IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. 12770/22P

In the matter between:

KARYN MAUGHAN **Applicant**

and

JACOB GEDLEYIHLEKISA ZUMA **First Respondent**
WILLIAM JOHN DOWNER **Second Respondent**

and

CASE NO. 13062/22P

In the matter between:

WILLIAM JOHN DOWNER **Applicant**

and

JACOB GEDLEYIHLEKISA ZUMA **First Respondent**
KARYN MAUGHAN **Second Respondent**

ORDER

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1. The applications under Case Nos 12770/22P and 13062/22P are enrolled as urgent applications, and the forms and service provided for in the Uniform rules of Court are dispensed with, and non-compliance therewith condoned, to the extent necessary.

A: Case No: 12770/22P

1. The operation and execution of paragraphs A1 and A2 of the orders of the Full Bench given under case number 12770/22P on 7 June 2023 shall not be suspended pending the final determination of any applications for leave to appeal or appeals against the order.
2. The First Respondent is directed to pay the costs occasioned by the unsuccessful opposition to this application on an attorney and own client scale such costs are to include the costs of two counsel.

B: Case No: 13062/22P

1. The operation of the orders made by this Court in paragraphs B1 and B2 of its judgment delivered on 7 June 2023 remain in force and such orders are not suspended pending the final determination of any application for leave to appeal or any appeals.
2. For the duration of this order:

2.1 The First Respondent's private prosecution of the applicant is suspended;

2.2. Mr Andrew Breitenbach SC may resume his role as a member of the prosecution team in the criminal prosecution of the first respondent;

2.3. The First Respondent may not pursue any private prosecution of the Applicant on substantially the same charges as those advanced in the summons in the private prosecution set aside.

3. The First Respondent is directed to pay the costs occasioned by the unsuccessful opposition to this application, including the costs of two counsel on the scale as between attorney and client.

JUDGMENT

THE COURT (KRUGER J, HENRIQUES J et MASIPA J)

Introduction

[1] In both Case No's 12770/22P and 13062/22P, the Applicants (Maughan and Downer) seek orders in terms of s18(3) of the Superior Courts Act 10 of 2013 ('the Act') to the effect that the judgment of this court of 7 June 2023 shall not be suspended pending the final determination of any applications for leave to appeal or appeals

against the order. In addition, thereto, in Case No. 13062/22P the Applicant, William John Downer ('Downer') seeks the following relief:

'3. For the duration of this order:

3.1 The First Respondent's private prosecution of the Applicant is suspended.

3.2 Mr Andrew Breitenbach SC may resume his role as a member of the prosecution team in the criminal prosecution of the First Respondent.

3.3 The First Respondent may not pursue any private prosecution of the Applicant on substantially the same charges as those advanced in the summons set aside.'

[2] Both Applicants also seek costs on the attorney and client scale in the event of the applications being unsuccessfully opposed. The First Respondent, Jacob Gedleyihlekisa Zuma ('Zuma'), has opposed both applications.

The relevant facts which preceded the applications

[3] On 7th June 2023 this court granted the following orders:

'**A: Case No: 12770/22P**

1. The summons issued out of the KwaZulu-Natal Division of the High Court, Pietermaritzburg on 5 September 2022, under case number CC52/2022P, for the purpose of instituting a private prosecution against the Applicant by the Respondent is set aside.
2. The Respondent is interdicted and restrained from reinstituting, proceeding with, or from taking any further steps pursuant to, the private prosecution referred to in paragraph 1.
3. The costs of this application are to be paid by the Respondent on an attorney and own client scale, such costs to include the costs of two counsel where so employed.

B: Case No: 13062/22P

1 The summons, by which the Respondent instituted a private prosecution of the Applicant in this court in Case CC52/2022P, is set aside.

2 The Respondent is interdicted from pursuing any private prosecution of the Applicant on substantially the same charges as those advanced in the summons set aside.

3 The Respondent is ordered to pay the Applicant's costs on the scale as between attorney and own client, such costs to include the costs of two counsel

where so employed.'

[4] In summary this court found that:

4.1 the First Respondent did not have a *nolle prosequi* certificate to authorise the institution of a private prosecution against Ms Maughan as required under s 7(2)(a) of the CPA;

4.2 the First Respondent lacked standing to institute a private prosecution against Maughan under s 7(1)(a) of the CPA as he did not have "a substantial and peculiar interest" arising from "injury" suffered as a result of Ms Maughan obtaining and publishing the contents of a letter by Brigadier (Dr) Mdutywa;

4.3 the First Respondent's institution of a private prosecution was an abuse of court process, pursued without merit and for an ulterior purpose;

4.4. the *points in limine* raised by the First Respondent of a lack of jurisdiction/prematurity, urgency, the state attorney's authority to act for Downer and the non-joinder of Maughan were without merit and dismissed.

