

Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO



IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Appeal Case No: CA+R26/2024

Court *a quo* Case No: 1452/2023

In the matter between:

ALEKKOR SOC LTD

Appellant

(First Respondent *a quo*)

And

VAST MINERAL SANDS (PTY) LTD

First Respondent

(Applicant *a quo*)

RICHTERSVELD MINING COMPANY
(PTY) LTD

Second Respondent

RICHTERSVELD SIDA IHUB
COMMUNAL PROPERTY ASSOCIATION

Third Respondent

Coram: Lever J, Nxumalo J et Stanton J:

JUDGMENT

Lever J:

1. This is an appeal that comes before us under the provisions of section 18(4)(ii) of the Superior Courts Act¹ (the Act). The history of this matter shows that Alexkor together with the second and third respondents listed above had entered what was referred to as the Pooling and Sharing Joint Venture (PSJV). The PSJV holds the right to mine diamonds on a sizable tract of land in the Richtersveld. Vast Mineral Sands (referred to as “Vast” in these proceedings) acquired a prospecting right for certain mineral sands on the same land mined for diamonds by the PSJV. The said prospecting licence was issued under the provisions of the Mineral and Petroleum Resources Development Act² (“the MPRDA”).
2. The said prospecting right was valid for an initial period of five years. It appears that despite being afforded an opportunity to do so, none of the respondents objected to the prospecting licence being issued. Initially Vast was allowed onto the relevant land to go about its prospecting as envisaged in the

¹ Act 10 of 2013.

² Act 28 of 2002.

relevant prospecting licence. This access was subsequently stopped by Alexkor. After a process envisaged by the MPRDA which did not resolve the issues between Alexkor and Vast, Vast applied for a final interdict on an urgent basis from the High Court Northern Cape Division to allow it access to the relevant land to for the purpose of prospecting in terms of the licence which it held. This application for the said interdict is described as the main application in these proceedings.

3. Only Alexkor opposed the main application. In fact, throughout this process the second and third respondents have not been active litigants in the sense that they have not supported Alexkor at any stage of these proceedings, even though they also hold an interest in the PSJV. The fourth respondent has also not entered the fray.

4. On the 15 September 2023 Mamosebo J granted a final interdict in the following terms:

- “1. The first respondent (including its employees, agents and contractors) is directed and ordered not to obstruct and/or interfere and/or prevent in any manner, directly or indirectly, the applicant from exercising its statutory right of entry to the Remainder, Portion 8 and Portion 9 of Farm 1 District Namaqualand as well as farm 155 District Namaqualand for prospecting purposes under or in terms of its Registered Prospecting Right NC 11923 PR.
2. The first, second and third respondents are directed and ordered to provide the applicant free and unrestricted access to the Remainder, Portion 8 and Portion 9 of Farm 1 District Namaqualand as well as farm 155 District Namaqualand for prospecting purposes under or in terms of its Registered Prospecting Right NC 11923 PR.

3. The first respondent, Alexkor SOC Ltd, is ordered to pay the costs of the application on a party and party scale, such costs to include the cost incumbent upon the employment of two counsel.”
5. Alexkor sought leave to appeal the judgment and order in the main application.

Vast, in response to the application for leave to appeal, brought an application under the provisions of section 18(3) of the Act to enforce the terms of the Order handed down by Mamosebo J on the 15 September 2023, notwithstanding the application for leave to appeal or any pending appeal.
6. The application for leave to appeal and the application to enforce the order in the main application were heard simultaneously. On the 24 April 2024 Mamosebo J handed down a composite judgment in the said applications and made an Order in the following terms:
 - “1. The application for leave to appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.
 2. It is declared that, in terms of section 18(3) of the Superior Courts Act, 10 of 2013, the order granted by this Court on 15 September 2023 be put into immediate operation and effect notwithstanding any appeal or appeals.
 3. That the costs of the section 18(3), which costs shall include the costs of two counsel where so employed, be paid by Alexkor SOC Ltd.”
7. Alexkor then sought leave to appeal from the Supreme Court of Appeal as contemplated in section 17(2)(b) of the Act, to appeal the judgment in the main application handed down on the 15 September 2023.

