



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: YES ☒ NO	
(2) OF INTEREST TO OTHER JUDGES: YES ☒ NO	
(3) REVISED <i>Yes</i>	
<i>27/3/2025</i>	
DATE	SIGNATURE

CASE NO: 039123/24

In the matter of:-

**THE MEMBER OF THE EXECUTIVE COUNCIL FOR
THE DEPARTMENT OF COMMUNITY SAFETY AND
TRANSPORT MANAGEMENT OF THE NORTH-WEST
PROVINCIAL GOVERNMENT**

Applicant

VS

THOMAS HENDRICK SAMONS N.O.

First Respondent

THOMAS HENDRICK SAMONS	Second Respondent
NORTH-WEST TRANSPORT INVESTMENT (SOC) LTD	Third Respondent
NORTH-WEST STAR (SOC) LTD	Fourth Respondent
ATTERIDGEVILLE BUS SERVICE (SOC) LTD	Fifth Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Sixth Respondent
THE AFFECTED PERSONS OF THE THIRD, FOURTH AND FIFTH RESPONDENTS AS DETAILED IN ANNEXURE "E"	Seventh Respondent

Heard on: 12 February 2025

Delivered: 27 March 2025 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *Caselines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 27 March 2025.

Summary:

1. This is an application for leave to appeal instituted in terms of Section 17(1)(a)(i) and a Section 18(3) application instituted in terms of the Superior Courts Act.
2. The test for reasonable prospects of success in an application for leave to appeal, postulates a dispassionate decision based on the facts and the law and that another court could reasonably arrive at a different conclusion. There must be a rational basis for the conclusion that there are prospects of success on appeal. *Mec for*

conclusion that there are prospects of success on appeal. ***Mec for Health, Eastern Cape v Mkhita*** and ***Ramakatsa and Others v African National Congress and Another*** (SCA decisions).

3. The grounds of appeal raised have no merit. The errors of fact and errors of law were raised in a piecemeal manner and without context to the reasons and findings in the judgment.
4. Section 18(3) application warrants a separate determination. However the prospects of success in the appeal is a factor that can be considered.
5. The decision of ***Knoop v Gupta*** (execution) set out the principles in determining exceptional circumstances. Notably the need to establish exceptional circumstances is clearly linked to the fact that irreparable harm would be suffered if the implementation of the removal of the BRP is not granted immediately.
6. The irreparable harm pleaded by the BRP was not as a consequence of the Section 18(3) application. The harm he would suffer had already ensued.
7. The application for leave to appeal was refused and the Section 18(3) application was granted.

ORDER

It is ordered:-

1. The application for leave to appeal is refused with cost of two counsel of scale C.
2. The orders of the court dated 21 November 2024 becomes immediately operational and may be executed pending any further appeal steps taken by the respondents in the S18(3) application.
3. The first to fifth respondents are ordered to pay the costs of two counsel on scale C.

JUDGMENT

KOOVERJIE J

APPLICATION FOR LEAVE TO APPEAL

- [1] The applicants seek to appeal the judgment and orders handed down by this court on 21 November 2024.
- [2] The applicants in this application are the first to the fifth respondents in the application for the removal of the BRP. The respondent, in this application, is the Member of the Executive Council for the Department of Community Safety and Transport Management of the North West Provincial Government ("the MEC"). For the purposes of this judgment, the parties will be referred to as they were in

the main application. The business rescue practitioner will be referred to as the “BRP”, the applicant as “COSATMA”, and the third to the fifth respondents as the “NTI Companies”.

[3] The application for leave to appeal is against the following, namely:

- 3.1 the order removing the business rescue practitioner of the third, fourth and fifth respondents in terms of Section 139(2) of the Companies Act (“the Act”);
- 3.2 the order directing the BRP to pay the costs of this application in his personal capacity;
- 3.3 the order dismissing the counter-application with costs.

