IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: MAKHANDA]

CASE NO. 1284/2021

In the matter between:

TEKOA ENGINEERS (PTY) LTD	**Applicant**
and	
ALFRED NZO MUNICIPALITY	**1st Respondent**
THE MUNICIPALITY MANAGER: ALFRED NZO DISTRICT MUNICIPALITY	**2nd Respondent**
ZINZAME CONSULTING ENGINEERS/CYCLE PROJECTS/UBUNTU BAM JV	**3rd Respondent**
EMLANJENI JV	**4th Respondent**
OLON CONSULTING ENGINEERS JV IMP PLANT HIRE	**5th Respondent**
BM INFRASTRUCTURE JV MAGNACORP	**6th Respondent**

JUDGMENT

JOLWANA J:

Introduction.

[1] Applicant sought and obtained an order declaring unlawful and setting aside the second respondent's decision to award a tender and to appoint the third, fourth, fifth and sixth respondents (the successful tenderers) to the panel of service providers in accordance with the said tender. Applicant was also granted an order declaring

unlawful and setting aside first respondent's decision to disqualify the bid submitted by applicant. Other ancillary relief that hinged on the applicant obtaining the above main relief were also granted. Applicant now seeks, in these proceedings, an order for the execution of the said judgment or orders pending any appeal processes that may still be underway.

Background.

[2] On 14 June 2022 this Court, per Laing J, delivered a judgment, *inter alia*, reviewing and setting aside as unlawful, the tender process followed by the first respondent in its evaluation, adjudication and award of a tender for the planning, design and construction of water services infrastructure in the Alfred Nzo District Municipality. The declaration of invalidity was suspended for a period of 30 days to allow for the completion of the projects that were near completion. On 30 June 2022 the successful tenderers lodged an application for leave to appeal. On 05 July 2022 first and second respondents (the municipal respondents) also lodged an application for leave to appeal. On 31 August 2022 the said applications for leave to appeal were heard and judgment was delivered on 6 September 2022 dismissing them. On 5 October 2022 first respondent and on 06 October 2022 the successful tenderers filed applications for special leave to appeal at the Supreme Court of Appeal.

[3] On 7 October 2022 applicant launched these proceedings on an urgent basis seeking an order for the immediate execution of the judgment or orders in the main application in terms of section 18 of the Superior Courts Act 10 of 2013 (the Superior Courts Act) pending the appeal processes. The urgent application was heard on 19 October 2022 and in a comprehensive judgment delivered on 25 October 2022 dealing only with the issue of urgency, this Court, per Lowe J, struck the urgent application from the roll. On 31 October 2022 applicant made written representations to the office of the Judge President for this matter to be allocated a date on the opposed roll on a preferential basis. The matter was subsequently enrolled for hearing on 11 November 2022 and it served before me in the opposed motion court. The municipal respondents, in their heads of argument and during the hearing of this application raised pertinently, the issue of the matter being allocated a preferential hearing date. Counsel for the successful tenderers also made

submissions on this issue, and urged the court to also deal with it as it is a matter of concern to them. I will revert to this issue later in this judgment.

The legislative framework.

[4] Section 18 makes provisions for what must prevail when an application for leave to appeal is lodged. It further provides for the application for an execution order by the successful party in the event of the decision of the court being the subject of an application for leave to appeal or of an appeal. Section 18 reads:

“18. (1) subject to subsections (2) and (3) and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subjection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

(4) If a court orders otherwise, as contemplated in subsection (1) –

(i) the court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules."

[5] The main application, not being of an interlocutory nature, subsection (2) finds no application. It is only to the requirements of section 18 (1) and (3) that the issues pertinent to this application must be determined.

The issues

[6] Briefly, the issues are whether applicant has established exceptional circumstances for the granting of the execution order. Furthermore, applicant must prove that it will suffer irreparable harm if the order is not granted and further prove that respondents will not suffer irreparable harm by the granting of the execution order. These are the three jurisdictional requirements that applicant must establish for it to obtain the relief sought.

[7] The leading authority on the section 18 applications is *Incubeta*[1] in which the legal position was discussed and crystalized for the first time following the passing into law of the Superior Courts Act. The court summarised the requirements provided for in section 18 as follows:

"It seems to me that there is indeed a new dimension introduced to the test by the provisions of Section 18. The test is two fold; the requirements are:

First, whether or not exceptional circumstances exist, and

[1] Incubeta Holdings & Another v Ellies & Another 2014 (3) SA 189 (GSJ) at para 16 and 17.

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."

Discussion.

[8] The exceptional circumstances cited by the applicant in its founding affidavit are the following. There is a declaration of the invalidity of the award of the tender to and the appointment of the successful tenderers. The 30 day period of the suspension of the invalidity which was granted by the court has lapsed. Therefore, the successful tenderers no longer have any authority, power or legal standing to continue with the works. Applicant also raises the fact that the appointment of the successful tenderers was for a fixed term period of three years which comes to an end on 31 August 2023. Therefore, unless the execution order sought is granted, the main judgment in terms of which their appointment was set aside will become academic after that expiry date.