8. Alexkor also sought to utilise its automatic right of appeal contemplated in section 18(4)(ii) of the Act to appeal to the full bench of this court to have orders 2 and 3, quoted above and handed down on the 24 April 2024, set aside. This is the appeal presently before this court.
9. There are a few issues relating to process before proceeding to consider the applicable statutory provisions and the law associated therewith. Firstly, there was a notice contemplated by Rule 7 of the Uniform Rules of Court (“the Rule/s”) issued by Vast. Alexkor filed a Rule 30 alternatively Rule 30A notice to set aside the Rule 7 notice as an irregular step. The day before the hearing of this appeal, Vast filed a notice withdrawing the Rule 7 notice and tendered costs on the unopposed party and party scale. Mr Loxton SC who appeared for Alexkor motivated for costs on the opposed scale. Having considered the issues relating to the Rule 7 and its withdrawal, in my view it was such a minor matter and could not have detained the parties for any significant amount of time. It was also withdrawn prior to the hearing, albeit the day before. In the circumstances, I believe, ordinary party and party costs on the unopposed scale would be the appropriate costs order. Since these costs have already been tendered by the first respondent there is no need to make an order in that regard.
10. The second issue relating to process is that Vast filed a document titled ‘supplementary affidavit’ before the hearing of this appeal. The said affidavit

tried to introduce two documents into these proceedings. The first purporting to be authored by an Acting-Deputy Director: Water Use Authorisation from the Department of Water and Sanitation. The second document was an Order issued by two Justices of the SCA dismissing the application for leave to appeal in respect of the main application, brought under the provision of section 17(2)(b) of the Act. The said Order appears to have been issued on the 30 July 2024. In terms of the said Order, the application for leave to appeal was dismissed on the basis that there was no reasonable prospect of success and there was no other compelling reason why an appeal should be heard in the matter.

11. In response to this 'supplementary affidavit' and on behalf of Alexkor, Mr Loxton filed a note in the form of Heads of Argument. Mr Loxton in substance objected to the letter ostensibly authored by the Acting-Deputy Director: Water Use Authorisation on two grounds. Firstly, in the absence of a confirmatory affidavit from the author of the said letter, it constituted hearsay evidence. Secondly, from the contents of the letter itself, it appeared that it was written in response to an enquiry and that such enquiry was not included in the 'supplementary affidavit'. That the failure to include the enquiry itself placed Alexkor at an unfair disadvantage in dealing with such letter.

- 12.Mr Loxton conceded that the Order of the two SCA Justices was a public document and that Alexkor did not object to it being placed before the court but did not consent to the admission of the ‘supplementary affidavit’.
- 13.Mr Oosthuizen SC who appeared for Vast conceded that in the said circumstances such letter was hearsay and further conceded that the enquiry to which the said letter was a response ought to have been included in the ‘supplementary affidavit’. Mr Oosthuizen also accepted that the Order of the SCA dismissing the application for leave to appeal could, as a public document, simply be placed before this court.
- 14.Both Alexkor and Vast accepted that the said SCA Order was in fact before this court. In these circumstances the ‘supplementary affidavit’ is not admitted to the record.
- 15.In his note, Mr Loxton, informed this court that Alexkor had referred its application for leave to appeal to the President of the SCA to exercise their discretion to reconsider the dismissal of the application for leave to appeal under the provisions of section 17(2)(f) of the Act.
- 16.In his response, Mr Oosthuizen conceded that the section 17(2)(f) referral was made within the prescribed time and that such application did engage the discretion of the President of the SCA as contemplated in section 17(2)(f) to

reconsider the refusal of the application for leave to appeal the main application.

17. In the circumstances it is accepted that the SCA has refused the initial application for leave to appeal brought under section 17(2)(b) and that the matter has been referred for reconsideration by the President of the SCA as contemplated under section 17(2)(f) of the Act.

