

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



Case number: 2024/080004

Date of hearing: 17 January 2025

Date delivered: 3 February 2025

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED
3/2/25
DATE SIGNATURE

In the application of:

HOSHOZA RESOURCES VRYHEID (PTY) LTD

Applicant

and

JULOVISTA (PTY) LTD

TRIPALEX (PTY) LTD

VERREYNNE S

DE BRUYN M

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

JUDGMENT

SWANEPOEL J:

[1] On 16 August 2024 I granted an order against the first respondent, interdicting it from conducting any form of mining in terms of the mining right issued to the applicant under DMRE reference number KZN 10081 (233) MR, also known as the “Kariboo” mining right.

[2] The first respondent sought leave to appeal against my order, which application I dismissed on 2 October 2024. On 1 November 2024 the first respondent launched an application for leave to appeal to the Supreme Court of Appeal, which application is still pending. The result is that in terms of section 18 (1) of the Superior Courts Act, 10 of 2013 (“the Act”) the execution of the order is stayed, either until the application for leave to appeal is dismissed, or, if leave is granted, then, until the appeal is finally determined.

[3] The applicant now seeks an order in terms of section 18 (3) of the Act, to set the order into operation notwithstanding that the appeal is still pending. The first respondent opposes the application. The second, third and fourth respondents are not protagonists in this application and no relief is sought against them.

[4] The first issue to decide is whether a video that the applicant relies upon, and which allegedly depicts the first respondent undertaking unlawful mining activities is admissible in evidence. The first respondent objects to the video on the basis that it constitutes inadmissible hearsay. The applicant also relies upon photographs which it attached to its

replying affidavit, to which the first respondent objects on the basis that the applicant should have made its case in its founding affidavit.

[5] The video was apparently recorded by an unknown person who demanded payment for the video. It was received by one Trichardt Du Plessis who forwarded it to the deponent to the founding affidavit. There is no suggestion that the video that is put up is the original. The applicant does not say who recorded the video. There is no evidence when it was recorded. Accordingly, the authenticity of the video cannot be established, and I find that it is inadmissible.

[6] The photographs only found their way into the pleadings in the replying affidavit. It is trite that an applicant has to make its case in its founding papers. There is no explanation why the photographs were not attached to the founding affidavit. The first respondent has not had an opportunity to deal with the photographs in its answer. For that reason I disregard the photographs.

[7] Section 18 (1) and (3) provide as follows:

“(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)

(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.”

[8] I have dealt extensively with the facts of the matter in my judgment in the main application. However, for purposes of this application, the material facts are briefly the following:

[8.1] On 23 August 2022 the parties entered into a written agreement in terms of which the first respondent obtained the right to mine the Kariboo Colliery under the mining right held by the applicant. Clause 2 of the agreement provided that the contract would terminate on 30 June 2024, unless an extended period was agreed to in writing.

[8.2] The applicant reminded the first respondent in writing on more than one occasion that its right to mine would terminate on 30 June 2024, a fact which the first respondent seemingly accepted. Belatedly, the first applicant alleged that the agreement did not reflect the true intention of the parties, and that clause 2 should be rectified to provide for a termination date of 2033, the year in which the mining right expires.

[8.3] The first respondent alleges that it was never the intention of the parties to enter into a short-term agreement, and that it did

not make economic sense to fund the operation simply to have it terminate a brief two years later. It does not seem, however, that the first respondent has taken any further steps to pursue the rectification argument in court.

[8.4] I held that there was no true dispute of fact raised in the answering affidavit. The first respondent provided no explanation for its seeming acceptance of the termination date as being 30 June 2024, not an iota of evidence to suggest that the parties intended a different termination date, nor how the alleged error in the agreement came about. For that reason, I held that there was no real factual dispute, and that the applicant had shown a clear right to the relief sought in the interdict application.

[9] In common-law, the rule of practice was that an order could not be carried out once an appeal had been noted, unless the court that had granted the order ordered otherwise.¹ In *South Cape* the Court explained that the reason for the rule was to prevent irreparable harm to the appellant by the execution of the order. Furthermore, the Court emphasized that it had a wide discretion to grant or refuse such an order, and to determine the conditions under which an order would be executed, if such an order were to be made.

