REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 6088/2022

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

Date Signature

In the matter between:

THE ROAD ACCIDENT FUND **APPELLANT**

and

NEWNET PROPERTIES (PTY) LTD
T/A SUNSHINE HOSPITAL **FIRST RESPONDENT**
SHERIFF PRETORIA EAST **SECOND RESPONDENT**

Summary: Automatic appeal in terms of section 18(4) of the Superior Courts Act. Requirements – (a) presence of exceptional circumstances to order otherwise; (b) irreparable harm to be suffered by the victor; and (c) no suffering of irreparable harm by the looser. All the above requirements must be present before a Court may order that the operation and execution of a decision which

is the subject of an application for leave to appeal is not suspended pending the decision on the application.

The default legislated position is that once a decision is subjected to an application for leave to appeal, such decision is automatically suspended. In order to remove the default legislated position, an applicant must meet all the requirements outlined above.

Should a Court disturb the default legislated position, the aggrieved party gains an automatic right of appeal to the next highest Court. When faced with an automatic appeal, the highest Court must still be satisfied that the requirements outlined, above, are met. Should any of the requirements not be met, the highest Court must leave the default position undisturbed.

It is by now settled law that presence of exceptional circumstances is fact-specific and does not involve exercise of judicial discretion. The facts giving rise to the exceptional circumstances must be related to the applicant itself. The applicant itself must produce evidence that demonstrates quandaries as a result of the suspension of the decision.

In the event, the decision sounds in money, as it is case in this appeal, the applicant must demonstrate on the preponderance of probabilities that it has the sufficient means not to place the to-be appellant in a situation of irreparable harm should the appeal succeed.

The fact that the suspension of the decision happens on the stroke of a pen, without more (mere application for leave to appeal); affording an automatic right of appeal; and a further suspension, is a perspicuous demonstration that the primary purpose of the section is to prevent irreparable damage being done to the intending appellant by the execution of the judgment pending an appeal process. This primary purpose was confirmed to be part of the common law rule of practice (*South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A)).

It is not the purpose of the section to insulate the sanctity of the impugned decision. Prospects of success on appeal, seem to appropriately apply in a situation where, an application for leave to execute is refused as opposed to when the leave to execute is granted. In other words, the fact that an appellant possess poor prospects of success does not in of itself constitute an exceptional circumstance to deviate from the default position – to uplift the suspension.

***Held*: (1) The appeal is upheld. *Held*: (2) The impugned order is replaced with an order that the application to uplift the suspension is dismissed with costs, which includes the costs of employing two counsels.**

JUDGMENT

CORAM: MOSHOANA J (with MALUNGANA AJ Concurring and SKOSANA AJ dissenting)

Introduction

[1] The main conundrum in the present appeal is the nebulous phrase of exceptional circumstances, which, in our view, is the primary jurisdictional requirement for an application to unsettle the default legal position – suspension of operation and execution of a decision subjected to an application for leave to appeal. 110 years ago Innes ACJ, as he then was, made an attempt to provide the phrase with a legal meaning. The erudite ACJ stated that[1]:

> "The question at once arises, what are "exceptional circumstances"? Now it is undesirable to attempt to lay down any general rule. Each case must be considered upon its own facts. But the language of the clause shows that the exceptional

[1] *Norwich Union Life Insurance Society v Dobbs* 1912 AD 395.

circumstances must arise out of, or be incidental to, the particular action there was no intention to exempt whole classes of cases from the operation of the general rule. Moreover, when a statute directs that a fixed rule shall only be departed from under exceptional circumstances, the Court, one would think, will give effect to the intention of the Legislature by taking a strict rather than a liberal view of applications for exemption, and by carefully examining any special circumstances relied upon." [Own emphasis]

[2] In the present appeal, a cutting to the chase approach emerges by simply having regard to the provisions of section 18(1) of the Superior Courts Act[2] (Superior Courts) instead of tracing back the common law rule of practice, which no longer exists.[3] The section reads:

"**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." [Own emphasis].