18. The centre – piece of the argument put forward by Mr Loxton on behalf of Alexkor has nothing to do with a direct application of the provisions of section 18 of the Act. In the circumstances, it is convenient to deal with this argument first. Mr Loxton submitted that Vast had a prospecting licence but that such prospecting licence was subject to its Environmental Authorisation (“EA”). That the EA Site Specific Conditions *inter alia* provided: “3. An Integrated Water Use Licence (IWUL) must be obtained from the Department of Water and Sanitation (DWS) prior (sic) commencement of activity”

19. Mr Loxton submitted that it was common cause that Vast did not have an IWUL. That possession of an IWUL was a necessary precondition to commencing any prospecting activity. Indeed, Vast does not claim to have an IWUL.

20. Mr Loxton submits that the EA Site Specific Condition contained in condition 3, quoted above, is clear and unambiguous despite the obvious grammatical deficiency as is evident from the quote above. Further, that this granting of the EA subject to the said condition constitutes an administrative act that stands until it is set aside. That for this court to allow prospecting activities to take place in these circumstances would be to countenance an illegal act. Mr Loxton referred to this argument as the ‘Oudekraal argument’ as it invoked the law set out in the case of Oudekraal.

21. Mr Oosthuizen argued on behalf of Vast that the said EA Site Specific Condition had to be interpreted in the context of the relevant water use legislation. That the relevant water use legislation only required an IWUL when one of the listed water use activities was required for such prospecting. That the prospecting activities of Vast did not and would not trigger a requirement for an IWUL. Therefore, Mr Oosthuizen submitted that an IWUL was not required for Vast to exercise its right to prospect under the relevant licence.

22. These arguments were before the Court *a quo* in the main application and subsequent application for leave to appeal. Accordingly, these questions were pertinently before the two Justices of the SCA when they dismissed Alexkor’s section 17(2)(b) application for leave to appeal on the basis that there was no

reasonable prospect of success in an appeal and that there is no other compelling reason why an appeal should be heard.

23. In the process that is before this court under section 18(1) as read with section 18(3) of the Act, as I understand it, it is not the role of this court to allow what would be an additional layer of appeal for a reconsideration of the merits in the main application and the application for leave to appeal. In short, and in other words it is not our role to reconsider the merits of the main application or the application for leave to appeal. The Act provides other avenues for that. Furthermore, Alexkor has now invoked the provisions of section 17(2)(f) and has requested the President of the SCA to use their discretion to refer the matter to the court for reconsideration. This argument put forward by Alexkor and the counterargument presented by Vast forms the basis upon which the President of the SCA must exercise such discretion.

24. In these circumstances it would be inappropriate for this court to pre-empt the President of the SCA from exercising such discretion. In my view this court should confine itself to the appeal brought before it under the provisions of section 18(4)(ii) of the Act. Accordingly, this appeal is confined to whether a proper case has been made out under the provisions of section 18(1) read with section 18(3) of the Act for an order to enforce the judgment of the court *a quo* in the main application.

25. In direct language Alexkor's 'Oudekraal' argument cannot be considered or sustained in the circumstances.

26. Turning now to the law relating to section 18 of the Act.

27. Rule 49(11) which previously regulated the enforcement of judgments during the appeal process has been repealed³. The common law relating to enforcement of a judgment despite a pending appeal has been replaced by section 18 of the Act. The differences between the process set out in section 18 and the common law will be highlighted in due course. Section 18 of the Act reads as follows:

- "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, is suspended pending the decision of the application or appeal.
- (2) ...
- (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
- (4) If a court orders otherwise, as contemplated in subsection (1)-
- (i) the court must immediately record its reasons for doing so;
 - (ii) the aggrieved party has an automatic right of appeal to the next highest court;
 - (iii) the court hearing such 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) ..."

³ Repealed on 22 May 2015.

28. The position under the common law has been authoritatively set out by Corbett JA (as he then was) in the matter of South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd⁴ (“the South Cape case”). The intention behind the common law rule was to prevent irreparable harm to the party seeking to exercise its right to appeal⁵.