[4] COSATMA opposed this application for leave to appeal in respect of all of the grounds raised by the BRP. Upon the institution of the application for the leave to appeal, COSATMA filed its application in terms of Section 18(1) of the Superior Courts Act, seeking to enforce the court orders. The Treasury Department of the North West Provincial Government (“Treasury”) also opposed the application for leave to appeal on the ground that there were no reasonable prospects of success on appeal.

[5] Section 17(1)(a)(i) of the Superior Courts Act stipulates:

“Section 17(1)

Leave to appeal may only be given where the judge or judges concerned are of the opinion that:

(a) the appeal would have reasonable prospects of success.”

[6] The test as to what constitutes “reasonable prospects of success” has been settled by the Supreme Court of Appeal in various judgments. It has been established that:

6.1 the test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law and the court of appeal could reasonably arrive at a conclusion different to that of the trial court;

6.2 the prospects of success must not be remote. The applicant must have a realistic chance of succeeding. A mere possibility of success or that a case is arguable on appeal is not sufficient. There must be a rational basis for the conclusion that there are prospects of appeal;¹

6.3 the use of the word “would” means that the standard of granting an appeal has been raised. This means that the appellant has to convince the court that there are grounds upon which they have prospects of success on appeal.²

[7] The BRP contended that it has reasonable prospects of success in the appeal. A rational basis exists that the court of appeal would come to a different conclusion. It was argued that the court of appeal would take into consideration all the facts, consider the BRP’s version on the papers, would make the correct factual findings

¹ S v Smith 2012 (1) SACR 567 (SCA), MEC for Health, Eastern Cape v Mkhita 2016 JDR 2214 (SCA) at paragraph 16-18

² Ramakatsa and Others v African National Congress and Another (724/2019) [2021] ZASCA 31 (31 March 2021) paragraph 21

and appreciate that the dispute presented on the part of the BRP could not be resolved on the papers.

THE BASIS OF THE APPEAL

[8] Before addressing the respective grounds on appeal, I find it apt to summarize the essence of the BRP's contentions that were raised in their grounds of appeal, namely:

- 8.1 the court erred in not taking into account the BRP's version as set out in the answering affidavit. Particularly it was not clear from the judgment whether the court considered the version of the BRP;
- 8.2 the court relied heavily on COSATMA's version;
- 8.3 the court also erred in law, by misconstruing the relevant provisions of the Companies Act and the application thereof;
- 8.4 the court incorrectly applied the test in *Knoop*³. The drawing of inferences from facts were not based on proven facts. The court could only have derived its conclusions on proven primary facts, if it had exercised its discretion correctly. The removal of the BRP could not be ordered as the factual basis is questionable in this instance.

GROUND OF APPEAL

³ Knoop N.O. v Gupta (Execution) 2021 (3) SA 135 (SCA) at paragraph 17 to 19

- [9] I have comprehensively set out my reasons and my findings in the judgment, hence it would serve no purpose to repeat same, save to express that the judgment must be read in context and not in a piecemeal manner. The BRP seeks to challenge my reasons and not the orders granted. I will proceed to succinctly respond to the respective grounds of appeal and indicate whether they have merit.

First ground of appeal raised in respect of paragraph 8

- [10] The BRP alleges that I erred in finding that SATAWU is the representative trade union. Paragraph 8 must be read in context. All that was stated was that SATAWU filed their affidavit in the application for the removal of the BRP. The failure to mention that SAWU also filed their affidavit could by no means infer that the court did not take SAWU's version into account. Moreso this does not affect the order granted.

Second ground of appeal raised in respect of paragraph 33

- [11] Again paragraph 33 must be read in context. I stated that the outcome of the counter application does not influence the application for the removal of the BRP. This aspect was conceded by counsel representing the BRP in the counter application. I appreciated that even though particular issues such as the funding dispute overlapped, I was able to make a determination in terms of Section 139(2) of the Act. Hence the two issues namely the removal of the BRP and the issues

in respect of the plan could be determined independently. This ground of appeal has no merit.

