a decision, he/she becomes *functus officio* and that decision cannot be changed by a decision maker but by a superior body. They further argued that *“once a decision has been made, that decision is final and cannot be varied or revoked”*. To bolster their case, the First and Second Respondents contended that *“the section 54(2) process does not accord the first respondent a corresponding power to reconsider his decision, once made”*. Consequently, the appeal will be moot.

[52] The Fourth and Fifth Respondents contended that if the execution order is granted, the appeal will be rendered moot, the PE Minister will be forced to make a decision based on an incomplete application. According to the Fourth and Fifth Respondents, *“this means that the PE Minister’s decision will not only be ill-informed but have severe consequences for the public at large and the public fiscus”*. To this end, they argued that the PE Minister will have made a decision in the absence of the Minister of Finance’s decision *“despite the government guarantees that have been granted in Mango’s favour”*.

[53] The Fourth and Fifth Respondents further contended that if the relief sought were to be granted, it would result in *“disjoint and incoherent decision-making processes in that the PE Minister will have to decide an incomplete application”* that cannot be implemented up until the Minister of Finance grants his approval. The Fourth and Fifth Respondents averred that the consequences were irreparable because once a decision has been made by the PE Minister,

¹⁰ L Baxter *Administrative Law* (1984) at pages 372-373.

he cannot “*unmake it*”.

[54] The Fourth and Fifth Respondents averred there would be benefits if the application is dismissed, and the Respondents are successful on appeal as the application process would remain open, and SAA would submit the required information to enable the relevant authorities to make an informed decision, amongst other things.

[55] The Fourth and Fifth Respondents contended that the investor has placed no time bar on the interest to invest in Mango and remains committed, contrary to the suggestions by the Applicants that the investor would not wait for too long.

[56] Ultimately, the Fourth and Fifth Respondents submitted that the delays in finalising the section 54(2) application have been caused by the Applicants, who are not assisting SAA and have brought this application. To a large extent, the Fourth and Fifth Respondents’ submissions echoed those of the First and Second Respondents.

EVALUATION OF SUBMISSIONS

[57] Concerning exceptional circumstances, in *MV AIS Mamas Seatrans Maritime v Owners, MV AIS Mamas, and Another*¹¹, the court dealt with the exceptional circumstances test which requires circumstances to be considered as exceptional to, *inter alia*, be out of the ordinary, unusual or uncommon, something which is accepted in the sense that the general does not apply to it. Their “existence or otherwise is a matter of fact which the Court must decide accordingly”.¹² There is no doubt that context is essential in the process of considering what constitutes exceptional circumstances.

[58] Counsel for the Applicants submitted that what made this case exceptional included that it involved State Owned Entities (“SOEs”) in business rescue, national and public interest, the significant amount involved, and prospects of Mango being successfully rescued. I doubt that these factors give rise to

¹¹ 2002 (6) SA 150 (C) at 156H.

¹² *Ibid.*

exceptional circumstances. The business of airlines by its nature involves the large amounts referenced in submissions. The same applies to SOEs which generally must conduct their affairs in the public interest because they involve the public purse. This Court is cautious of the suggestion that a matter that has attracted the attention and interest of a significant portion of the public at large is necessarily a matter of national and/or public interest. With what is before this Court, the Applicants have not shown that the matter is indeed exceptional. I do not see how the *Knoop* case supports or strengthens the Applicants' case.

[59] In my view, NUMSA did not save the situation as counsel considered exceptionality to be something that vested in the rights of its members to receive preference in the job creation in the event that Mango was successfully rescued. This is not out of the ordinary but occurs in any given situation where there is an agreement to do so especially if business rescue proceedings are implemented successfully.

[60] In light of the above, this Court is persuaded by the submissions of the Respondents that the aforesaid factors are not sufficient to meet the definitional requirements of exceptional circumstances.

[61] The consideration of irreparable harm entails a fact-specific inquiry. Irreparable harm means something that cannot be remedied and/or corrected "*if the litigant claiming it is ultimately successful in the appeal pending which interim execution is sought*".¹³ In *Zero Azania (Pty) Ltd v Caterpillar Financial Services SA*, it was further held that:

"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."¹⁴

[62] The test to be applied is one on the balance of probabilities, "an objective test

¹³ *Zero Azania (Pty) Ltd v Caterpillar Financial Services SA (Pty) Ltd* [2023] ZAGPJHC 1341 at para 26.

¹⁴ *Ibid* at para 46.

*and is dependent on the value to be given to the facts insofar as it relates to relative probabilities*¹⁵.

[63] The Applicants' submissions mainly focused on the fact that the appeal process may take long, that the investor may eventually decide to change their mind as they could not wait forever, and that the BRP would then be forced to wind down Mango. My difficulty with this submission is that it assumes that the section 54(2) application will be approved, whereas the PE Minister has the option to approve or decline. If the PE Minister declines, it follows that the BRP would have to follow the winding-up route.

[64] Again, NUMSA did not assist the Applicants' case as they averred that winding down constitutes irreparable harm because liabilities amounting to R 183 million would remain unpaid, and that there would be no jobs re-created, amongst other things. The submissions are problematic because it invites this Court to enter into speculation; something that is beyond its scope. Further, it suggests that nothing will come out of the winding-up process if Mango eventually goes that route.