29. It is apparent from the wording of section 18 of the Act that prevention of irreparable harm to the party seeking to exercise their right of appeal is still the primary consideration. However, when one examines the differences between the common law rule and the requirements of section 18(1) as read with section 18(3) of the Act, the current position under section 18 is more onerous on the party seeking to enforce the relevant order pending the completion of the appeal process than it was under the common law.⁶

30. The position under the common law before section 18 of the Act came to regulate the position when an order is put into effect whilst an appeal process was still pending gave the relevant High Court a broad general discretion as to whether to grant relief or not. This is no longer the case⁷.

⁴ 1977 (3) SA 534 (A) at 544H to 545H.

⁵ South Cape case., above., at 545B.

⁶ UFS v Afriforum 2018 (3) SA 428 (SCA) at paras [9] to [11].

⁷ Ntlemenza v Helen Suzman Foundation 2017 (5) SA 402 (SCA) at para [20].

31. Again, under the common law, where there was potential for irreparable harm to both parties should the order be put into effect before the appeal process was finalised, the court would weigh up the balance of hardship as one of the factors to be considered in making the decision relating to the enforcement of the order pending the finalisation of the appeal.⁸ This balance of hardship is no longer a consideration under the provisions of section 18 of the Act. This is evident from section 18 itself.

32. The prospects of success in the contemplated appeal process is not mentioned anywhere in the wording of section 18 of the Act. However, the SCA has determined that the prospects of success still plays a role⁹.

33. Turning now to the requirements to be established under the provisions of section 18 of the Act for an order that that execution of an order may be put into effect pending the finalisation of the appeal process.

34. It is evident from the provisions of section 18(1) that a person who seeks to put a judgment and order into effect before the finalisation of the appeal process must establish 'exceptional circumstances' to depart from the norm of an appeal process suspending the operation of such order pending the finalisation of the appeal. Reading section 18(1) together with section 18(3)

⁸ South Cape case., above at footnote 4., at p 545G.

⁹ UFS v Afriforum case., above footnote 6., at paras [14] and [15].

the onus of establishing such 'exceptional circumstances' would fall on the applicant.

35. In addition to establishing 'exceptional circumstances' the applicant must, under the provisions of section 18(3), establish on a balance of probabilities that it would suffer irreparable harm if the order being the subject of an appeal is not put into effect and that the opposing party (the appellant) will not suffer irreparable harm if such order is put into effect.

36. What is required by section 18 has been succinctly set out by Sutherland J (as he then was) in the case of *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another*, and I quote the relevant passages:

"[16] It seems to me that there is indeed a new dimension introduced to the test by the provisions of s 18. The test is twofold. The requirements are:

- First, whether or not 'exceptional circumstances' exist; and
- Second, proof on a balance of probabilities by the applicant of –
 - the presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order; and
 - the absence of irreparable harm to the respondent/loser, who seeks leave to appeal.

[17] What constitutes 'exceptional circumstances' has been addressed by Thring J in *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and Another* 2002 (6) SA 150 (C), where a summation of the meaning of the phrase is given as follows at 156I-157C:

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

1. What is ordinarily contemplated by the words "exceptional circumstances" is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; "besonder", "seldsaam", "uitsonderlik", or "in 'n hoë mate ongewoon".
2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.