[9] Effectively, so contends applicant, without the execution order being granted pending the appeal processes, the successful tenderers will continue with the works to finality as if there never was a declaration of invalidity. Therefore, despite the injunction by the court that after the expiry of the 30 day period allowed for the completion of the projects that were near completion, the successful tenderers will continue with the works and finalise even the projects that were not near completion thus rendering the declaration of invalidity of no moment. The result of all of this will be that the successful tenderers will receive undue benefits from continuing with the works despite the court having ordered them to stop. The failure of the successful tenderers in their appeal would be meaningless. The converse also holds true in that the success of the applicant in the appeal processes will become futile. On the basis of these averments, it was argued that applicant has established exceptionality as provided for in section 18(1).

Has applicant established exceptional circumstances?

[10] The term, "exceptional circumstances" has received considerable attention by courts even long before the Superior Courts Act was enacted. In *Ntlemeza*[2], Navsa JA explained the meaning of the term "exceptional circumstances" as follows:

"As to what would constitute exceptional circumstances, the court, in *Incubeta*, looked for guidance to an earlier decision (on admiralty law), namely *MV Ais Mamas: Seatrans Maritime v Owners, MV Ais Mamas, and Another* 2002 (6) SA 150 (C), where it was recognised that it was not possible to attempt to lay down precise rules as to what circumstances are to be regarded as exceptional and that each case had to be decided on its own facts. However, at 156H – 157C, the court said the following:

'What does emerge from an examination of the authorities, however, seems 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 hoé 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 is unusual or different; the secondary meaning is markedly unusual or especially different.

[2] Ntlemeza v Helen Suzman Foundation 2017 (5) SA 402 (SCA) at 415 E-J.

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'."

[11] Applicant accepts the above legal position which is therefore common ground and in fact does not contend that there is a less exacting meaning to the phrase "exceptional circumstances". The question is, as it must therefore be, whether applicant has met the rather high threshold set by the Legislature in section 18 for the granting of the execution order it seeks.

[12] What applicant contends as being exceptional circumstances amounts to no more than this. There is a judgment in terms of which the awarding of the tender to and the subsequent appointment of the successful tenderers were declared unlawful. The successful tenderers, in those circumstances, continuing with the works is by and of itself an exceptional circumstance. This is because the contract will run out while the appeal processes are ongoing and render moot any success by it on appeal. In that way the whole judgment that declared unlawful, the awarding of the tender as being non-compliant with section 217 of the Constitution will be defeated and therefore the contravention of section 217 of the Constitution will have been condoned. Those are, in a nutshell, applicant's contentions an exceptionality.

[13] Mr Beyleveld who appeared for the municipal respondents argued that this postulation, if accepted, means that in all cases in which an administrative action has been reviewed and set aside as being unlawful – by virtue of that declaration of invalidity, exceptionality is established. He pointed out that there are many cases some of which arise out of contractual relationships whose contracts are time bound which are brought before courts on review all the time. In all of them, the time the appeal process will take can never be guessed with any degree of exactitude. What is also known generally, is that appeal processes do take time to be finalized. What the submissions of the applicant on exceptionality amount to is that in all cases that are time bound whose contracts have been reviewed and set aside, an applicant for an execution order need do no more than allege that the contract might expire by

effluxion of time before the appeal processes are finalised. On this basis an execution order must be granted. This submission is not without merit, as I explain below.

[14] The starting point must be the intention of the Legislature as can be ascertained from the language used in section 18. If the Legislature had considered a declaration of invalidity of a contract or the setting aside of a tender and an appointment made as a sequel to the award are, per se, an exceptional circumstance for purposes of preventing constitutional deviance or correcting constitutional non-compliance, it seems to me that the Legislature would have said so. Instead of saying so, the Legislature went to the opposite direction by making its intentions clear in making the rule that appeal processes have an effect of suspending the orders appealed against and that fixed rule can only be departed from under exceptional circumstances. In making this law, the Legislature has made no exception, save for interlocutory applications provided for in section 18(2). It did not create a special dispensation for cases in which a court finds that there were constitutional contraventions. Any attempt, through interpretation, to deviate from this clear intention of the Legislature would, in my view, be no less than the courts, deliberately undermining the clear intention of the Legislature under the pretext of preventing constitutional deviance. That would not be interpretation but an impermissible subversion of the clear intention of the Legislature. That would amount to courts extending the boundaries of their authority at the expense of the Legislature which would be unconstitutional, the exact opposite of constitutional compliance. Courts also have a duty to lead by example by being careful not to exceed the boundaries of their authority by showing deference to the law making authority of the Legislature.