[5] Subsequent to the delivery of the written judgment on 7 June 2023, at 11h25 on the same day, the JG Zuma Foundation published a statement on Twitter in which it indicated that the First Respondent was to appeal the judgment of the Full Court. This prompted Maughan's attorneys on 14 June 2023 to address a letter to the First Respondent's attorneys requesting them to confirm whether or not they did not intend to seek leave to appeal and in the absence of advice to the contrary, assumed that the First Respondent did intend to appeal.

[6] The letter requested an undertaking from the First Respondent that pending the finalisation of all appeal processes the First Respondent would not take steps pursuant to the summons in the private prosecution, which was set aside and that Maughan would not be required to attend the criminal court on 4 August 2023 or any other future postponed date. To avoid a court appearance the parties could agree on joint correspondence to the Judge President requesting directives embodying that agreement.

[7] A response was submitted by the First Respondent's attorneys on 19 June 2023 in which they confirmed the First Respondent's instructions to proceed and lodge the application for leave to appeal and also did not provide the undertaking as

requested. It was for these reasons that the application was instituted by Ms Maughan on 23 June 2023.

[8] Downer's attorneys had written to the First Respondent's attorneys on 17 April 2023 for their consent to allow Breitenbach to assist the NPA in doing all things necessary in relation to the First Respondent's application for the removal of Downer as lead prosecutor in the criminal prosecution. A response was requested by 26 April 2023. A response was forthcoming on 3 May 2023 declining the request. Downer instituted this application on 20 June 2023. The First Respondent's application for leave to appeal was filed in court on 28 June 2023.

[9] Against that background, the First Respondent raised, *in limine*, the fact that the applications were not urgent, were premature and should therefore be struck from the roll.

[10] Section 18 applications are by their very nature urgent. This is borne out by the provisions of s 18(4) which provides that an appeal must be dealt with on an extremely urgent basis – see *Trendy Greenies (Pty) Ltd t/a Sorbet George v De Bruyn and Others*[1]. The First Respondent has submitted that the applications are not urgent and will not prevent the Applicants from appearing in court on the 4th August 2023. The underlying reason for this submission is that in the event this court finds in favour of the Applicants, the First Respondent will immediately invoke his right of automatic appeal in terms of s 18(4) of the Act. This is contemptuous as it is pre-empting the judgment and reasoning of the judgment. However, as the s18 applications are inherently urgent, we are of the view that there is no merit in the First Respondent's point *in limine*.

[11] The first respondent also submitted that the s 18(3) applications are premature as they were instituted prior to the application for leave to appeal being filed. This submission is not correct. An application for leave to implement and execute an order can be brought prior to an application for leave to appeal being lodged. It can be instituted in circumstances where there has been an indication of an intent to lodge an application for leave to appeal or in circumstances where one is reasonably

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[1] *Trendy Greenies (Pty) Ltd t/a Sorbet George v De Bruyn and Others* (2021) 42 ILJ 1771 (LC) at para 9

anticipated. This was confirmed by the Supreme Court of Appeal in *Ntlemeza v Helen Suzman Foundation and Another* [2].

The legal position

[12] The relief sought by the Applicants is in terms of s18(3) of the Superior Courts Act 10 of 2013 ('the Act'). This section provides:

> '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.
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> (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.
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> (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.
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> (4) If a court orders otherwise, as contemplated in subsection (1)-
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> (i) the court must immediately record its reasons for doing so;
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> (ii) the aggrieved party has an automatic right of appeal to the next highest court;
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> (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
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> (iv) such order will be automatically suspended, pending the outcome of such appeal.
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> (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] The sole purpose behind a section 18(3) order is to regulate the interim position between the parties pending the finalisation of all appeal processes. This was confirmed by the Constitutional Court in the various applications involving *Tasima*

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[2] *Ntlemeza v Helen Suzman Foundation and Another* 2017(5) SA 402 (SCA) at paragraph 27

which came before our various courts.[3] The Constitutional Court in *Department of Transport and others v Tasima (Pty) Ltd; Tasima (Pty) Ltd and others v Road Traffic Management Corporation and others*[4] held the following:

> '[54] Accordingly, the sole purpose of the Basson 1 order relative to section 18(3) was to regulate the interim position between the litigants from the time when that order was made until the final determination of the underlying dispute between the parties by this Court.
>
> [55] At the hearing of this case, counsel for Tasima conceded that the Basson 1 order had its origin in the various High Court orders going back to the order of Mabuse J. Moreover, this order was, in part, granted in terms of section 18(3) of the Superior Courts Act which meant that it could only subsist for so long as the judgment of this Court in Tasima 1 was still pending.
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> [56] Thus, an order made under section 18(3), as already indicated above, serves to regulate the interim position between the litigants from the time when such an order is made until the final judgment on appeal is handed down.'