[3] It must be stated at this stage that the legislated position is that the operation and execution of a decision is suspended. That remains the import of the section.[4] What will upset the default legislated position is the demonstration of exceptional circumstances and the proving of an irreparable harm and the absence thereof on another party.[5] For the purposes of this judgment, it is common cause that on or about 25 July 2022, this Court per our learned sister Janse van Nieuwenhuizen J granted judgment (decision) ordering the appellant, the Road Accident Fund (RAF) to pay to the first respondent, Newnet Properties (Pty) Ltd t/a Sunshine Hospital (Newnet) an amount of R301 721 492.50. Of the total amount ordered, the amount of R90 000 000.00 was immediately payable and the balance thereof was payable in instalments equivalent to R45 581 098.50 per month until the entire amount is paid in full. As at the time of the hearing of this appeal, it was common cause that an

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[2] Act 10 of 2013.

[3] See *Minister of Finance v Sakeliga NPC (previously Afribusiness NPC) and Others (Afribusiness)* 2022 (4) SA 401 (CC) at paragraph 15 – The position is now governed by section 18 (1) of the Superior Courts Act.

[4] *Afribusiness* para 12.

[5] Section 18(1) read with 18(3) of Superior Courts.

application for leave to appeal the decision was launched at the Constitutional Court of South Africa. In other words, the decision is the subject of an application for leave to appeal.

[4] On 13 September 2022, this Court again per Janse van Nieuwenhuizen J, sitting alone, granted Newnet an order (order) authorising Newnet to execute the decision pending the determination of the appeal processes. It is against this order that the present appeal lies. Having launched an automatic appeal, the order itself is automatically suspended pending the decision of this Court. After hearing submissions from the parties, this Court, for reasons set out below arrived at the following order:

Order

1.1 The appeal is upheld;

1.2 The order of Janse van Nieuwenhuizen J dated 13 September 2022 is set aside;

1.3 It is replaced with the following:

1.3.1 The application in terms of section 18 (3) seeking leave to execute a decision subject to an appeal is dismissed with costs, which includes the costs of employment of two counsel.

[5] The present appeal was duly opposed by Newnet.

Facts pertinent to the present appeal

[6] This being an automatic appeal, it is unnecessary to give a full rendition of the facts appertaining the dispute between the RAF and Newnet. It suffices to mention that as outlined earlier, on 25 July 2022, a decision was made against the RAF. The RAF has subjected that decision to an application for leave to appeal at the Constitutional Court. This after, Janse van Nieuwenhuizen J and the Supreme Court of Appeal (SCA) refused to grant Newnet leave to appeal the decision. Both Janse

van Nieuwenhuizen J and the SCA held a view that Newnet is not possessed of reasonable prospects of success on appeal.

[7] On 13 September 2022, an order was made authorising Newnet to put into operation and take into execution the decision of 25 July 2022.[6] Aggrieved thereby, the RAF exercised its automatic right of appeal. It is this appeal that serves before us. It is an appeal that we are statutorily obligated to deal with as a matter of extreme urgency.

Analysis

[8] When faced with this type of appeal, this Court must urgently determine whether: (a) exceptional circumstances existed or were demonstrated to unseat, as it were, the default legal position – subjecting a decision to appeal processes suspends the operation and execution of a decision; (b) the applicant, in this appeal, Newnet, will suffer irreparable harm if a Court, this Full Court at this point, does not order that default legal position ceases to obtain; or (c) the other party, in this appeal, the RAF, will not suffer irreparable harm if the default legal position ceases to obtain.

[9] In our view, the starting point, in determining an appeal of this nature, is to appreciate that stemming deep from the common law rule and by extension the Constitution of the Republic of South Africa (Constitution),[7] the primary consideration is the protection of the right to appeal. A party appeals a decision in order to alter the decision of a lower Court. Should a party succeed, an earlier decision stops its operation and it is incapable of being taken into execution. Necessarily, and appreciating the possibility of alteration of a decision, putting into operation and taking into execution a decision causes harm, which in some circumstances may be irreparable. It was for this very reason that Corbett JA observed in *South Cape*

[6] In effect, Janse van Nieuwenhuizen J removed as it were the suspension imposed by the legislative provisions of section 18(1) of the Superior Courts. In our view, the correct order within the contemplation of section 18(1) read with 18(3) is to order that the operation and execution of a decision is not suspended by the subjecting of the decision to an application for leave to appeal. The legislature specifically decrees that a Court may order otherwise. The word 'otherwise' grammatically, means (a) other than as supposed or expected; (b) in other respects or ways; or (c) in another and different manner. Nevertheless, at this stage nothing much turns on this.