[15] The principles of statutory interpretation in general, have been set out and explained by our courts at various times. It sometimes becomes necessary to restate them, trite as they may be. In *Komani School*[3] the underlying principles of statutory interpretation and in particular, the courts respecting the boundaries of their own authority, were restated by Petse AP very recently as follows:

[3] Member of the Executive Council, Department of Education, Eastern Cape v Komani School & Office Supplies CC t/a Komani Stationers 2022 (3) SA 362 (SCA) paras 43-44

"… [I]ts approach is not what s 60 (1) countenances. The provision is specially designed to come to the rescue of someone who asserts a delictual or contractual claim for damage or loss. There is no good reason to extend the operation of section 60(1) beyond its natural ambit. To do so would be crossing the divide between statutory interpretation and legislating. The clear and unequivocal language employed in s60 (1) cannot be ignored for as Kentridge AJ aptly put it in *S v Zuma and Others*: '[I]f the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination.'

Although these remarks were made in a different context, the Constitutional Court subsequently stated in *Kubyana* that they apply even more forcefully in relation to statutory interpretation generally.' Accordingly, the reliance by Komani Stationers on Mostert NO is misplaced as that case turned on its facts which are materially distinguishable from the facts of the present matter."

[16] It must be emphasized that the section 18 requirements are not subject to the discretion of the court. They must be established on the basis of a factual enquiry that must be conducted. In *University of the Free State*[4] the Supreme Court of Appeal explained this position as follows:

"Whether or not 'exceptional circumstances' for the purposes of s 18(1) are present, must necessary depend on the peculiar facts of each case. In *Incubeta Holdings* at para 22 Sutherland J put it as follows:

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

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

[4] University of the Free State v Afriforum and Another 2018(3) SA 428 (SCA) at para 13.

deviation from the norm, which, in turn, requires the existence of truly exceptional circumstances to justify the deviation."

[17] On the facts of this matter it is self-evident that applicant has failed to prove, on a balance of probabilities, the existence of exceptional circumstances, as would justify a departure from the general rule that pending the appeal processes, the judgment or order issued remains suspended. I am of the view that this conclusion is, on its own, sufficient for the dismissal of this application. This is so because the very scheme of section 18 is such that for applicant to succeed, it is required to establish all the three requirements, as against establishing one or some of them. That notwithstanding, I consider it important to examine if, in any event, applicant has established the other two requirements.

Irreparable harm.

[18] I turn now to deal with whether applicant has established the requirements of irreparable harm to itself if the order is not granted and conversely, that no irreparable harm will befall the respondents if the execution order is granted. In its founding affidavit, applicant relies, for the most part, on the main judgment and the orders contained therein. In that regard reference is made to the projects that are not near completion and an amount estimated to be about one hundred million rand that is apparently yet to be expended. It is further submitted that the orders sought to be enforced will fall away, and the successful tenderers will finalise the entire project, unless the execution order is granted. In the result the orders that were granted to protect what it calls, *"the interests of the applicant*" will come to nought. This may result in the appeal itself being dismissed on the basis that it will have no practical effect. The result of all of this, it was argued, will be that applicant might not even have an opportunity to argue against the appeal as the projects will all have been completed by then.

[19] A further averment is made that if the works are allowed to continue, there will be no possible re-advertisement of the project, re-application by the applicant and a re-adjudication of the tender in respect of the now still uncompleted projects as the whole project will have been completed. In the final analysis, all the declaratory

orders that invalidated the award of the tender to the successful tenderers will become irrelevant. Therefore, the judgment will become unenforceable and applicant's victory in the main application, inconsequential. It seems to me that what applicant has set out as irreparable harm is, in addition to it just being the same submissions that were made on exceptionality, appears to be founded on a number of speculative hypothetical postulations. What applicant avoids or fails to deal with is to be more precise about the harm that it will suffer if the execution order is not granted. After all, the harm that must be assessed is, in the first instance, actual harm to itself.

[20] Mr Tshikila who appeared for the successful tenderers made some telling submissions which are very apt in relation to the issues in this matter. His submissions were that in the main judgment the court did not award the tender to applicant. Therefore, no right accrued to applicant which might be irreparably harmed. Furthermore, even if the respondents do not succeed in their appeal, the effect of their loss will be that the municipal respondents will have to decide if and whether they should take a decision to re-advertise the tender. Only if they do, will applicant be entitled, like all other qualifying service providers, to submit a tender for evaluation and adjudication. Even if that does happen, applicant will be entitled to no more than an opportunity to participate in the tendering process which extends to all interested bidders. If this submission is correct, the question is, what is it that applicant will lose as its opportunity to participate in a future tendering process will not be threatened should a decision to re-advertise the tender be made if the respondents' appeals fail.