[14] Section 18 of the Act introduces a new test where one seeks to execute an order pending the appeal processes being finalised. Consequently, authorities that predate the enactment of the section have been overtaken. The test to be applied in applications of such a nature was initially stated as follows by Sutherland J in *Incubeta Holdings (Pty) Ltd and another v Ellis and another*[5] as follows:

> 'It seems to me that there is indeed a new dimension introduced to the test by the provisions of s 18. The test is twofold. The requirements are:
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> - First, whether or not 'exceptional circumstances' exist; and
> - Second, proof on a balance of probabilities by the applicant of –
>   - the presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order; and
>   - the absence of irreparable harm to the respondent/loser, who seeks leave to appeal.'

[15] Two distinct findings of fact must now be made rather than a weighing up consideration to discern a preponderance of equities. The discretion in the sense

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[3] *Tasima (Pty) Ltd v Department of Transport* 2016 JDR 4674 (GP), *Tasima (Pty) Ltd v Department of Transport and others* [2016] 1 All SA 465 (SCA).
[4] *Department of Transport and others v Tasima (Pty) Ltd; Tasima (Pty) Ltd and others v Road Traffic Management Corporation and others* 2018 (9) BCLR 1067 CC at paras 54 – 56
[5] *Incubeta Holdings (Pty) Ltd and another v Ellis and another* 2014 (3) SA 189 (GJ) at 16

articulated in *South Cape Corporation (Pty) Ltd v Engineering Management Services*[6] is now absent. The three-fold statutory test in *Incubeta* has been endorsed by the Supreme Court of appeal in *University of the Free State v Afriforum and Another*[7], *Ntlemeza v Helen Suzman Foundation and Another* [8],*Premier for the Province of Gauteng and others v Democratic Alliance and others*[9] and *Knoop NO and another v Gupta (Execution)*[10].

[16] Both Applicants bear the onus to prove the three statutory requirements in terms of s 18(1) and (3) of the Act in order to succeed in their applications for the implementation of the orders granted.

Exceptional Circumstances

[17] A number of decisions which have dealt with the interpretation of s 18 specifically examine what is meant by the words 'exceptional circumstances' as it appears in the section. Most of the authorities commence with the test for exceptional circumstances enunciated by Thring J in the decision *in MV AIS Mamas Seatrans Maritime v Owners, MV AIS Mamas, and Another*[11] where he provided a summation of the meaning of the phrase as follows:

> '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 somewhat out of the ordinary and of an unusual nature; something which is excepted in the sense that the general does not apply to it; something in common, 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.

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[6] *South Cape Corporation Pty Ltd v Engineering Management Services Pty Ltd* 1977 (3) SA 534 (A)
[7] *University of the Free State v Afriforum and Another* 2018(3) SA 428 (SCA) at paragraphs 5 -6
[8] *Ntlemeza v Helen Suzman Foundation and Another* 2017(5) SA 402 (SCA) at paragraphs 19-22
[9] *Premier for the Province of Gauteng and others v Democratic Alliance and others* [2021] 1 All SA 60 (SCA) at paragraph 9
[10] *Knoop NO and another v Gupta (Execution)* 2021 (3) SA 135 (SCA) at paragraph 45
[11] *MV AIS Mamas* Seatrans Maritime v Owners, MV *AIS Mamas*, and Another 2002 (6) SA 150 (C) at 156I-157C

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.'

