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

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO:2023-046143

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

Date: 31 July 2023 E van der Schyff

In the matter between:

L[…] B[…] APPLICANT

and

M[…] B[…] RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] The applicant and the respondent are divorced. The parties' major, but financially dependant son, E[…], is 19. He is studying computer science and participates in

Formula Vee motor racing. E[…] has participated in Formula Vee racing since he was 15. He also raced in the National Challenge Championship and is number 3 in the top ten.

[2] After the divorce, a dispute arose between the parties as to whether the expenses and costs relating to E[…]'s racing activity, which his mother refers to as an extra-mural activity or sport and his father as a hobby, constitute 'reasonable maintenance needs' as is provided for in paragraph 5.10 of the divorce settlement agreement.

[3] During the Covid-19 pandemic, the respondent sold E[…]'s racing car. He explained to him that he could not afford the expenses anymore. The applicant bought another racing car a few months later and, at a later stage, a second car. The respondent commenced contributing to the racing expenses, but it made it clear that he contributes *ex gratia* and not because he is legally obliged. He indicated from the start that he does not deem the racing expenses part of his maintenance obligation. The initially amicable post-divorce relationship between the applicant and the respondent died a quick death when the respondent became involved in another relationship. The applicant's expressed contempt for him, the relationship, and the new love in his life resulted in him presenting her with an ultimatum. She could either accept the new relationship and behave with dignity, or he would stop contributing to E[…]'s racing expenses. As he has, in his view, no maintenance obligation in this regard and contributed *ex gratia*, he was unwilling to contribute if he and his new partner were not respected. Since the applicant was unwilling to give an undertaking that she would behave civilly and respectfully towards his partner and himself, he stopped the contributions in February 2023. This eventually led to the applicant approaching the urgent court for declaratory relief.

[4] On 6 June 2023, an order was granted in the following terms:

'1. That the reasonable maintenance needs of the major dependant child, E[…] Booyens, as stipulated in paragraph 5.10 of the Settlement Agreement, made an order of Court on the 5th of March 2020 under case number 87558/2019, includes the expenses and payments relating to his participation in Formula Vee and/or other motor racing.

2. That both the Applicant and the Respondent [are] equally liable for the expenses and payments relating to and in respect of the major child's participation in Formula Vee and/or motor racing until the end of November 2023.'

[5] The respondent subsequently applied for leave to appeal. The application still stands to be heard. The applicant is now applying on an urgent basis and in terms of s 18(3) of the Superior Courts Act 10 of 2013 (the Act) for an order to the effect that the order handed down on 6 June 2023 remains in force and effect.

[6] Urgency was not disputed. The applicant enrolled the application in the Family Court, and the respondent did not take issue with the fact that the s 18(3) application was not enrolled to be heard by the judge who granted the order on 6 June 2023. Section 18(3) does not have the same requirement as its predecessor, rule 49(11),[1] that the judge who handed down the order must hear the s 18(3) application. Since urgency was not disputed, I heard the application.

Section 18(1) and (3) of the Superior Courts Act

[7] Section 18(1) of the Superior Courts Act provides that unless the court, under exceptional circumstances, orders otherwise, the operation and execution of a decision that is the subject of an application for leave to appeal is suspended

[1] 'Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.'

pending the decision of the application or appeal. Section 18(3) prescribes that a court may only order otherwise, that is, order the decision to remain operational and effective, if the party who applies for the order to remain in force and effect, in addition, proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not grant the order, and that the other party (who is applying for leave to appeal the decision) will not suffer irreparable harm if the court orders the decision to remain in force and effect.

[8] Section 18 was preceded by Rule 49(11) of the Uniform Rules of Court under the Supreme Court Act of 1959. Corbett JA reiterated in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd,*[2] that the purpose of the rule was to prevent irreparable damage being done to the intending appellant by the execution of the judgment pending the appeal. Section 18 of the Superior Courts Act undoubtedly tipped the scales in favour of appellants. It reinforced the purpose of this statutory prescript as preventing irreparable harm from being done to the intended appellant.

[9] The Supreme Court of Appeal (SCA) explained in *University of the Free State v Afriforum and Another*:[3]

> '[9] . . . Section 18(1) thus states that an order implementing a pending judgment appeal shall only be granted 'under exceptional circumstances. The exceptionality of an order to this effect is underscored by s 18(4), which provides that a court granting the order must immediately record its reasons; that the aggrieved party has an automatic right of appeal; that the appeal must be dealt with as a matter of extreme urgency and that pending the outcome of the appeal the order is automatically suspended.