3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.
 4. Depending upon the context in which it is used, the word “exceptional” has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.
 5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.’
- [18] Significantly, although it is accepted in that judgment that what is cognisable as ‘exceptional circumstances’ may be indefinable and difficult to articulate, the conclusion that such circumstances exist in a given case is not a product of a discretion, but a finding of fact.
- [19] The survey of authorities addressed by Thring J included a broad range of circumstances, and his summation or compendium appears to be of universal application. Nevertheless, it seems to me, to be necessary to express caution about importing from one kind of enquiry into another kind of enquiry an understanding of a familiar phrase. It is important to appreciate that Thring J was not addressing the phrase in s 18 of the Superior Courts Act but in the provisions of section 5(a)(iv) of the Admiralty Regulation Act 105 of 1983, which confers a power on a competent court to direct an examination of various things in order to procure evidence.
- [20] A given phrase in any statutory provision has a function specific to that provision and to that specific statute and that the primary aim of the interpreter is to discover the function it performs in that specific context. It may perform a different function in another statute and one must avoid being seduced by beguiling similarities.
- [21] The context relevant to section 18 of the Superior Courts Act is the set of considerations pertinent to a threshold test to deviate from a default position, ie the appeal stays the operation and execution of the order. The realm is that of procedural laws whose policy objectives are to prevent avoidable harm to litigants. The primary rationale for the default position is that finality must await the last court’s decision in case the last court decides differently – the reasonable prospect of such an outcome being an essential ingredient of the decision to grant leave in the first place. Where the pending happening is the application for leave itself, the potential outcome in that proceeding, although conceptually distinct from the position after leave is granted, ought for policy reasons to rest on the same footing.
- [22] 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 am not of the view that one can

be sure that any true novelty has been invented by s 18 by the use of the phrase.

...

[23] ...

[24] ... The proper meaning of that subsection is that if the loser, who seeks leave to appeal, will suffer irreparable harm, the order must remain stayed, even if the stay will cause the victor irreparable harm too. In addition, if the loser will not suffer irreparable harm, the victor must nonetheless show irreparable harm to itself. A hierarchy of entitlement has been created, absent from the *South Cape case* test. ...¹⁰ (the emphasis is mine)

37. The SCA in the matter of Tyte Security Services CC v Western Cape Provincial Government & Others¹¹ took a more nuanced and less formalistic approach to the application of section 18(1) as read with section 18(3) of the Act. In the Tyte case it was submitted before the SCA that each of the three requirements set out in section 18(1) and (3) were distinct, separate and self-standing. The response to this argument is important.

38. To some extent the approach taken by the SCA in Tyte's case is a counter point to the approach taken in Incubeta's case and some of the other authorities quoted above. In these circumstances it is necessary to quote substantively from the Tyte case to understand what is required in the application of section 18(1) and (3).

¹⁰ Incubeta Holdings v Ellis and Another 2014 (3) SA 189 (GJ) at p 194C to 196B.

¹¹ 2024 JDR 2306 (SCA).

39. The relevant passages responding to the argument that the three requirements that need to be established under the provisions of section 18(1) and (3) are distinct, separate and self-standing by the SCA in the Tyte case read as follows:

- “[10] Whilst there are indeed statements in those judgments that would appear to support counsel’s fundamental hypothesis, they seem to have been made in passing. They thus call for closer examination in this matter. An important point of departure, so it seems to me, is that consideration of each of the so-called three requirements is not a hermetically sealed enquiry and can hardly be approached in a compartmentalised fashion.
- [11] It is important to recognise that the existence of ‘exceptional circumstances is a necessary prerequisite for the exercise of the court’s discretion under s 18. If the circumstances are not truly exceptional then that is the end of the matter. The application must fail and falls to be dismissed. If, however, exceptional circumstances are found to be present, it would not follow, without more that the application must succeed. ...
- [12] ...
- [13] What constitutes irreparable harm is always dependant upon the factual situation in which the dispute arises, and upon the legal principles that govern the rights and obligations of the parties in the context of that dispute. It was accepted in *Knoop* that: ‘the need to establish exceptional circumstances is likely to be closely linked to the applicant establishing that they will suffer irreparable harm if the ... order is not implemented immediately.’ The same, I daresay, can be said of its counterpart, the absence of irreparable harm to the respondent. In that sense, the presence or absence of irreparable harm, as the case may be, can hardly be entirely divorced from the exceptional circumstances enquiry. It would perhaps be logically incoherent for a court to conclude, on the one hand, in favour of an applicant that exceptional circumstances subsist, but, on the other, against an applicant on either leg of the irreparable harm enquiry.
- [14] The argument, as I have it, is that as the language of s 18(3) is clear – it is for an applicant, in addition to exceptional circumstances, to prove on a balance of probabilities that it would suffer irreparable harm and conversely the other party would not. A court is thus required to undertake what would be in the nature of a tick-box exercise by enquiring into and satisfying itself as to the *first*, then the *second* and finally the *third*, in that order. Unless each box is successfully ticked, the applicant must fail. Here, so the argument proceeds, the high court failed to undertake such an exercise; had it done so, it could not permissibly have ticked the third box, consequently, the s 18 application should have failed. Even accepting that the legislature has employed the words ‘in addition [to exceptional circumstances] proves on a balance of probabilities’ in s 18(3), it would be passing strange that if an applicant comes short in respect of either the