[10] Rule 49 (11) of the Uniform Rules of Court (now repealed) restated the common law. However, section 18 of the Act introduces a new test,

¹ *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (2) SA 118 (T) at 544 H to 545 A

and places a more onerous burden on an applicant seeking to execute in the face of an appeal. As the Supreme Court of Appeal pointed out in *University of the Free State v Afriforum*²:

“[9] What is immediately discernible upon perusing s 18 (1) and (3) is that the legislature has proceeded from the well-established premise of the common law that the granting of relief of this nature constitutes an extraordinary deviation from the norm that, pending an appeal, a judgment and its attending orders are suspended. Section 18 (1) thus states that an order implementing a judgment pending appeal shall only be granted ‘under exceptional circumstances’. The exceptionality of an order to this effect is underscored by s 18 (4), which provides that a court granting the order must immediately record its reasons; that the aggrieved party has an automatic right of appeal; that the appeal must be dealt with as a matter of extreme urgency; and that pending the outcome of the appeal, the order is automatically suspended.

[10] 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 made, and that the other party ‘will not’ suffer irreparable harm if the order is made. The application of rule 49 (11) required a weighing up of the potentiality of irreparable harm or prejudice being sustained by the respective parties and, where there was a potentiality of harm or prejudice to both of the

² *University of the Free State v Afriforum* 2018 (3) SA 428 (SCA) at paras [9] and [10]

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."

[11] In *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another*³ Sutherland J (as he then was) reiterated that subsections 18 (4) and (5) had no precedent in our law, and that they underscored the exceptionality required for the granting of relief under section 18 (3). In *Ntlemeza v Helen Suzman Foundation and Another*⁴ the Supreme Court of Appeal remarked that the legislature had set a high bar for an applicant seeking to execute pending an appeal.

[12] For obvious reasons, the courts have repeatedly emphasized that the granting of an order in terms of section 18 (3) is contrary to the default position, and is only granted in exceptional circumstances. How then is one to consider the synergy between the requirement of exceptional circumstances, and the consideration of irreparable harm?

[13] In *Incubeta (supra)* the Court held that:

"a hierarchy of entitlement has been created, absent from the South Cape (Corporation) test. Two distinct findings of fact must now be made, rather than a weighing up to discern a preponderance of equities."

³ *Incubeta Holdings (Pty) Ltd v Ellis and Another* 2014 (3) SA 189 (GJ)
⁴ *Ntlemeza v Helen Suzman Foundation* 2017 (5) SA 402 (SCA)

[14] In *Tyte Security Services CC v Western Cape Provincial Government and Others*⁵ the submission was made that three separate, distinct and self-standing requirements existed, namely, firstly, whether exceptional circumstances were present, secondly, whether the applicant would suffer irreparable harm if the order were not granted, and, thirdly, whether there would be no irreparable harm to the respondent if the order were to be granted. The Court, however, held that these were all different sides to the same question, and that is whether exceptional circumstances existed. The Court said:

"[10]An important point of departure, so it seems to me, is that consideration of the so-called three requirements is not a hermetically sealed enquiry and can hardly be approached in a compartmentalized fashion.

[11] It is important to recognize 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, 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.

[13] What constitutes irreparable harm is always dependent 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

⁵ *Tyte Security Services v Western Cape Provincial Government* 2024 (6) SA 175 (SCA)

context of that dispute. It was accepted in *Knoop* that '(t)he 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 dare say, 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. . .'

[14] . . . 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 legislator 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.

[15] Although it has been postulated that the second and third are distinct enquiries, they are perhaps more accurately to be understood as being two sides of the same coin."

[15] What would constitute exceptional circumstances? That question was considered in *Seatrans Maritime v Owners, MV Ais Mamas and Another*⁶ (albeit in different circumstances). The Court said that although it is undesirable to lay down rules as to what would constitute 'exceptional

⁶ *Seatrans Maritime v Owners, MV Ais Mamas* 2002 (6) SA 150 (C)

circumstances, and each case would necessarily depend on its own facts, certain guidelines could be useful:

[15.1] 'Exceptional circumstances' are something out of the ordinary and unusual;

[15.2] The circumstances must arise out of or be incidental to the case;

[15.3] The existence of exceptional circumstances or not is a factual matter, and does not involve the exercise of a judicial discretion;

[15.4] Where, in a statute, it is directed that a rule should only be departed with under exceptional circumstances, effect must be given to the intention of the legislature and a strict meaning must be given to the phrase.

[16] The existence of exceptional circumstances, it seems to me, is not strictly a factual enquiry (as is suggested in *MV Ais Mamas* and *Incubeta*), but rather, a court is required to evaluate the facts of the matter including the existence or absence of irreparable harm holistically, and then decide whether, considering the entire picture, exceptional circumstances exist to deviate from the norm, (that an appeal suspends execution).