[7] Constitution of the Republic of South Africa, 1996, as amended.

Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd (South Cape)[8] that the purpose of the common law rule of practice was to prevent an irreparable harm.

[10] In order to give a stern affirmation of this purpose, the legislature deemed it appropriate that the suspension is gained through what appears to be a very low threshold – mere application for leave to appeal. In this regard, launching an application for leave to appeal serves as a shield to the operation and execution of even an unalterable decision of a Court. As a further affirmation of the purpose, the legislature made it nearly impossible to alter the lowly achieved threshold by introducing a much higher threshold to cross.[9] Just to embellish the point further, the legislature chose to employ the word '"unless". The grammatical meaning of the word unless is *except if.* When used as a preposition it seeks to introduce a rare except. Simply put, the legislative position is that except if the Court is shown exceptional circumstances under which it can order that the operation and execution of a decision is not suspended, the legislated position remains in pole position.

[11] The phrase *exceptional circumstances* received judicial attention in a number of pronouncements, in an instance where it is used in legislation. As indicated earlier in this judgment, 110 years ago, Innes ACJ made his own pronouncement on the phrase. A key consideration from Innes ACJ's pronouncement is that a stricter as opposed to a liberal view must be taken where the legislature directs presence of exceptional circumstances. In as far as this Court could establish, Thring J in *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and Another*[10] provided a useful summary of the approach to be adopted to the question of what the nebulous phrase means. It is unnecessary to repeat that summary in this judgment. It however suffices to state that the approach of Thring J received an *imprimatur* from the SCA in the matter of *Avnit v First Rand Bank Ltd (Avnit)*[11].

Did Newnet show *exceptional circumstances* or not?

[8] 1977 (3) SA 534 (A).
[9] Almost all the authorities and some scholars do appreciate that section 18(1) introduced a stringent bar to upset the default position.
[10] 2002 (6) SA 150 (C).
[11] (20233/14) [2014] ZASCA 132 (23 September 2014).

[12] To our minds, the question whether exceptional circumstances were shown to exist is dispositive of the present appeal. Should it be found that exceptional circumstances were not shown to exist, then *cadit quaestio*. Before this Court delves into the question, it is important to highlight that, this Court is not sitting as the Court of first instance. It is sitting as the highest Court and does not work from a clean slate. The Court a *quo* has already exercised a discretion when it heard the section 18(3) of the Superior Courts application.

[13] Owing to the fact that the legislature, legislated an automatic appeal, one without leave from the Court below, such can only suggest that this Court must consider whether the discretion was exercised judiciously. A discretion is exercised injudiciously, if it is based on wrong principles of law.[12] It suffices to mention that, it remains the *onus* of the applicant in a section 18(3) application to allege and prove the exceptional circumstances relied upon to reverse the default legal position. In the founding affidavit deposed to by Chief Financial Officer (CFO) of Newnet in support of the section 18(3) application, it is apparent that the deponent only addressed the requirements[13] of the old common law rule of practice as set out by the erudite Corbett JA in *South Cape.* Inasmuch as the factors relevant to the old common law rule of practice serves as an important base, section 18 of the Superior Courts legislated its own requirements. As indicated above, the main requirement to enable a Court to order otherwise is the existence of exceptional circumstances. It is only under such circumstances that a Court is empowered to order otherwise.

[14] It is indeed so that the legislature did not define what the exceptional circumstances are, for a simple reason that the enquiry into their existence is a factual one. Those circumstances must arise out of, or incidental to the particular case. In *Avnit*, the learned Mpati P, dealing with section 17(2) (f) of the Superior Courts had the following to say:[14]

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[12] See *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC).
[13] At 545B-C of *South Cape.*
[14] *Idem* fn 12.