[21] On its own showing, it is clear that there is no irreparable harm to be suffered by applicant as there is no entitlement or right that has accrued to it as a result of the judgment and the orders that are the subject of the appeal that is not available to any other qualifying service providers. This is because even if it obtains the execution order and goes on to succeed on appeal, none of that will entitle it to the award of the tender. Therefore, no real prejudice or irreparable harm will befall it if the order is not executed. It must be emphasized that what was required of the applicant was proof on a balance of probabilities that it specifically, will be irreparably harmed by the non-execution of the order or judgment. Its right to participate in any future

tendering process is not threatened. I am of the view that the completion of the whole project and therefore the loss of an opportunity to participate in a future tendering process, whose outcomes are not guaranteed cannot be equated to an irreparable harm as it will not be automatically entitled to be awarded the tender on its success on appeal. The situation would be somewhat different if the court that determined the main application had awarded the tender to applicant, which was not the case. The effect of the main judgment is no more than providing a *spes* to applicant as explained above, with an uncertain outcome. Applicant's contentions on irreparable harm to itself are clearly unsustainable.

[22] Applicant was also required in terms of section 18(3) to prove that respondents will not suffer irreparable harm. I think that as a general proposition, it is fair to make the observation that, generally speaking, it can be difficult to prove irreparable harm to the other party. It is not unimaginable that an applicant might not know the nature or extent of the irreparable harm that a particular respondent might suffer. This would be due to the fact that the inner workings of one entity may not be easy to fathom by another entity from the outside. I can go as far as to say, without deciding the point, that once an applicant proves the first two requirements, its performance or ability to prove the third requirement, that is, absence of irreparable harm to a respondent should be assessed less stringently. If an applicant fails to prove the first and second requirements, its inability to prove the third requirement should become less material as, by then, the horse will have bolted. This is because all the requirements must be proved for it to succeed and be granted an execution order.

[23] However, in this case applicant has not even made a decent attempt in its founding affidavit to establish the absence of irreparable harm to any of the respondents. When the founding affidavit was drawn, it must have been very clear to the drafters thereof that they were simply unable to provide any facts to prove that the respondents would not suffer irreparable harm. This is in part demonstrable from the fact that in no more than two paragraphs on this jurisdictional requirement, applicant merely states the fact that if the respondents succeed in appealing against the main judgment, their rights will not become moot. Contradictorily, and even confusingly, applicant avers that the only way to secure the rights of the respondents in the appeal is to grant the execution order. I do not understand how the granting of

the execution order can conceivably be regarded as proof that the respondents will not suffer irreparable harm.

[24] The respondents, as a matter of law, have a right to appeal the judgment and they have elected to do so. What applicant must prove is that the execution order it seeks will not harm the respondents, if it is granted. In other words, it must prove that in addition to the irreparable harm, not just harm, it will suffer if the order is not granted, respondents will not suffer irreparable harm by the granting of the execution order. Applicant's submissions in this regard go against the very purpose of section 18(3). This, it does without challenging its constitutionality. It is incorrect for a litigant to make a postulation that is contrary to the clear language of a statutory provision and the purpose of that statutory provision, without challenging its constitutionality.

[25] The municipal respondents have submitted that if the project is halted because of the execution order, they will suffer irreparable harm in that they might lose the funding they got for the project from the Department of Water and Sanitation. Most importantly, the citizens who are obviously in dire need of this very important life sustaining essential which is clean running water, will continue to be denied access to clean running water. This, only so as to protect the applicant's financial interests in a possible, hopefully positive outcome of a future tendering process. The work already done in respect of the projects that are not near completion might be vandalized in the interim. Applicant has failed to prove on a balance of probabilities that respondents will not suffer irreparable harm. The exposure of the incomplete infrastructure to vandalism in respect of the projects that are not near completion is certainly a definite potentially irreparable harm and therefore, potential loss of limited public resources as a result. These are, in a nutshell, the submissions made on behalf of the municipal respondents.

[26] Some of the contentions of the successful tenderers are that they will suffer irreparable harm if the order is granted. They refer to the effect of the granting of the execution order, which will be that the contract awarded to them will finally be terminated. Thereafter, the tender will have to be re-advertised if they lose the appeal and the whole bidding process which normally takes a very long time will

have to start afresh. This process may not be finalised within the remaining period for which the funding was allocated. This will cause them irreparable harm. Even if the respondents ultimately succeed on appeal, that success will be meaningless should the funding be no longer available. In any event, the period for the contract will have expired. It certainly cannot be said that the successful tenderers will not suffer irreparable harm in these scenarios. One clearly discernible irreparable harm is that they will have lost the contract in terms of which they have been appointed. Even if they ultimately succeed on appeal, they will have lost whatever benefits of their contract are for providing the services. In contradistinction to applicant, it seems to me that there is real potentially irreparable harm to the successful tenderers.