second or third requirements it would nonetheless still be able to successfully meet the exceptional circumstances threshold. The use of the words ‘in addition proves’ in s 18(3) ought not to be construed as necessarily enjoining a court to undertake a further or additional enquiry. The overarching enquiry is whether or not exceptional circumstances subsist. To that end, the presence or absence of irreparable harm, as the case may be, may well be subsumed under the overarching exceptional circumstances enquiry. As long as a court is alive to the duty cast upon it by the legislature to enquire into, and satisfy itself in respect of exceptional circumstances, as also irreparable harm, it does not have to do so in a formulaic or hierarchical fashion.”¹² (references omitted and the emphasis is mine)

40. In Tyte’s case, as can be seen from the passages quoted above, the SCA recognises the fact that in most cases the irreparable harm would be subsumed into the ‘exceptional circumstances’. In those circumstances one would have to rely on the same facts and circumstances to establish both requirements.

41. I have dealt with Tyte’s case to the extent that it has a direct bearing on the present appeal before this court. Any litigant who seeks relief under the provisions of section 18(1) and (3) where the questions of any discretion a court might have in granting or refusing relief in terms of the said subsections or where the question of whether and in what circumstances the harm suffered by the relevant parties can be weighed against each other, would be well advised to study the judgment of the SCA in Tyte’s case. In fact, Tyte’s case shows that the SCA has departed from the position set out in paragraph [24]

¹² Tyte case., above at footnote 12., paras [10] to [14].

of the Incubeta judgment. The relevant passage of the Incubeta judgment has been quoted above.

42. Turning now to applying the law to the facts of this case. Vast in their section 18(3) application made out the case that their prospecting right was for a limited period. Initially for five years and a possible extension was in the offing at the time they deposed to their founding affidavit in the section 18(3) application. Only one extension is possible and such extension would only be for a period of three years. Subsequent to the deposing of the founding affidavit a three-year extension to the relevant prospecting right was granted. The extended prospecting right will come to an end in January 2026. All of this is common cause between Vast and Alexkor.

43. Vast was afforded access to the relevant land during this initial prospecting permit for a period of approximately ten months. Then Alexkor barred Vast from accessing the relevant land and to date Vast has not been able to exercise its right to prospect either in the initial period or the extended period of the prospecting right. This is also common cause.

44. Alexkor contends that due process was not followed by Vast in obtaining its prospecting right. This is disputed by Vast.

45. There was correspondence between Vast and Alexkor to try and resolve the issues between them. Vast implemented a process under the MPRDA to try and resolve the issues that Alexkor raised. This ultimately resulted in the application for a final interdict which is described as the main application herein.

46. In the section 18(3) application Vast contends that exceptional circumstances exist due to the fact that in the now eight year right that has been awarded to it ultimately, it has only been able to do approximately ten months prospecting work. This Vast submits is not sufficient to fulfil two important requirements. The first being the need to satisfy the relevant Department of State that administers the mineral resources that a mining right should ultimately be issued to Vast. Secondly, that sufficient data is required from the prospecting work to enable Vast to attract investors to raise the finance required to exploit the mineral sands resource.

47. In its answering affidavit Alexkor raises a variation of the 'Oudedekraal' argument and then satisfies itself with a blanket denial of the rest.

48. Vast submits that there are only some 15 months left in its extended prospecting right. This is already a very short time to accomplish the two goals referred to above. If this short period were to be eaten up by further appeal processes, they would suffer irreparable harm.