[18] In *Incubeta* Sutherland J sounded a caution of using the definition enunciated by Thring J as he was doing so in the context of the provisions of s 5 of the Admiralty Regulation Act 105 of 1983. He cautioned that one must interpret a provision in the context of a specific statute.[12]

[19] After examining a number of authorities Sutherland J concludes that exceptional circumstances may not be definable and may be difficult to articulate but whether or not such circumstances exist in a given case is not a product of the exercise of a court's discretion but rather a finding of fact[13]. In addition, he opines that '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.'[14] In relation to the second leg of the test in s 18 he indicates that s 18(3) requires 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 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. Two distinct findings of fact must now be made, rather than a weighing-up to discern a 'preponderance of equities'. The discretion is absent in the sense articulated in *South Cape*.[15]

[20] In *S v Liesching & Others* [16], it was held at paragraph 39:

'The phrase "exceptional circumstances" is not defined in the Superior Court's Act. Although guidance on the meaning of the term may be sought from case law, our

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[12] *Incubeta Holdings (Pty) Ltd and another v Ellis and another supra* at paragraph 20
[13] *Incubeta Holdings (Pty) Ltd and another v Ellis and another supra* at paragraph 18
[14] *Incubeta Holdings (Pty) Ltd and another v Ellis and another supra* at paragraph 22
[15] *Incubeta Holdings (Pty) Ltd and another v Ellis and another supra* at paragraph 24
[16] *S v Liesching & Others* 2019 (4) SA 219 (CC)

courts have shown a reluctance to lay down a general rule. This is because the phrase is sufficiently flexible to be considered on a case–by– case basis, since circumstances that may be regarded as "ordinary" in one case may be treated as "exceptional" in another.'

[21] In *Knoop N O and Another v Gupta (Execution)*[17], the court held:

'. . . 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.'

[22] In proving exceptional circumstances, Downer contends that a suspension of the main court orders, which were granted to prevent a glaring abuse of process, will be negated. The private prosecution was instituted in bad faith with ulterior motives to delay and obstruct Downer in performing his duties and to also have him removed as the First Respondent's prosecutor. Therefore, allowing the private prosecution to proceed whilst the First Respondent pursues his appeal would, in the face of the main judgment, perpetuate the harm caused to the legal process. He contends that this private prosecution was unique in our law since it was initiated by an accused against his prosecutor and was a disguised attempt to retaliate. If such conduct was allowed to continue, despite the main judgment having found it to be an abuse, it would be an invitation to other well sourced accused persons to engage in the same conduct which will result in prejudice to the administration of justice.

[23] In the main judgment we noted that the private prosecution was instituted for an improper purpose and was used as a basis for the First Respondent to seek the removal of Downer as a prosecutor in his criminal trial. Accordingly, that private prosecution served as a precursor to the recusal application now brought before the criminal court and set down for hearing on the 15th and 16th August 2023. The findings of this court in the main judgment were aimed at bringing an end to the abuse inherent in the private prosecution which abuse would continue if the execution order sought is not granted.

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[17] *Knoop N O and Another v Gupta (Execution)* 2021 (3) SA 135 (SCA)

[24] Ms Maughan contends that the continued operation of the summons against her permits the First Respondent to continue to violate her freedom of expression and the general public's corresponding right to freedom of the press. It has been submitted on her behalf that the private prosecution is in itself an exceptional circumstance. It deals with the private prosecution of a journalist who is doing her job; a prosecution by a former president; and a prosecution which has been declared as an abuse. All these factors reinforce the submission that this is an exceptional case.

[25] In response, the First Respondent avers that the only exceptional circumstance is that all are not equal before the law. The First Respondent contends that whenever he challenges the constitutionality of his prosecution or the prosecutor's title to prosecute, it is labelled as 'Stalingrad'. However, when the Applicants do exactly the same, it is labelled as an exercise of their constitutional rights.

[26] This argument by the First Respondent is flawed in two respects. Firstly, as regards Stalingrad, this was said to be the First Respondent's defence strategy by his former legal representative. The First Respondent has, to date, never disavowed this defence strategy despite being afforded several opportunities to do so. We have already alluded to the fact that the private prosecution served as a precursor to an application for the recusal of Downer as the prosecutor in the main trial. This, in our view, clearly evidences the Stalingrad strategy. Secondly, it is noted that the Applicants are not challenging the constitutionality of the private prosecution but are merely exercising their common law rights not to be subjected to an unlawful prosecution which is an abuse of process.

Irreparable Harm

[27] It has been submitted on behalf of Downer that if the order of this court is not put into operation, Downer and the State stand to suffer the following irreparable harm:

(a) a further delay in the start of the First Respondent's criminal trial, further prolonging the case;

(b) it would compromise the public confidence in the administration of justice;

(c) it would cause prejudice to the administration of justice as trial preparations and arrangements have been repeatedly disrupted and wasted;

(d) the prejudice which will affect the witnesses adversely due to the effluxion of time;

(e) the financial prejudice to the NPA and the South African's tax payers due to the costs incurred in defending the First Respondent's repeated applications.