[2] 1977 (3) SA 534 at 545B-C.

[3] 2018 (3) SA 428 (SCA) at para [9] – [10].

> [10] It is further apparent that the requirements introduced by ss 18(1) and (3) are more onerous than those of the common law. Apart from the requirement of 'exceptional circumstances' in s 18(1), s 18(3) requires the applicant 'in addition' to prove on a balance of probabilities that he or she 'will' suffer irreparable harm if the order is not made, and that the other party 'will not' suffer irreparable harm if the order is made. The application of rule 49(11) required a weighing-up of the potentiality of irreparable harm or prejudice being sustained by the respective parties and where there was a potentiality of harm or prejudice to both of the parties, a weighing-up of the balance of hardship or convenience, as the case may be, was required. Section 18(3), however, has introduced a higher threshold, namely proof on a balance of probabilities that the applicant will suffer irreparable harm if the order is not granted and conversely that the respondent will not if the order is granted.'

[10] Three boxes need to be ticked to satisfy the jurisdictional requirements for a court to exercise its discretion to grant or refuse the application:[4]

i. The existence of exceptional circumstances;

ii. Proof on a balance of probabilities that the applicant will suffer irreparable harm if the order is not put into operation (the presence of irreparable harm if the order is not put into operation and executed);

iii. Proof on a balance of probabilities that the respondent who seeks leave to appeal, will not suffer irreparable harm if the order is put into operation and executed (the absence of irreparable harm if the order is put into operation and executed pending the application for leave to appeal).

Exceptional circumstances

[4] *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* 2014 (3) SA 189 (GJ).

[11] Adams J recently reaffirmed that whether exceptional circumstances exist is not a decision that depends on exercising judicial discretion. Its existence or otherwise is a matter of fact which the court must decide accordingly.[5] This approach corresponds with Sutherland J's view as expressed in *Incubeta Holdings*[6] that:

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

[12] In dealing with the notion of exceptionality, Hughes J,[7] as she then was, succinctly stated:

> 'In establishing whether exceptional circumstances do exist I am mindful that the facts of each case inform whether exceptional circumstances exist. Further, that these circumstances must be nothing short of 'exceptional' in order to deviate from the norm of the judgment and its order be suspended until the appeal process is complete. In addition, the circumstances of being exceptional must arise from the facts adduced as being the difficulty in that particular case.'

[13] To give meaning to the term 'exceptional circumstances', one needs look no further than *Ntlemeza v Helen Suzman Foundation and Another.*[8] The SCA referred with approval to the discussion of the concept in *MV Ais Mamas: Seatrans Maritime v Owners, MV Ais Mamas, and Another:*[9]

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[5] *Dlamini v Ncube and Others* (01355/2023) [2023] ZAGPHJC 379 (18 April 2023).

[6] *Supra*, note [4] at par [20].

[7] *FourieFismer Inc and Others v Road Accident Fund; Mabunda Inc and Others v Road Accident Fund; Diale Mogashoa Inc v Road Accident Fund* (17518/2020; 15876/2020; 18239/2020) [2020] ZAGPPHC 293 (8 July 2020).

[8] 2017 (5) SA 402 (SCA) at par [37].

[9] 2002 (6) SA 150 (C) at 156H-157C.

'What does emerge from an examination of the authorities, however, seems to me to be the following:

1. What is ordinarily contemplated by the words exceptional circumstances is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; "besonder, seldsaam, uitsonderlik, or in hoë mate ongewoon".
2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.
3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.
4. Depending on the context in which it is used, the word exceptional has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.
5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.'

[14] *In casu*, the applicant contends that the exceptional circumstances are found therein that the relief provided through the order granted on 6 June 2023, is time-specific and does not only relate to a monetary aspect. The party that will suffer irreparable harm if the order is not put in operation and executed is not the applicant, but E[…], who will not be able to continue partaking in Formula Vee

racing for the current season that ends in November 2023, because the applicant does not have the means to carry the total costs associated with the Formula Vee racing. This, counsel submits, constitutes an exceptional circumstance. If the relief sought in this application is not granted, the issue will become moot as far as the dependant son is concerned since he will never again be able to participate in the 2023 Formula Vee racing season. Counsel submits that the applicant's financial position or ability to pay the expenses associated with Formula Vee racing is not a factor that comes into play when the court determines whether exceptional circumstances exist that allow the court to consider the next aspect, namely the issue of irreparable harm.