> "[7] A useful guide is provided by the established jurisprudence of this court in regard to the grant of special leave to appeal. Prospects of success alone do not constitute exceptional circumstances." [Own emphasis]

[15] The Court below dealt with this important requirement of exceptional circumstances in the following manner:

> **"Exceptional circumstances**
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> 20. The object of the RAF is contained in section 3 of the Road Accident Fund Act, 56 of 1996, to wit… (*Text of section 3 as quoted omitted*).
>
> 21. In fulfilling the object of the Act, the RAF performs a public function and its obligation to pay for services rendered to vulnerable victims of motor vehicle accidents places it on a different footing than a normal commercial creditor.
>
> 22. A further factor to consider is the fate of the patients that are cared for at Newnet. These patients have a right to receive the benefits bestowed on them by the Act. These benefits includes proper and specialised medical treatment. The physical well-being of the patients should, in my view, play a pivotal role in establishing whether exceptional circumstances exist.
>
> 23. Taking the aforesaid considerations into account, I am of the view that exceptional circumstances exist to order the enforcement of the order."

[16] With considerable regret, this Court does not share the views upon which the Court below predicated the existence of exceptional circumstances. They appear, *ex facie* the judgment to be (a) statutory obligation to pay for services and (b) the physical well-being of unnamed patients. In the first place, section 3 of the Road Accident Fund Act (RAF Act),[15] specifically deals with payment of compensation as opposed to payment of services. In *casu*, the claim of Newnet is purely contractual and does not fit the bill of compensation contemplated in section 3 of the RAF Act. Contrary to the view expressed by the learned Judge in the Court below, in this regard, the RAF is a normal commercial creditor. To the extent that the learned

[15] Act 56 of 1996.

Judge considered the RAF not to be a normal commercial creditor, the learned Judge erred. That, notwithstanding the veritable question, is whether considering the RAF not to be a normal commercial creditor in of itself presents exceptional circumstances to enable a Court to unsettle the default legal position? The answer, in our view, is a resounding no. As concluded by Thring J, what is contemplated is something out of the ordinary and of an unusual nature, something which is expected in the sense that the general rule does not apply to it, something uncommon, rare or different. Thus, the fact that section 3 obligates the RAF to pay compensation is nothing out of the ordinary. Even if this Court were to accept that the obligations set out in section 3 extends to payment of service providers over and above the victims of the motor vehicle accidents, that also does not present exceptional circumstances. Most importantly, this Court fails to see how the statutory obligations would arise out of, or incidental to, a contractual claim for money that is due and payable. The existence of exceptional circumstances is viewed as a "controlling measure".[16]

[17] Where exceptional circumstances vanish, the power to alter the default legal position vanishes too. Additional to the statutory obligation, the Court below considered the physical well-being of the patients to play what was considered to be a pivotal role. With considerable regret this Court does not find the so-called "physical well-being of the patients" to play any pivotal role. It is of course unclear to this Court what the phrase physical well-being of patients mean in the greater scheme of things. However, the case pleaded by Newnet in the founding papers was couched in the following terms:

> "[20] However, the potential harm and prejudice to be suffered by <u>NEWNET is incalculable and irreparable</u>. This is because human lives are at stake. It was emphasised in the main application that the RAF's conduct threatens the lives and well-being of a number of patients in the NEWNET Hospital facility. This aspect was never disputed by the RAF in the application papers.
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> [21] At present there are approximately 53 patients treated in NEWNET who suffered injuries in motor vehicle accidents. Some of these patients are suffering from

[16] See *Leisching and Others v The State* CCT304/16 [2018] ZACC 25 and *Ntlemeza v Helen Suzman Foundation and Another (Ntlemeza)* 2017 (5) SA 402 (SCA).

very serious injuries and are in need of constant specialised treatment. This includes 7 patients on ventilators at this stage. These patients will suffer very serious prejudice and may even pass away should NEWNET not be able to provide further treatment to them.

[22] The critical consequences caused by the failure by the RAF to comply with its obligations, and now the Court Order, is that NEWNET is effectively at the end of its ability to proceed with its operations and to maintain the treatment and care of patients without urgent payment from payments due by the RAF. The only significant debtor of NEWNET is the RAF.

[23] The sad and life threatening situation is thus that if this Honourable Court does not come to the assistance of NEWNET at this stage, the inevitable consequences will be that NEWNET will not be able to maintain its services to patients and that it will have to close down. I am not aware of any other medical facility in the area who will be able to accommodate these patients on short-time notice or at all. The problem is exacerbated by the fact that all institutions are aware of the non-compliance by the RAF of their obligations to make payment to suppliers and will not be willing and/or able to accommodate patients who suffered injuries in motor vehicle collisions. It will also be a dangerous and even life threatening exercise to move some of these patients to other facilities at this stage."