[27] The irreparable harm that may be suffered by the respondents, especially the municipal respondents, must be assessed not exclusively of what such respondents may themselves suffer. That they are, after all, there and exist for the sole purpose of delivering services to the public is a very weighty consideration. So too is the importance of the protection of the fiscus from a clearly possible exposure to financial losses. That is also because the fiscus is basically tax payers' money and therefore its exposure to loss is a very significant consideration especially due to foreseeable possible vandalism. Over and above all of that, the effect of the granting of the execution order will be that the intended beneficiaries of the project, the communities, will have to wait for many more years for access to clean running water. The provision of clean running water is for the benefit of the public and that is a very weighty consideration. The relevance and importance of what is for the general public benefit as a weighty consideration was aptly explained as followed in *Allpay*[5]:

"Once a finding of invalidity under PAJA review grounds is made, the affected decision or conduct must be declared unlawful and a just and equitable order must be made. It is at this stage that the possible inevitability of a similar outcome, if the decision is retaken, may be one of the factors that will have to be considered. Any contract that flows from the constitutional and statutory framework is concluded not

[5] Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014 (1) SA 604 (CC) para

on the state entity's behalf, but on the public's behalf. The interests of those most closely associated with the benefits of that contract must be given due weight. Here it will be the imperative interests of grant beneficiaries and particularly child grant recepients in an uninterrupted grant system that will play a major role. The rights or expectations of an unsuccessful bidder will have to be assessed in that context."

[28] The interests of an unsuccessful bidder such as applicant are important as well and in an appropriate case they must be protected. However, such rights or interests must necessarily recede into the background and give way to the interests of the beneficiaries of the project in an appropriate case. The implementation of this project is part of the government's fulfilment of its constitutional obligation to work towards the progressive realisation of the people's socio economic rights provided for in the Constitution. Over and above government trying to meet its constitutional obligation through this project, the citizens of Alfred Ndzo District Municipality, can for the first time since the advent of democracy 28 years or so ago, see in the horizon, the delivery of water to them becoming a reality. All of their hopes for clean running water will be dashed by the granting of the order sought by applicant. This is not a small issue for the communities who currently share drinking water with livestock and are often at risk of getting infectious diseases due to unhygienic living conditions. This is a case in which the applicant's rights, even if they were there, must give way to the rights and expectations of the communities as the ultimate beneficiaries of this project.

[29] After the decision of the court in *Incubeta*[6] the first case to come before the Supreme Court of Appeal was *University of the Free State*[7] in which *Incubeta* was quoted with approval. The court therein expressed itself authoritatively as follows on section 18 (1) and (3):

"It is further apparent that the requirements introduced by s 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

[6] Incubeta note 1 supra
[7] University of the Free State note 4 supra.

made, and that the other party 'will not' suffer irreparable harm if the order is made. The application of rule 49 (1) 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."

[30] In my view, applicant has failed, on the facts of this matter, to establish exceptional circumstances justifying a departure from what is essentially the norm. It has further failed to prove on a balance of probabilities that it will suffer irreparable harm if the execution order is not granted. The language employed in section 18 (3) indicates that the irreparable harm that it will suffer must be very real, a certainty and not just a possibility. The same applies to the requirement that the respondents will not suffer irreparable harm. That is, in my view, clear from the use of the words, "will" and "will not" in section 18 (3) as it refers to both the applicant and the respondents respectively. I have arrived at the inevitable conclusion that applicant must therefore fail in its application for the granting of the execution order.

The preferential hearing date.

[31] This brings me to the last issue I alluded to at the beginning of this judgment, relating to applicant's request for a preferential hearing date in the opposed roll. As indicated elsewhere in this judgment, this matter was struck off the roll consequent upon the court having determined that it did not warrant being dealt with on the basis of urgency. In his judgment, Lowe J went into a detailed factual analysis and a careful discourse dedicated to the issue of urgency which he then wrapped up as follows:

"In my view accordingly and having regard to all of the above, this is a matter which simply cannot proceed on the urgency time line adopted by applicant as a result of both self-created urgencies adverted to above and quite separately from that, the unreasonable and unnecessary stringent and unsustainable time line adopted.

…

It is worth saying that this entire issue surrounding the urgency difficulty and set down dates could have been avoided had the parties sought that their matter be dealt with by way of caseflow management by the Judge President or his nominee as to procedure and dates of hearing. In this regard and whilst not completely on all fours, the matter of *Bobotyana* is relevant.

If applicant is to proceed with the matter and having regard to the order I intend to give, it must do so in the manner and procedure required by law and in addition thereto engage the case flow management process by way of the Judge President or his nominee."

[32] It is clear that first, the court found the urgency to have been self-created. Second, the court found that even putting aside the issue of the self-created urgency, applicant adopted unreasonable and unnecessarily stringent and unsustainable time lines in the time table it set. The matter, having been struck off the roll, in a ten-page letter dated 28 October 2022 date stamped by registrar on 31 October 2022, applicant made representations to the office of the Judge President. In the main, the representations are no more than further submissions on urgency or a regurgitation of the submissions on urgency which had already been made in court and which were considered and given short shrift by the court. The matter was, however, allocated a date of hearing on the opposed roll in about two weeks after it had been struck off the roll.