49. Vast further submits that that depending on the outcomes at the various stages of appeal open to Alexkor the remaining period of its prospecting right could conceivably be consumed. That if the President of the SCA exercises their discretion in favour of Alexkor in the section 17(2)(f) application and allows an appeal to the SCA it would eat up the remaining period of Vast's prospecting right. If the SCA refers the matter to the full bench of this Division a similar result would follow. Mr Oosthuizen on behalf of Vast pointed out that if the section 17(2)(f) application fails that Alexkor might attempt to petition the Constitutional Court.

50. Vast also contends that its prospecting right cannot be further renewed. This fact cannot be disputed by Alexkor.

51. Vast contends that if the order is put into effect that Alexkor will not suffer any irreparable harm.

52. Alexkor contends that it will suffer irreparable harm if the order in the main application is put into effect in that there is no agreement between it and Vast on the statutory health and safety requirements. Alexkor contends that in those circumstances if a fatal or serious accident occurs it will suffer irreparable harm and that its mining right could potentially be put at risk in those circumstances.

53. Vast responds to the alleged potential irreparable harm to Alexkor by pointing out that during the ten months it did indeed prospect on the relevant property it followed Alexkor's health and safety protocol with no incidents. This was not denied by Alexkor. Vast also points out that in various correspondence it tried to negotiate an agreed health and safety protocol. All efforts to do so were either ignored or rebuffed by Alexkor. Vast has tendered to abide by Alexkor's existing health and safety protocol. Vast has also tendered to comply with Alexkor's security requirements and respect the PSJV's mineral rights.

54. In oral argument Mr Loxton submitted that there is nothing out of the ordinary in a prospecting right being of limited duration and submitted that this could not form part of the 'exceptional circumstances'. In the context of what is set out above, in my view this is nothing more than a facile argument and it is not deserving of any further consideration.

55. Mr Loxton adopted the formalistic approach of first proving 'exceptional circumstances', then considering the alleged irreparable harm to Vast and then the potential irreparable harm to Alexkor as if they were in hermetically sealed silos and not related to each other. Mr Loxton further submitted that additional facts or circumstances would require to be alleged and proved to establish irreparable harm to Vast. That Vast could not rely on the same facts as used to establish exceptional circumstances. As can be seen from the passages quoted

from the SCA judgment in the Tyte case, this approach has well and truly been put to bed.

56. Mr Loxton also submitted that Vast had not supplied details of its work program to show that it would indeed suffer irreparable harm. In my view and given the circumstances Vast has supplied sufficient detail to establish its irreparable harm.

57. In my view the irreparable harm is self-evident from the facts and circumstances set out by Vast.

58. The argument put forward by Alexkor in relation to its irreparable harm is contrived given the fact that Vast prospected on the property for some ten months adhering to Alexkor's health and safety protocol without incident and that it has again tendered to do so.

59. Accordingly, the appeal brought by Alexkor under the provisions of section 18(4)(ii) stands to be dismissed.

60. The remaining issue is the issue of costs. No reason has been placed before this court as to why costs should not follow the result. The next question is on what scale should the costs be awarded. The matter is clearly important to both parties. Both parties engaged both senior and junior counsel which was

appropriate in all of the circumstances. In my view the appropriate scale that fees should be awarded is on scale "C".

Accordingly, the following order is made:

1. The appeal is dismissed.
2. The appellant, Alexkor, is to pay the party and party costs involved on scale "C". Such costs to include the costs of employing two counsel where two counsel were actually engaged.


LG Lever
Judge-Northern Cape Division,
Kimberley

I agree,


APS Nxumalo
Judge-Northern Cape Division,
Kimberley

I agree,


A Stanton
Judge-Northern Cape Division,
Kimberley

Representation:

For the Appellants: *Adv CDA Loxton (SC) & Adv TV Mabuda
Instructed by:* *Engelsman Magabane Inc.*

For the Respondents: *Adv MM Oosthuizen (SC) & Adv Erasmus
Instructed by:* *Van De Wall Inc.*

Date of Hearing: *29 August 2024*

Date of Judgment: *10 September 2024*