[18] A cardinal and trite principle of our procedural law is that a party in motion proceedings, makes its case in the founding papers.[17] It has already being held that the exceptional circumstances must be fact specific.[18] In our view, what Newnet alleged, as set out above, amounts to an emotive plea predicated on wild and unspecified speculations and nothing more. In dealing with these unspecified allegations, the RAF specifically denied the closure to be true since Newnet refused to disclose its financial statements and bank statements. A wild and unspecified speculation cannot, in our considered view, create an exceptional circumstance. Nevertheless, what Newnet laments is nothing out of the ordinary. Ordinarily, every business outfit that does not receive payments from its debtors, whether for a good or bad reason, it would experience cash-flow and financial difficulties. Therefore,

[17] See *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H – 636C.
[18] *Incubeta Holding (Pty) Ltd and Another v Ellis and Another* 2014 (3) SA 189 (GJ) at [18].

financial quandaries are not something rare, different or out of the ordinary. With regard to the well-being of the patients nothing specific was provided by Newnet to attract exceptional circumstances.

[19] In *University of the Free State v Afriforum and Another (Afriforum)*[19] the SCA in agreeing with Sutherland J in *Incubeta Holdings (Pty) Ltd & another v Ellis & Another (Incubeta)*[20] when he stated that exceptionality must be fact-specific, stated the following:

> "[13] … I agree. Furthermore, I think, in evaluating the circumstances relied upon by an applicant, a court should bear in mind that what is sought is an extraordinary deviation from the norm, which in turn, requires the existence of truly exceptional circumstances to justify the deviation." [Own emphasis].

[20] The issue about the speculated plight of the patients is not truly exceptional in the absence of specificity. Nevertheless, the Court in *Afriforum* stated the following:

> "[18] In any event, and even if there were some 'quandary' or 'uncertainty' amongst these students regarding the status of the judgment of the Full Court due to the suspension thereof pending appeal, I fail to see how this could amount to an 'exceptional circumstance' as envisaged in section 18(1) of the Act. …
>
> [19] Not only did Afriforum in its founding affidavit grossly exaggerated the number of students whose interests it proclaimed to safeguard, but it also failed to show that any prospective first-year student in fact stands to be adversely affected by the introduction of the new language policy in 2017. …
>
> [20] … In essence, Afriforum now pinned its colours solely to the mast of exceptionality on the ground that, pending the appeal process, the constitutional right of the students in terms of section 29(2) of the Constitution, to receive education in the language of their choice where reasonably practicable, would be taken away and could never be restored.

[19] [2017] 1 All SA 79 (SCA).
[20] *Idem* fn 19.

[21] I fail to see how, even if there had been an infringement of rights as contended for, this would constitute exceptional circumstances as envisaged in section 18(1) of the Act. The mere reliance on the foregoing of the right by the students to exercise a choice does not in itself (ie without proof of any adverse consequences) constitutes exceptional circumstances…" [Own emphasis]

[21] In similar vein, the case of Newnet is to a large degree predicated on the plight of the 53 patients, who have not been named, let alone any mention being made of the injuries sustained by them requiring specialised treatment. An allegation was made, which was not sufficiently challenged that patients with what appears to be less serious injuries were referred to Newnet, a facility found some 100 kilometres away, in some instances. It may well be so that these 53 patients fall within the category of patients with less serious injuries. There is no proof of any adverse consequences likely to befall these unnamed patients whilst the appeal process is on-going. It is one thing to allege a sad life threatening situation and inevitable consequences, it is yet another to prove the sad and life threatening situation as well as the inevitable consequences. What is required is not only a bare allegation but sufficient prove, owing to the fact that an extraordinary deviation from the legislated default position is requested. Newnet failed to prove that the patients will indeed face sad life threatening situation. Most, if not all, medical practitioners take a professional oath to protect the interests of patients. It is incongruent or hard to believe that a medical doctor will refuse to treat a patient who is staring death in the face simply because he or she will not be paid.[21] Therefore, in order to demonstrate exceptional circumstances envisaged in section 18(1) Newnet needed to prove that the medical doctors would go against their professional oath. It simply alleged that it will not be able to maintain the services to the patients and it will close down. It seems illogical and truly perplexing to us that a specialised outfit like Newnet would place all its eggs in one basket (RAF), as it were, to a point that it now gazes at closure without that one basket. On the facts of this case, the quandaries as between the RAF and Newnet seem to have arisen in December 2020. Of course, the niggling question, owing to the alleged eminent closure, is how Newnet has been surviving up to now. It remains a mystery as to why the doors are still open and service is still being offered