Third ground of appeal raised in respect of paragraph 44

- [12] I had not erred in finding that the BRP was well-aware that the necessary statutory requirements had to be complied with. The agreement expressly recorded same. Even if an incorrect factual finding was made, namely that the agreement was implemented, it would not affect the order granted for the BRP's removal. This ground of appeal is therefore untenable.

Fourth ground of appeal raised in respect of paragraphs 47 to 50

- [13] The BRP contended that the material facts were not taken into consideration and further that I was misdirected in finding that the BRP accepted Tansnat's claim without verification. The facts set out in paragraphs 47 and 48 are premised on common cause facts. In paragraph 48, I correctly expressed that the BRP advised that the overstatement of R18 million as per Clemetson report was relied upon. This was indeed the case and the BRP's version was accepted on his version.
- [14] My finding was that although the BRP could have initially relied on Mr Kenoshi regarding the verification of Tansnat's claims, he was required to conduct an independent verification particularly due to the uncooperative relationship he had with Mr Kenoshi. Hence I found in paragraph 50:

"I find that the BRP had compromised his independence by relying on officials who, on his version, were instrumental in railroading the business rescue proceedings. Mr Samons was required to remain independent throughout the proceedings. It was evident that Mr Samons only procured the Clemetson Report in an attempt to verify Tansnat's claim after the Nel Report surfaced."

This ground of appeal can therefore not be sustained.

Fifth ground of appeal in respect of paragraphs 51, 52 and 53

[15] The BRP clearly misconstrued the contents of paragraph 53. The "amendment" referred to in paragraph 53 pertained to the dispute which formed the subject matter of the counter application, namely whether the recordal of the funding of R615 million in the draft business plan was agreed upon or not. COSATMA was not satisfied that same was recorded in the draft business plan.

[16] It is common cause that when the draft plan "THS3" was considered by the legal team of the MEC, the recordal of an amount of R615 million funding in the draft, was disputed. On this issue, I was not referring to the draft plan of July 2023. Hence my finding in paragraph 53:

"On the reading of the papers it is evident that the contents of the adopted third plan has been placed in dispute. In particular, the absence of the conditions COSATMA insisted upon and the funding amount. The BRP should have appreciated that, in law, he was not permitted to amend the plan without the input of the affected parties, in this instance, COSATMA."

Sixth ground of appeal raised in respect of paragraph 54

- [17] This is not a valid ground of appeal. No finding was made. I merely set out the applicant's version regarding the extensions sought by the BRP in not being able to furnish the business rescue plan. Consequently it does not affect the order for the BRP's removal.

Seventh ground of appeal raised in respect of paragraph 55

- [18] There is no merit in this ground of appeal. My finding was correct in that I made reference to negotiations regarding the nature of the funding as well as the extent of the funding. It was common cause that the parties were involved in the negotiations regarding the funding dispute as well as the status of COSATMA on its right to vote. In paragraph 132 of this judgment, the chronology sets out the manner in which the parties continued negotiations until September 2023. Moreover the BRP, in this application for leave to appeal, concedes this point.⁴

Eighth ground of appeal raised in respect of paragraphs 56 and 57

- [19] There is no merit in respect of this ground. The contents of the said paragraphs were not in dispute. The GPDRT had insisted that a plan be adopted at the

⁴ Paragraph 11 of the BRP's heads of argument

earliest. It had in fact expressed that it was uncomfortable in conducting negotiations without a plan in place. I referred to the relevant correspondence (**Annexure 'FA28'** of the founding affidavit). I had taken the version of the BRP into consideration as set out in paragraph 55. However it was common cause that the first plan was circulated nine months after his appointment. Hence I had not erred in my finding that he failed to appreciate the importance of an approved plan and that without an expedited plan the business rescue proceedings could not be successful. He sought the subsequent extensions thereafter. The negotiations with COSATMA were only initiated after the first draft business plan was circulated in July 2023.