[17] I now turn to the facts of this matter. The applicant contended that the exceptional circumstances lie in the fact that the first respondent is

continuing to occupy the Colliery, and is continuing to mine whereas its entitlement to do so lapsed on 30 June 2024. In support of its submission, the applicant has referred me to *Omaruru Minerals (Pty) Ltd v Mankele Community Trust and Others*⁷. In that case the applicant sought the restoration of its possession of immovable property from which it had been unlawfully spoliated. The Court granted an order for the restoration of the applicant's possession of the property, at which point the respondent sought leave to appeal, which application suspended the working of the order. The applicant sought the execution of the order. In granting the section 18 (3) order the court said that it had previously found that the applicant had been unlawfully dispossessed, and wanted to continue occupying the land unlawfully. The court said⁸:

"Countenancing the persistence of that state of affairs will encourage disdain of the rule of law, which is so respected and cherished by this country. A finding that this is not exceptional will be aberrant."

[18] Likewise, the applicant says, the first respondent in this case is unlawfully mining the colliery and its continued presence there is unlawful. In my view, it is in the manner in which the respondent obtained possession of the land that the difference lies between these cases. In *Omaruru* possession was obtained unlawfully, which is anathema to our law. Generally, courts will restore possession where there has been a

⁷ (954/2024) ZAMPMBHC 30 (dated 22 April 2024)

⁸ At para [7]

spoliation, even if the right of the person who is dispossessed is in question. Spoliation is not tolerated.

[19] In this case the first respondent is in possession of the land by virtue of an agreement between the parties, albeit that the date of termination of the agreement is in dispute. The first respondent's possession does not carry the same taint as that of the possessor in *Omaruru*. In my view, the mere unlawful possession of the land is not in and of itself exceptional.

[20] What other circumstances are there that may be exceptional? In my view there are none. That is the end of the matter. However, if one were to consider whether the applicant will suffer irreparable harm, it seems to me that the applicant has also not crossed that hurdle. I found in the main application that the first respondent's continued occupation of the colliery would result in irreparable harm to the applicant, in the sense that the ore body would be continuously depleted. That finding was made in circumstances where the alternative to granting the order was that the first respondent would continue to mine whilst a trial played itself out in court, possibly over a matter of years.

[21] The circumstances are now that this relief is sought pending an appeal. The appeal will likely be determined expeditiously. If leave is granted, the appeal itself will likely be heard during this year, and the matter would be finally determined one way or another. If leave is denied, that should happen soon, and would finally resolve the main application.

In the meantime, the evidence is that the first respondent is accounting to the applicant monthly on the tonnages of coal being removed from the mine, and it has tendered payment in terms of the agreement. If the applicant were to suffer damages by virtue of the first respondent's continued mining, it will be able to quantify such damages fairly easily. I do not believe that irreparable harm would ensue to the applicant if the order were not to be executed.

[22] The first respondent has submitted that it would suffer irreparable harm should the order be put into operation. The first respondent would be forced to halt the entire mining operation, and would have to dismiss its employees. It says that the operation involves an enormous financial commitment that would be jeopardized should the operation be halted. It says that the resulting loss would be incapable of calculation and would be unrecoverable. There would, first respondent says, also be severe consequences to the surrounding community, many of the residents being employed by the first respondent. An immediate shut-down would result in environmental fall-out and would pose health risks to the community.

[23] In reply, the applicant simply pleads that the allegations of irreparable harm are vague, and that it is unable to answer thereto. It does not deny that the community would suffer severe consequences, but says that the consequences to the community are irrelevant to the enquiry. The applicant also says that a shut-down is the natural consequence of my

order. The applicant attempted to minimize the rehabilitation fall-out resulting from an immediate shut-down.

[24] In my view, it is most likely that a shut-down at this stage would result in severe losses to the first respondent. If the appeal were then to be successful, the first respondent will likely have suffered irreparable harm. The contention that I must disregard the effect of a shut-down on the community is ill-founded. *Tyte* made it clear that the circumstances must be considered holistically, and it would be unthinkable for a Court to ignore the obvious effects of a shut-down on the community, in circumstances where the shut-down may be temporary if the appeal were to be successful. The first respondent's financial losses that it incurs in the interim may result in the shut-down being irreversible, and the community will invariably be adversely affected by a shut-down.

[25] I am therefore of the view that there are no exceptional circumstances in the matter, justifying a section 18 (3) order. I also find that, given the fact that the appeal is likely to be resolved relatively soon, there is no irreparable harm to the applicant. However, if the order were to be executed pending the appeal, there will likely be irreparable harm to the first respondent. It follows then that the application must be dismissed with costs.

[26] I make the following order:

[26.1] The application is dismissed with costs on Scale C.


SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

Counsel for the applicant:	Adv. P. Lourens
Instructed by:	Krone & Associates
Counsel for the respondent:	Adv. F. van der Merwe
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