[21] As an example, members of the South African Medical Association pledge that the health and well-being of my patient, community and my broader African communities will be "my key considerations."

to the unnamed 53 patients. No wonder Newnet rebuffed the legitimate request by the RAF for financial statements. All of these lends sufficient credence to the unshakable contention that no exceptional circumstances existed for the Court below to order otherwise, as it did.

[22] In the final analysis, it is our considered view that Newnet failed to demonstrate any exceptional circumstances to dislodge the default legal position. Accordingly, the learned Judge in the Court below erred when she concluded that exceptional circumstances existed to enforce the order. On this basis alone, the appellant must succeed. This conclusion makes it unnecessary for this Court to consider in any greater detail the issue of irreparable harm to either of the parties. However, this Court is behoved to touch on the issue of the prospects of success, since it was strenuously argued before us and the learned Skosana AJ concludes that since the RAF is bereft of prospects of success, the appeal must fail

The issue of prospects of success and do they exist in this regard?

[23] The view expressed by the Court below is that the RAF has an emaciated prospects of success on appeal.[22] Such emaciated prospects invigorated the ordering otherwise. Differently put, absence of good prospects of success on appeal serves as an exceptional circumstance to justify ordering otherwise. The debate that raged amongst the members of the judiciary with regard to the role of prospects of success in the analysis of a section 18 situation, seem to have been settled by the SCA in *Afriforum.* We say "seem" because there is no clear and direct authority on this point, in our view, given what the SCA said at a later stage. On the one end of the spectrum sat a view held by Sutherland J that prospects of appeal play no role at all and on the other end of the spectrum sat a view held by the Full Court[23] beaconed by Binns-Ward J that prospects of success remain a relevant factor and therefore the less sanguine a court seized of an application in terms of section 18(3) is about the prospects of success of the judgment at first instance being upheld on appeal, the

[22] "[26] Lastly, I am of the view that the RAF's slim prospects of success on appeal supports the granting of the relief claimed."
[23] *The Minister of Social Development Western Cape & others v Justice Alliance of South Africa* (20806/2013) 2016 ZAWCHC 34.

less inclined it will be to grant the exceptional remedy. The SCA adopted the approach by Binns-Ward J and commented that the Western Cape decision serves as a perfect example on the issue of the prospects of success.

[24] Before us, Mr Celliers SC, appearing on behalf of Newnet, passionately and vigorously submitted that the RAF is devoid of a defence in law against the claim since it has already admitted liability. It was for that reason, that leave to appeal was refused by the Court below and the SCA, so went the argument. He additionally submitted that the application for leave to appeal launched by the RAF is simply to delay the inevitable. In the pending application before the Constitutional Court, the RAF disputes that the liability was admitted and that a finding by the Court below that the issue of liability was common cause was made in error. Might we add, it is not apparent anywhere that the sole defence raised by the RAF is the terms of SIU proclamation as learned Skosana AJ in the dissenting judgment seeks to project. In an instance where a party is sued for payment of money denial of liability to pay the money is in itself a valid defence in law. Nevertheless, of importance, in *Afriforum*, there was no record available and as such prospects of success did not feature in the consideration of the matter. This in our view is a demonstration that even in the absence of prospects of success, a Court may successfully consider a section 18(3) application and or 18(4) appeal. This position seems to have been buttressed by the SCA in the *Ntlemeza* judgment.

[25] The Court in *Ntlemeza* punctiliously stated the following:

> "[44] … However, in *UFS*, in deciding the matter before it, this court recorded that the review record was not before it and thus had no regard to the prospects of success. … As in *UFS*, but more so, because of the application for leave to appeal the principal order, pending in this case, before us the question of prospects of success recedes in the background. …"

[26] The above vindicates the submissions by Mr Rip SC, appearing for the RAF, that prospects of success would in appropriate situations not play a role. In both *Afriforum* and *Ntlemeza*, prospects of success played no role at all.