Ninth ground of appeal raised in respect of paragraph 58

- [20] This ground of appeal is unsustainable. It was common cause that the financial statements for the respective financial years were not prepared nor were they made available to COSATMA and to Provincial Treasury. Even though the financial statements predated the BRP's appointment, he proffered no tenable explanation as to the delay in compiling the financials (hence my findings are set out in paragraphs 61 to 68). It is also not in dispute that the BRP had only informed the Auditor-General 18 months after his appointment of the challenges he faced in preparing the predated financial statements. In paragraph 59, I addressed the BRP's challenges. Once again considering his version on the papers.

Tenth ground of appeal raised in respect of paragraphs 60 and 61

[21] Upon having regard to both parties' versions on the papers, it became clear that the MEC was not privy to the challenges the BRP faced prior to the litigation. The BRP's contention that COSATMA was only informed of his challenges upon receipt of his answering affidavit, is untenable. Simply put, the MEC only learnt of the BRP's issues at litigation stage.

[22] The BRP failed to appreciate that he was statutorily obliged to compile the financial records expeditiously. The BRP had various statutory remedies at his disposal. He could apply to court to compel the officials to perform their functions. This ground of appeal is therefore unsustainable.

Eleventh ground of appeal raised in respect of paragraphs 62 to 68

[23] The BRP once again misconstrued my reasons in the said paragraphs. I had outlined the proven facts, namely that: misrepresentations were made to the creditors, he delayed approaching the Auditor-General (and did so 18 months after his appointment); the MEC was only informed on 7 March 2024 of the forensic audit that was to be conducted by SAIRA and the financial records for the predated as well as the current financials were neither prepared nor furnished to COSATMA.

[24] I concluded at paragraph 68:

"[68] The BRP was obliged, in terms of the PFMA, to have kept the MEC abreast with the financial situation of the entities. In terms of Section 19 of the PFMA, the MEC is required to prepare consolidated financial statements in respect of the public entities who are in the care and control of the provincial executive. Section 19(5) of the PFMA requires of the MEC to furnish an explanation to the provincial legislature as to why the financials were not timeously submitted. These shortcomings of Mr Samons not only illustrated his incompetence but his failure to act with a level of skill and care expected of him in his position as a BRP. He undoubtedly compromised the financial reporting obligations of not only the MEC, but Provincial Government as well as Provincial Treasury."

Twelfth ground of appeal raised in respect of paragraphs 69, 70, 73, 77, 81, 82, 83 and 84

- [25] The BRP challenged my finding that the employees' salaries were not prioritized. The proven fact remains that - the employees had not received their salaries on a monthly basis during the term of the business rescue proceedings. In fact this was common cause. The BRP does not dispute any of the findings of fact.
- [26] I had considered the version of the BRP, namely in paragraphs 71, 72 and 77. At paragraph 73, I discredited the BRP's reasoning that- it was permissible to skip salary payments as such claims would be classified as post-commencement finance claims in terms of Section 135(1)(a) of the Act, under the circumstances of the matter.

- [27] I made no finding that non-payment of salaries constituted a contravention of the Act. My finding was that the BRP ought to have prioritized the payment of salaries over the payments made to Tansnat. He was statutorily obliged to do so. Accordingly there is no merit in this ground of appeal.

Thirteenth ground of appeal raised in respect of paragraph 80

- [28] The BRP argued that the NTI Companies' employees had received their salaries for more than three months of 2023. The alleged factual errors in respect of the number of employees as well as the months where the salaries were not paid, would not affect the outcome of the order granted.
- [29] The proven fact remains- that employees' salaries were not paid on a monthly basis for extensive periods of time.⁵ During those same periods, Tansnat's claims were paid regularly. This ground of appeal should be rejected.