[33] I consider it important to start by highlighting the fact that section 18(5) provides for when a matter becomes subject of an application for leave to appeal or of an appeal as this matter is consequent upon the respondents pursuing their appeals. It reads:

"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 <u>an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules."</u> (my emphasis)

[34] In light of this provision and in the context of applicant having pleaded for the allocation of a preferential hearing date, it is important to once again make reference to what the court hearing the urgent application in this matter said elsewhere in its judgment, once again, on the issue of urgency. The court said:

"50. As conceded by applicant's counsel, and correctly so, of course it is plain that this application could have been brought at any time after the initial application for leave to appeal was filed in respect of the judgment of Laing J dated 13 June 2022. Certainly, having regard to applicant's fears, it could appropriately have been brought both before and certainly at the time of or soon after the 30 day period lapsed expiring on 15 July 2022. The applicant would not have been faulted for bringing that application at any time up to 6 September 2022 when the application for leave was dismissed."

This is the context in which applicant's decision to apply for a preferential hearing date must be understood. This is the context in which, as I understood them, respondents have difficulties with applicant having been allocated a date so soon after this matter was struck off the roll.

[35] Respondents take issue with the fact that instead of the matter joining the other cases that are awaiting dates in the opposed roll for possible hearing some time later in the normal course, the matter has been allocated a date of hearing in the opposed roll soon after it was struck off the roll on 25 October 2022. It was submitted that the net effect of the directive for the matter to be heard on 11 November 2022 was that that directive overruled the judgment and order that struck it off the roll through an administrative process. It was argued that the directive amounted to a reversal of such judgment and order. It was further submitted that it is inappropriate for a matter, having been considered by the court and accordingly struck off the roll and a judgment or order having been issued in that regard, that there be an administrative process effectively reversing the judgment.

[36] It was submitted on behalf of applicant that the court that heard the urgent application indicated that if applicant wanted to proceed with the matter it may

engage the caseflow management process through the office of the Judge President. Attorneys for applicant indeed approached the office of the Judge President and made written representations for the allocation of a preferential hearing date. It was consequent upon such representations that the matter was given a preferential hearing date on the opposed roll which was the 11 November 2022. In essence, applicant relies on the caseflow management process for the fact that it was allocated a date that was within two weeks or so after the matter was struck off the roll. I consider it necessary to put the caseflow management process in its proper perspective and I proceed to do so hereunder.

Judicial caseflow management.

[37] There can be no debate about the necessity and indeed the important role the judicial caseflow management process plays as part and parcel of the measures that have been introduced to enhance the performance of the courts. The introduction of these measures finds its statutory undergirding in section 8 of the Superior Courts Act 10 of 2013[8]. This has been done through the introduction of an amalgam of measures all designed to improve efficiency in the judicial system and importantly,

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8. Section 8 of the Superior Courts Act reads: "(1) …
(2) The Chief Justice as the head of the judiciary as contemplated in section 165 (6) of the Constitution, exercises responsibility over the establishment and monitoring of norms and standards for the exercise of judicial functions of all courts.
(3) The Chief Justice may, subject to subsection (5) issue written protocols or directives, or give guidance or advice, to judicial officers-
(a) in respect of norms and standards for the performance of the judicial functions as contemplated in subsection (6), and
(b) regarding any matter affecting the dignity, accessibility effectiveness, efficiency or functioning of the court.
(4) (a) Any function or any power in terms of this section, vesting in the Chief Justice or any other head of court, may be delegated to any other judicial officer of the court in question.
(b) The management of the judicial functions of each court is the responsibility of the head of that court.
(c) …
(5) …
(6) The judicial functions referred to in subsection (2) and subsection (4) (b) include the –
(a) determination of sitting of the specific courts;
(b) assignment of judicial officers to sittings;
(c) assignment of cases and other judicial duties of judicial officers;
(d) determination of the sitting schedules and places of sitting for judicial officers,
(e) management procedures to be adhered to in respect of –
(i) caseflow management;
(ii) the finalisation of any matter before a judicial officer, including any outstanding judgment, decision or order; and
(iii) recesses of Superior Courts.
(7) …"

the speedy finalisation of cases. Very importantly, caseflow management is also provided for as one of those measures in section 8 (6) (e) (i) of the Superior Courts Act.