[27] We nevertheless take a view that on the peculiar facts of this case, although there is no concrete evidence at this stage, it seems to us that something untoward has happened in the contractual arrangement between the RAF and Newnet. In a period of about 20 months, Newnet managed to amass referrals that earned it close to a billion Rand whilst other reputable hospitals are nowhere close to that figure. Although this Court cannot safely comment on the prospects of success for the purposes of this appeal, we take a view that the Constitutional Court may, in the interest of justice, take a keen interest in the defence that given the on-going investigations, which investigations implicates Newnet, the RAF may within the contemplation of the Public Finance Management Act (PFMA)[24] not be obliged to pay this questionably amassed debt. If indeed, the Special Investigating Unit (SIU) establishes that the invoices accepted on the system was fraudulent and or inflated one way or another, the obligation to pay such invoices weans away. With such prospects, it will be prejudicial to the RAF to order otherwise – that the suspension of the operation of the order – the default legal position, is removed in this matter. More recently, the Constitutional Court in *Lebea v Menye and Another*[25] confirmed that in a leave to appeal application prospects of success is not always decisive. Writing for the majority Zondo CJ stated the following:

> "[44] In the circumstances, I am of the view that the applicant's application has no reasonable prospects of success. <u>Although the absence of reasonable prospects of success is not always a decisive factor in an application for leave to appeal, it is an important factor and, sometimes, it can be a decisive factor…"</u> [Own emphasis]

[28] Accordingly, although the SCA approved the approach of Binns-Ward J, it seems apparent to us that the fact that an appellant does not demonstrate and or is possessed of reasonable prospects of success, the appellant may still obtain leave to appeal in the Constitutional Court. That being the case, it is doubtful to us that in an instance where an alleged corruption is simmering, a Court would not, in the interest of justice, hear and where possible grant leave of appeal, simply on the singular basis that the applicant is devoid of prospects of success. I interpose and state that

[24] Act 1 of 1999 as amended.
[25] CCT 182/20 [2022] ZACC 40 (29 November 2022).

this Court is not hearing the appeal at this stage. It is inappropriate for us at this stage to second guess the stance to be taken by the Constitutional Court when hearing the application for leave to appeal. In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others,*[26] the Constitutional Court recognised the following:

> "[67] It is true that any invalidation of existing contract as a result of the invalid tender should not result in any loss to Cash Paymaster. The converse, however, is also true. It has no right to benefit from an unlawful contract.[27] And any benefit that it may derive should not be beyond public scrutiny. …"

The issue of irreparable harm

[29] As indicated earlier absence of exceptional circumstances is dispositive of this appeal. However, we take a further view that Newnet nevertheless failed to prove on a balance of probabilities that the RAF shall not suffer any irreparable harm. In our view, the Court below took what appears to be a short shrift approach on this requirement. The learned judge simply stated that the patients in the care of Newnet will suffer irreparable harm whilst the RAF will suffer no irreparable harm if ordered to fulfil its statutory obligations. As indicated earlier, the RAF bears no statutory obligations in terms of the RAF Act to pay service providers. If anything the obligation may arise from the PFMA and its regulations. Skosana AJ takes a view that since Newnet has no intricate and internal knowledge of the business operations and accounting records of the RAF, it cannot provide 'detailed' and 'exhaustive' information to establish that RAF will not suffer irreparable harm. We agree with Skosana AJ that Newnet failed to provide detailed and exhaustive information. However, that simply implies that one of the requirements to alter the legislated default position did not exist. Naturally, it follows that Newnet failed to prove on a balance of probabilities that the RAF will not suffer an irreparable harm. Skosana AJ also takes a view that the RAF has not placed much in the papers to establish the irreparable harm it is likely to suffer. In our considered view that view is wrong. If

[26] 2014 (4) SA 179 (CC).
[27] The dissolution of a contract creates reciprocal obligations seeking to ensure that neither contracting party unduly benefits from what has already been performed under a contract that no longer exists.

accepted to be correct, then the *onus* is reversed to the respondent in the circumstances where the provisions of section 18 (3) are lucid and clear[28].