[28] The irreparable harm to Downer is that he is scheduled to appear in the criminal court for a private prosecution on the 4th August 2023 and thereafter, despite this court declaring the private prosecution to be unlawful and setting it aside. There is also potential harm to Mr Breitenbach, a member of the prosecution team, who has been implicated in the unfounded charges of disclosure of confidential information and named as a witness in the private prosecution.

[29] The First Respondent has not challenged Downer's assertions of irreparable harm. Instead, the First Respondent has raised irrelevant considerations that Mr Downer is biased and unable to conduct a fair trial. However, this issue is not before us and is to be considered by the court on the 15th and 16th August 2023 when the recusal application will be heard.

[30] Ms Maughan contends that her continued prosecution and associated need for her to appear in the criminal court in respect of an unlawful private prosecution is likely to be prolonged whilst the First Respondent exhausts every possible process available to him. The irreparable harm which she will suffer if the main judgment remains suspended pending the First Respondent's appeals relates to the prolonged infringement of her constitutional rights to freedom of movement and infringes on her personal liberty without any lawful basis. Her continued appearance as a criminal accused is therefore patently harmful to her, especially in view of the associated social media abuse. This abuse has not been denied by the First Respondent.

[31] Other factors raised by Ms Maughan relate to her personal safety. She avers that the attacks against her, particularly on social media, intensify each time she appears in court as a litigant. It has been submitted that the continued existence of the unlawful summons causes irreparable harm to the administration of justice and allowing them to stand will be seen as a court unwittingly facilitating ongoing abuse of its processes. The harm she will suffer should the relief she seeks not be granted, cannot be remedied and is therefore irreparable.

[32] What of the harm to the First Respondent? The only harm or prejudice likely to be suffered by the First Respondent has been postulated as being that he would be prosecuted by a person who was himself subject to prosecution and who might be convicted. However, as stated earlier, this issue is not before this court. Apart from this averment, there is no other allegation of any harm which would befall the First Respondent should this court not grant the orders that the Applicants seek, nor were any advanced at the hearing of the applications. The only impact on the First Respondent would be that pending the appeal processes, he would be precluded from furthering the private prosecution. However, should he be successful in his appeal, the private prosecution will resume and there is clearly no prejudice or irreparable harm to the First Respondent.

Prospects of Success

[33] Mr *Mpofu* SC, on behalf of the First Respondent, submitted that the Applicants not only bore the onus in terms of the three-fold statutory test but also had an onus to discharge in respect of the prospects of success on appeal. In addition, he has submitted that the Applicants were required to specifically plead prospects of success in their founding papers and relied on an unreported judgment of the Gauteng Division, Pretoria, delivered on 17 December 2019 in *Bila Civil Contractors (Pty) Ltd v Samancor Chrome Ltd*[18].

[34] The only onus which the Applicants have to discharge is the three-fold statutory onus imposed by s 18. There is no onus in the traditional sense for the Applicants to discharge in respect of prospects of success on appeal. In *Knoop N O and Another v Gupta (Execution)*[19] the prospects of success on appeal was held to be one of the considerations for the court in exercising its discretion in terms of s 18. The court would consider the prospects of success once the Applicant had satisfied the three-fold statutory test imposed in s 18.

[35] Secondly, as correctly pointed out by Mr *Budlender G SC* for Downer, the reliance on the *Bila* judgment is misplaced as it was decided prior to the decision in *Knoop.* We accordingly disagree with the submissions by Mr *Mpofu* SC that there is

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[18] *Bila Civil Contractors (Pty) Ltd v Samancor Chrome Ltd* [2019] ZAGPPHC 1051
[19] *Knoop N O and Another v Gupta (Execution)* 2021 (3) SA 135 (SCA)

an onus on the Applicants to show prospects of success on appeal which ought to have been specifically pleaded.

[36] Much time at the hearing of the application was spent by Mr *Mpofu* SC on the prospects of success on appeal. It is common cause that an application for leave to appeal is pending before the court and is yet to be enrolled. Much of Mr *Mpofu* SC's submissions in this regard related to the alleged factual misdirections made by this court as well as the aspect of subsidiarity and the courts alleged failure to deal with this. This court still has to determine the existence or otherwise of such prospects of success on appeal when it considers the application for leave to appeal. It is accordingly undesirable at this juncture that these prospects be explored in detail. Purely at the level that it has been submitted that this court failed to deal with the aspect of subsidiarity, it is noted that in the main application before us, this was labelled as a jurisdictional or prematurity aspect. A mere perusal of the judgment will show that it was dealt with in some detail. If indeed the main thrust of the First Respondent's application for leave to appeal is the failure of the court to deal with the subsidiary aspect, then prospects of success are indeed slim.