[15] Counsel for the respondent submits that the sole reason for the s 18(3) application is the applicant's alleged impecunity. The problem that the applicant is facing in this regard, contends counsel, is that there is a stark factual dispute 'about the crux of the Applicant's present application *viz* her alleged impecunity.' In answer to the applicants' alleged inability to carry the full extent of the costs associated with Formula Vee racing, the respondent refutes the applicant's stance that she cannot fully finance the parties' son's racing hobby pending the outcome of the appeal. The respondent did not make bold allegations but fully motivated his stance. He stated in the answering affidavit that the applicant possesses an investment account which amounted already in 2019 to R3.5 million. Although the applicant referred in the founding affidavit to the main application to an investment, she contended that she could not utilise the funds since it included her children's funds for tertiary education and constituted funds for her retirement. The respondent contends that the applicant had to demonstrate how the amounts she would need to pay from her investment account for E[…]'s racing expenses would affect her retirement. The failure to deal in detail with her financial ability to pay, or her impecunity as alleged, submits counsel, gave rise to a factual dispute. The respondent claims that the factual dispute that arose regarding the applicant's alleged impecunity is an absolute bar to finding that exceptional circumstances exist, since the court, in applying the Plascon Evans principle, must accept the respondent's version that the applicant is indeed in a financial position to fund her son's racing hobby pending the outcome of the appeal.

Discussion

[16] It is an unfortunate reality that children often become collateral damage in divorce proceedings.[10] E[…] is not spared this fate. There is, unfortunately, no exceptionality found in this sad truth.

[17] I also considered the issue of exceptional circumstances from another perspective – if the facts indicate that E[…] will suffer irreparable harm if the order remains suspended, that could constitute exceptional circumstances.

[18] If the order remains suspended, and the applicant can indeed not carry the expenses associated with E[…]'s motor racing, he will inevitably not be able to complete the 2023 racing season unless he receives funds from another source not indicated in the papers. The order granted on 6 June 2023 limits the respondent's liability to pay these expenses to the end of November 2023. The facts do not indicate that E[…]'s alleged dream to become a professional Formula One racer earning his income from racing, an averment denied by the respondent, is an attainable goal or that his non-participation in the remainder of the season would destroy any opportunities that might exist in this regard. Not participating in the remainder of the 2023 season will be a missed opportunity, but a missed opportunity that can hardly be considered irreparable harm.

[19] Applying the test explained in *Incubeta*, *Dlamini*, *FourieFismer,* and *Ntlemeza* to the facts above, I do not find that any exceptional circumstances exist.

[20] If I am wrong in this regard, the next aspect to consider, is whether the applicant will suffer irreparable harm if the order granted on 6 June 2023 remains suspended. The parties are *ad idem*, that it is not the applicant, E[…]'s mother,

[10] *Standard Bank of South Africa Ltd v Du Toit N.O. and Others* (575/2022) [2022] ZAFSHC 51 (14 March 2022) at par [34].

who will suffer any harm if the order remains suspended, but E[…]. In considering whether E[…] will suffer irreparable harm, I have to take into account that the respondent offered to pay 50% of the motorsport expenses pending the appeal, subject to the applicant providing security or a guarantee that if the appeal succeeds, she will reimburse the respondent. The applicant refuses to provide such a guarantee. In these circumstances, where a reasonable option is open for the applicant to obtain 50% of the motorsport expenses from the respondent pending the appeal, it cannot be found that either she or E[…] will suffer irreparable harm if the order remains suspended.

[21] This is by nature an interlocutory application, and it is just that the costs hereof be costs in the appeal.

ORDER

In the result, the following order is granted:

1. The forms and services prescribed by the Rules of Court are disposed of, and the application is heard as an urgent application in terms of Rule 6(12);

2. The application is dismissed;

3. Costs are costs in the appeal.

E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

For the applicant: Adv. B. Boot SC

With: Adv. S.M. Stadler

Instructed by:	Adams & Adams Attorneys
For the respondent;	Adv. T.A.L.L. Potgieter SC
Instructed by:	Couzyn, Hertzog & Horak
Date of the hearing:	25 July 2023
Date of judgment:	31 July 2023