[30] The judgment involved in this appeal is one that sounds in money. The Court below did not consider the question whether Newnet has demonstrated sufficient means to protect the claw back interests of the RAF. Mr Rip SC argued that the desperation shown by Newnet almost suggests that it is on the brink of being insolvent to a point that should the RAF succeed to overturn the decision of the Court below on appeal, it would not be in a position to recover the money it would have paid out as ordered. In that regard, the RAF would certainly suffer an irreparable harm. In countering this rather valid argument, Mr Celliers SC, pointed the Court to allegations made in respect of a set off against what is allegedly owed to Newnet. The primary difficulty with that argument is that Newnet seeks to dispel impecuniosity by relying on payment that may be found by the SIU to have been improperly earned. On its own version, should the Court not order otherwise, it would close its doors, since it would be unable to pay its debts, it would seem. A common act of insolvency occurs when an admission of inability to service debts is made. In *Shelter Canadian Properties Limited v Christie Building Holding Company Limited,*[29] Joyal C.J.Q.B dealing with the risk of irreparable harm resulting from the immediate execution of a judgment considered what was said in *Laufer v Bucklaschuk,*[30] which is the following:

> "[7] The risk of harm to an applicant is the risk of not recovering the amount paid, or realized on execution, if the judgment is subsequently set aside on appeal. This risk is obviously small if the plaintiff is a person of substantial means, such as government or major corporation, but increases as the means of the plaintiff decreases. …"

[31] In the final analysis, Joyal C.J.Q.B reached the following apt conclusions:

[28] If the **party who applied** to the court to order otherwise**, in addition proves on a balance of probabilities that the other party will not suffer irreparable harm if the court so orders.**
[29] 2021 MBQB 59 (CanLII).
[30] 1999 CanLII 18747 (MB CA).

> "[51] …I have not unconsciously de-emphasized the onus that rests with Christie, an onus which requires it to put forward convincing evidence of amongst other things, the potential impecuniosity on the part of Shelter.
>
> …
>
> [56] Based on the evidence adduced, not only am I of the view that Shelter has the ability to repay a 3.6 million judgment in the event of a successful leave application and a successful appeal, I am also of the view that (see paragraphs 57-62 below) that there is insufficiently persuasive evidence to satisfy me of the other aspects of Christie's argument concerning irreparable harm. …"

[32] In our view, since the *onus* is on Newnet to prove on a balance of probabilities that the RAF will not suffer irreparable harm if a Court ordered otherwise, by failing to show its ability to repay the money, the risk of the RAF suffering irreparable harm increased. It remains the *onus* of an applicant to demonstrate that the other party insulated by the default position will not suffer irreparable harm once the insulation is lifted. Having failed to discharge the *onus*, the Court below erred in granting a section 18(3) application, absent all the requirements being satisfied.

Conclusions

[33] In summary, this Court takes a view that the Court below in exercising its clearly trammelled discretion, it regretfully paid lip service to the presence of all the legal requirements to order otherwise, more particularly the presence of exceptional circumstances. In our considered view, Newnet failed to demonstrate anything out of the ordinary, in order to permit the Court below to order otherwise. Additionally, we take a view that Newnet failed to demonstrate on the preponderance of probabilities that the RAF will not suffer an irreparable harm. It is not the duty of the RAF to prove that it will suffer irreparable harm, to conclude so, this Court would be saddling the RAF with a reverse *onus.* The provisions of section 18(3) of Superior Courts are couched in a negative as opposed to the positive sense, namely: "*the other party will not suffer irreparable harm*." Accordingly, the Court below erred and its order is susceptible to being set aside on appeal. The appeal must succeed.

[34] For all the above reasons, naturally, the order of the Court below must be replaced with an order as outlined below.

Order

1.1 The appeal is upheld;

1.2 The order of Janse van Nieuwenhuizen J dated 13 September 2022 is set aside;

1.3 It is replaced with the following:

1.3.1 The application in terms of section 18 (3) seeking leave to execute a decision subject to an appeal is dismissed with costs, which includes the costs of employment of two counsel.

____

MOSHOANA J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree

____

MALUNGANA AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I disagree

____

SKOSANA AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

Counsel for the Applicant	**: Adv. M. Rip SC & Adv. T. Pillay**
Instructed by	**: Malatji & CO Attorneys**
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Instructed by	**: Podbielski Mhlambi Attorneys Inc**
Date Heard	**: 28 November 2022**
Date of Judgment	**: 06 December 2022**