[37] We are accordingly satisfied that the Applicants have discharged the onus in terms of the three-fold statutory test imposed by s 18 of the Act. The Applicants have shown exceptional circumstances; that they will suffer irreparable harm if the order is not made and finally that the First Respondent will not suffer irreparable harm if the order is made.

Costs

[38] The basic law regarding costs was summarised aptly by the Constitutional Court in *Ferreira v Levin N.O. and others*; *Vryenhoek and others v Powell N.O. and others* [20] as follows:

> "The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even the second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs.

[20] 1996 (2) SA 621 CC at paragraph 3

> Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as for example, the conduct of the parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of litigants and the nature of the proceedings."

[39] These trite principles have consistently been followed by our courts. Both Applicants seek a punitive costs order on an attorney client scale. There are no reasons advanced by the First Respondent to deviate from these sound principles save for the submissions that this court's judgement was a nullity, these applications were futile to begin with and any costs order granted will be suspended by a s 18(4) appeal.

[40] Firstly this court's judgment is not a nullity. Until such time as the judgment is set aside on appeal the orders made remain in place, it is merely the operation and execution thereof that has been suspended by the application for leave to appeal. The acceptance of the submissions that s 18(3) applications are futile would defeat the very purpose for which they were enacted.

[41] The basis for the punitive costs orders has been the fact that a timeous and reasonable undertaking was requested pending the outcome of all appeal processes. This in our view was an eminently reasonable request. Given that the First Respondent indicated an intention to exercise his right of appeal, there could be no prejudice to him let alone the administration of justice had the First Respondent consented to such a request. It would have obviated the need for these applications and further legal expenses being incurred. A costs order on an attorney client scale including the costs of two counsel is thus justified.

[42] We accordingly grant the following orders:

1. The applications under Case Nos 12770/22P and 13062/22P are enrolled as urgent applications, and the forms and service provided for in the Uniform rules of Court are dispensed with, and non-compliance therewith condoned, to the extent necessary.

A: Case No: 12770/22P

1. The operation and execution of paragraphs A1 and A2 of the orders of the Full Bench given under case number 12770/22P on 7 June 2023 shall not be suspended pending the final determination of any applications for leave to appeal or appeals against the order.
2. The First Respondent is directed to pay the costs occasioned by the unsuccessful opposition to this application on an attorney and own client scale such costs are to include the costs of two counsel.

B: Case No: 13062/22P

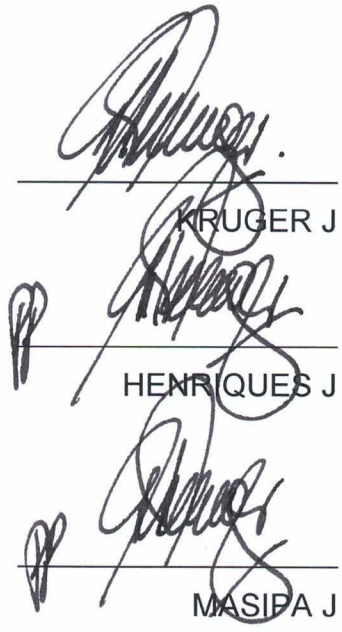
1. The operation of the orders made by this Court in paragraphs B1 and B2 of its judgment delivered on 7 June 2023 remain in force and such orders are not suspended pending the final determination of any application for leave to appeal or any appeals.
2. For the duration of this order:

2.1. the First Respondent's private prosecution of the applicant is suspended;

2.2. Andrew Breitenbach SC may resume his role as a member of the prosecution team in the criminal prosecution of the first respondent;

2.3. the First Respondent may not pursue any private prosecution of the Applicant on substantially the same charges as those advanced in the summons in the private prosecution set aside.

3. The First Respondent is directed to pay the costs occasioned by the unsuccessful opposition to this application, including the costs of two counsel on the scale as between attorney and client.



KRUGER J

HENRIQUES J

MASIPA J

CASE INFORMATION

Date of Set Down	:	28 July 2023
Date of Judgment	:	3 August 2023

APPEARANCES

Applicant	:	**KAREN MAUGHAN**
Counsel for the Applicant	:	Steven Budlender SC Janice Bleazard
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