[38] The Chief Justice, acting in terms of section 8(2) of the Superior Courts Act, issued the Norms and Standards for Judicial Officers[9] (the norms and standards). The norms and standards provide for, *inter alia,* Judicial Officers taking control of the management of cases at the earliest possible opportunity. What becomes apparent from the reading of both the Superior Courts Act and the norms and standards is that what is sought to be achieved is the orderly operational efficiency of the court system. Through the judicial caseflow management process an effort is being made to reduce, if not eliminate, the postponement of cases for foreseeable and avoidable reasons such as settlement negotiations being pursued or some other delays which notoriously manifest themselves when the trial should be starting. The identification of the real issues in dispute between the parties and what sort of evidence is required to deal with those issues, the number and availability of witnesses that must be called are just some of the issues that are normally dealt with during the caseflow management process. In this regard, a number of templates have been introduced in our Division by the Judge President to make this process user friendly and to promote consistency. There are many other low hanging fruits or obvious benefits that may flow directly from the judicial caseflow management process when it is applied correctly and with a good degree of consistency. It is designed to enable all practitioners to know what is expected of them every step of the way and to ensure that they do what is required of them so that by the time a matter is allocated a date

9. Clause 5.2.4 of the Norms and Standards provides:
"(i)Case flow management shall be directed at enhancing service delivery and access to quality justice through the speedy finalisation by all matters.
(ii) The National Efficiency Enhancement Committee, chaired by the Chief Justice shall coordinate case flow management at national level. Each Province shall have only one Provincial Efficiency Enhancement Committee, led by the Judge President that reports to the Chief Justice.
(iii) Every Court must establish a case management forum chaired by the Head of that Court to oversee the implementation of case flow management.
(iv) Judicial Officers should take control of the management of cases at the earliest possible opportunity.
(v) Judicial Officers should take active and primary responsibility for the progress of cases from institution to conclusion to ensure that cases are concluded without unnecessary delay.
(vi) The Head of each Court shall ensure that Judicial Officers conduct pre-trial conferences as early and as regularly as may be required to achieve the expeditious finalisation of cases.
(vii) No matter may be enrolled for hearing unless it is certified trial ready by a Judicial Officer.
(viii) Judicial Officers must ensure that there is compliance with all applicable time limits."

of hearing, it is, to the extent possible, actually ready for a hearing. Where there is non-compliance or one of the parties is trying to be dilatory and thus frustrate the progress of the matter, such problems are identified timeously and dealt with. As a result, once a matter is certified trial ready, chances of the matter not proceeding on the date allocated for it are eliminated or at the very least, substantially reduced. This has, statistically speaking, improved the finalisation rate of cases in our Division.

[39] In *Bobotyana*[10] Mbenenge JP explained some of the statutory foundations of the caseflow management process and some of the implementation procedures that are observed very succinctly as follows:

"Paragraph 5.2.4 of the Norms and Standards for Judicial Officers makes it incumbent on Judicial Officers to take active and primary responsibility for the progress of cases from initiation to conclusion so as to ensure that cases are concluded without unnecessary delay. The Norms and Standards further provide that the Head of each Court shall ensure that Judicial Officers conduct pre-trial conferences as early and as may be required to achieve expeditious finalisation of cases. No matter may be enrolled for hearing unless a Judicial Officer has certified it to be ready for trial or hearing.

Judicial caseflow management received statutory fortification with the insertion of rule 37A in the Uniform Rules. Rule 37A(1)(b) provides that a judicial case management system shall apply, at any stage after a notice of intention to defend is filed to any proceedings in which such management is determined by the Judge President, of own accord, or upon the request of a party, to be appropriate. Rule 37A(2)(a) provides that case management through judicial intervention shall be used in the interests of justice to alleviate contested trial rolls and to address the various problems which cause delays in the finalisation of cases.

By virtue of the content of paragraph 5.2.4 of the Norms and Standards, read with rule 37A(1)(b) and 37A(2)(a) of the Rules, there is no reason in law and in logic why

[10] Bobotyana and Others v Dyantyi and Others 2021 (1) SA 386 (ECG) paras 18-20.

caseflow management should not, *mutatis mutandis*, apply to motion proceedings. Indeed, in this Division a form for caseflow management has been made applicable to other proceedings as well. Case files are routinely allocated to Judges for perusal before the hearing date to ensure that short comings that sometimes beset the progress of cases are brought to the attention of the parties and remedied timeously, long before the hearing date."

[40] I think it is fair to make an observation that there is nothing in the Superior Courts Act, the norms and standards or any other instrument that I am aware of which entitles a party to make an application for what is called a preferential date of hearing. It is not clear how the term "preferential date" came to be as it finds no expression at all in any of the court instruments. Even in the context of urgent applications, the term has not been employed in any of the rules. In the context of urgent opposed applications that term has also not been used anywhere. I understand Rule 6(12) which provides for urgent applications as providing for urgent hearing and determination of applications depending on the exigencies of a particular matter. However, there is simply no dispensation for allocating a preferential date as the term seems to be used loosely, for urgent applications. However, in the context of caseflow management there is nothing to suggest that a Judge President or his nominee, may not take into account whatever exigencies of a particular matter and allocate an early date of trial in the case of actions or an early date of hearing in the opposed motion court roll, in the case of applications. Surely, the interests of justice may require such an intervention in appropriate cases. I do not consider it helpful to try to give some examples of situations that may have to be considered as each situation would have to be considered on its own peculiarities. It seems to me that what the Judge President or his nominee, considers to be in the interests of justice should be the determining factor depending on the exigencies of each case.