[65] The continued commitment of the investor was brought into the core of the considerations by the Applicants. A reading of the letter before the Court from the investor does not assist the Applicants' case much. I agree with the Respondents that the letter from the investor does not reveal any signs of withdrawal, but a commitment by the investor to continue with the transaction. Delays in any litigation are somehow unavoidable. They are part and parcel of the legal procedure.¹⁶ In my view, this also settles the suggestion that the delays associated with the appeals process constitute exceptional circumstances in so far as Mango's "*clear prospect of successful rescue*" are concerned.

[66] The prospects of Mango being rescued do count in favour of Mango but for the affirmation letter from the investor, they do not take the Applicants' case further.

¹⁵ Ibid.

¹⁶ Ibid at para 27.

[67] All these factors point me in one direction, the Applicants have failed to discharge the onus resting on them on the facts.

[68] Concerning the absence of irreparable harm to the State Respondents, the Applicants' core argument on one hand was that the State Respondents would not suffer irreparable harm because the evidence before this Court showed that the Respondents' reason for pursuing an appeal was that the case was novel and that they sought to get legal certainty about how section 54(2) of the PFMA ought to operate. Consequently, the granting of the relief would not hinder the State Respondents from proceeding with their appeal for legal certainty as per section 17(1)(a)(ii) of the Act. On the other hand, the Respondents maintained that interim enforcement will result in irreparable harm to the section 54(2) transaction and will prejudice the First Respondent's ability as a government shareholder representative and as the executive authority under the PFMA, amongst other laws.

[69] In my view, the order of the court *a quo* does not tie the hands of the PE Minister to decide the section 54(2) application in a particular manner. I agree with the Applicants' submissions in that the PE Minister still retains the discretion to make a decision on whether to approve the section 54(2) application. Indeed, once he decides, that will be the end of the process of the decision and Mango will have to either go into business or wind up. One of these possibilities is unavoidable. I do not think that the issue of prejudice arises on the part of the State Respondents.

[70] Furthermore, the Fourth and Fifth Respondents' reliance on disjointed and incoherent decision-making processes suggests that government departments operate independently from each other, and that they do not communicate on issues that cut across their scope of authority and/or mutual interests. This is not the case.¹⁷ Accordingly, the issue of disjointed decision does not arise because the PE Minister is not directed to make a decision in a particular way but to consider what is before him, in the light of confirmation that no additional

¹⁷ See for example, the Intergovernmental Relations Framework Act, 13 of 2005 which defines intergovernmental relations as "... relationships that arise among different governments or among organs of state from different governments in the conduct of their affairs".

information will be forthcoming, and make a decision that he deems just in the circumstances.

[71] In so far as the *locus standi* is concerned, the BRP's legal standing emanates from the amended business rescue plan.¹⁸ In addition, they were the successful parties in the court *a quo* and therefore have a direct and substantial interest in seeking the decision of the court *a quo* being enforced. In my view, this settles the issue of *locus standi*.

[72] Concerning prospects of success, the Respondents maintain that they have significant prospects of success. This Court has carefully considered the application for leave to appeal as it was heard on the same day as the current application. In my view, I do not think that the Respondents have prospects of success. Even if this is the position, this does not relieve the Applicants from making out a case for the relief that they seek in this application.

[73] I similarly find that the Applicants have failed to meet the requisites, on a balance of probabilities, that need to be met for the granting of relief sought as per the notice of motion. Therefore, their case ought to be dismissed.

[74] Ultimately, two possibilities await Mango, either to be saved or liquidated. This demands that finality be reached. It is incumbent on all the parties involved to allow the inherent urgency to inform their conduct and cooperate to the greatest extent possible to bring finality to the business rescue proceedings that are connected to the section 54(2) application.

COSTS

[75] There is no basis on which to find that the costs should not follow the results.¹⁹

ORDER

¹⁸ *Mango Airlines SOC Limited and Others v Minister of Public Enterprises and Others* [2023] 4 All SA 475 (GP) at paras 164-166.

¹⁹ *Neuhoff v York Timbers Ltd* 1981 (4) SA 666 (T).

[76] I, therefore, make the following order:

- (a) The Applicants' non-compliance with the Rules of Court in respect of periods and manner of service are condoned to the extent that is necessary, the application is heard as urgent application and enrolled as such.
- (b) The section 18(3) application is dismissed with costs including the costs occasioned by the employment of two counsel.

PHOOKO AJ

**ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA**

APPEARANCES:

Counsel for the First and Second Applicants: Adv IV Maleka SC, and Adv T Scott

Instructed by: Instructed by Cliffe Dekker Hofmeyer Inc

Counsel for the Third Applicant: Adv R Tulk SC and Adv NL Chesi-Buthelezi

Counsel for the First and
Second Respondents: Adv Mphaga SC, and Adv D Mtsweni,

Instructed by: State Attorney, Pretoria

Counsel for the Fourth and
Fifth Respondents: Adv K Pillay SC, and Adv N Nyembe

Instructed by: State Attorney, Pretoria

Counsel for the Sixth to Eighth
Respondents: n/a

Instructed by: n/a

Date of Hearing: 28 November 2023
Date of Judgment: 18 December 2023