[41] In this matter the judgment striking the matter off the roll was handed down on 25 October 2022. Under the guise of relying on the caseflow management process to which reference was made in that judgment, applicant wrote a very long letter to the office of the Judge President dated 28 October 2022 making representations. That letter was only delivered by hand to the registrar, it would appear, three days

later on 31 October 2022, if the registrar's date stamp is anything to go by. On a proper reading of the so-called representations for a preferential hearing date, applicant repeated almost all the submissions that had been made in the papers and in court when the matter was heard which were considered and rejected by the court. In making those submissions which are contained in a ten paged letter and some 36 paragraphs, applicant's attorneys also made the following telling conclusions:

"33. For the afore-mentioned reasons which are set out in more detail in <u>the applicant's papers and summarised in the certificate of urgency, the applicant contends that the circumstances of this matter do justify this matter being given a preferential date on the opposed roll this in order to prevent public funds being utilized on an unlawful tender. (my emphasis)</u>

34. We might also mention further that it is settled law that applications in terms of section 18 (3) of the Superior Courts Act are urgent in nature.

35. We, therefore request that this letter be urgently brought to the attention of the Honourable Judge President or his nominee, in order to consider our request that this matter be given a preferential date on the opposed roll preferably from 3rd week of November 2022 until 2nd week of December 2022."

[42] It is worth mentioning that there is no indication in the letter itself that the respondents' attorneys were copied to this letter or a copy thereof was served on them. There is no indication in the court file that they were heard before the decision was made to allocate the date of hearing of the 11 November 2022. Even if the respondents, through their attorneys, were given a hearing and indeed indicated that they and their counsel were available, that would not be the end of the matter. Urgent applications are struck off the roll routinely in our courts in any given week after being given due consideration and an appropriate hearing by a duty Judge. The question that must follow logically is whether through the judicial caseflow management process, such matters can be reconsidered in chambers and deemed to be deserving of a preferential hearing date despite being struck off the roll by a court for lack of urgency or some other non-compliance with the rules. That does not

seem to sit well with our rules in general and antithetical to what a judicial determination is all about as it is understood in our jurisprudence.

[43] Practitioners and indeed litigants themselves must understand that once a judicial determination is made one way or the other, there is no administrative process that can lead to what the respondents in this matter referred to as the reversal of the judgment striking the matter off the roll. Court determinations can only be reconsidered or reversed through an appropriate court process that is provided for in the relevant court rules. If such a process is no longer available, that is the end of the matter. Court judgments, orders or rulings are only subject to court procedures and processes. There is simply no avenue, outside of a court process, unless provided for in the legislative framework, that is available for their reconsideration. They may not be watered down even in circumstances where their effect may be perceived to be harsh, outside the judicial processes themselves.

[44] The term, "preferential hearing date", even when considered in the context of urgent unopposed or urgent opposed applications seems to be a misnomer. Rule 6(12) provides for urgent applications and it makes no reference to a "preferential" hearing date. The dates that are determined as suitable for hearing of urgent applications are not preferential dates. The term "preferential date" has a connotation of a weighing up of one matter against another and denotes preferential treatment of one matter over the others. That is not how dates of hearing urgent applications are determined. The dates on which they are heard are not preferential dates in my view. They are dates determined by duty Judges as appropriate hearing dates depending on the urgency and the exigencies of each particular matter which may even be at night in some cases. However, that is not a preference or a preferential date or time. In the circumstances, once a Judge has pronounced or found that a matter is not urgent, that matter can only be heard in due course, like any other non-urgent matter. It should not be given preferential treatment.

[45] Judicial caseflow management is not intended to change our rules of practice in this regard save as provided for in the rules themselves and any practice directives that may be applicable. Its main focus is, as I understand it, not to give preference to a specific matter but to enable all matters that are deemed ready for a hearing to

proceed on the hearing date, with all and any short comings having been identified early on and addressed. Once that is done, a matter is allocated a hearing date by the registrar depending on the readiness of each matter that lands on his desk on a first come first served basis. This is the only system that, in a way allows for matters contesting for an early spot in the court calendar to be allocated dates depending on their readiness and compliance with the rules and practice directives. Applicant having been unsuccessful in its application, there is no reason why costs should not follow the result.

[46] In the result the following order shall issue:

1. The application in terms of section 18 of the Superior Courts Act for the granting of an execution order is dismissed.

2. The applicant is ordered to pay costs including costs consequent upon the employment of two counsel, where so employed.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

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Instructed by	:GILINDODA ATTORNEYS GRAHAMSTOWN
Date heard	: 11 November 2022
Date delivered	: 17 January 2023