Fourteenth ground of appeal raised in respect of paragraph 103

- [30] The contention raised was that the BRP had not persisted in the unlawful sale of the assets. Again this ground has no merit. I found that the BRP failed to appreciate his reporting obligations in respect of state owned enterprises. I

⁵ On the BRP's own version, in the answer to the Section 18(3) application, he submitted that in 2024 employees were not paid their salaries for 5 months (paragraph 79)

emphasized that state owned enterprises must have efficient and transparent systems in place. No finding was made that the sale of assets was a ground of removal. I raised a concern with the BRP's explanation- *"that there would be no harm as the sale of assets would augment cash flow issues and further find operational expenses necessary to implement the GPDRT contracts"*. In this regard his competence was put into question. Paragraph 103 must be considered in context with the preceding paragraphs (85-102) where my reasons support the finding that the BRP failed to comply with the PFMA and the Treasury Regulations.

Fifteenth ground of appeal raised in respect of paragraphs 118

- [31] This ground of appeal has no merit. On the BRP's own version, he stated that he would require over R907 million to keep the entities afloat (see paragraph 117 of my judgment).
- [32] Again the BRP raises a dispute on the amounts. The BRP presented different figures in respect of pre-commencement as well as the post-commencement creditors. The BRP's version is that the pre-commencement debt amount was in the region of R463 million at the commencement of the business rescue. The debt has now increased to over R525 million (that is if the applicant's debt is excluded).

[33] In response thereto the MEC pointed out that the recent draft financial statements, that were availed, illustrated that the NTI companies had an assessed loss of R409 million.

[34] It cannot be disputed that the debt remains substantial. The bottom line is that the entities are currently in debt of around R1 billion (R818,531.64 on the BRP's version).⁶ This was a far cry from the findings in the GTAC report where the debt was in the region of R356 million and the working capital of R250 million was required in order to settle the debts. Accordingly this ground of appeal has no merit.

COSTS ORDER

[35] The BRP challenges the cost order as well. The issue of costs are in the discretion of the court and I have furnished my reasons for holding the BRP personally liable together with Tansnat (paragraphs 121 to 124 of the judgment). Consequently, I found that the BRP and Tansnat are jointly and severally liable for the costs of the application for the removal of the BRP application.

All complaints not considered

⁶ Paragraph 29.3 of the BRP's heads of argument states if the applicant's amount is included and considered a debt.

[36] The further ground raised was that this court did not deliberate on and make findings in respect of the rest of the complaints raised against the BRP. It was argued that no findings were made *inter alia* the irregular and unlawful opening of bank account, the SARS irregularities, the unlawful dismissal of employees and directors and the alleged transgressions committed in the context of ghost employees.

[37] Section 139(2) of the Act makes provision for the removal of the BRP from office on any one of the grounds, namely in terms of his incompetence, his failure to exercise a proper degree of care in the performance of his functions, and engaging in illegal acts or conduct. I hold the view that on the reading of Section 139(2) it could never have been the intention of the legislature that a court was required to deal with each and every complaint lodged for the BRP's removal. This court was not required to deal exhaustively with each contention raised by COSATMA for the BRP's removal. I had addressed specific instances where the BRP was found to be incompetent and where he failed to perform his duties with the proper degree of care.

COMPELLING GROUNDS

[38] The BRP also pointed out that there are compelling grounds for the court to grant leave to appeal. It was argued that the interplay between the PFMA and the Companies Act need to be clarified, particularly to what extent the PFMA find application in instances where business rescue proceedings are initiated in

respect of state owned enterprises. I find no merit on this ground. Not only was this aspect not raised as one of the grounds of appeal, but more notably my findings in terms of the non-compliance with the PFMA and Treasury Regulations (as set out in paragraphs 85 to 104 of my judgment) were never challenged.

CONCLUSION

- [39] My analysis has demonstrated that the BRP raised factual errors and errors of law without context to my reasons and findings. I hold the view that the BRP has not convinced this court that another court would come to a different conclusion. There is no sound rational basis to conclude that there are reasonable prospects of success on appeal. In the premises, the application for leave to appeal is dismissed with costs, consequent upon the employment of two counsel, on Scale C.

COUNTER APPLICATION

- [40] The main contention raised by the BRP in respect of the dismissal of the counter application was that the court ought to have referred the dispute to oral evidence and moreover sufficient weight was not given to important facts. The facts (and the ultimate finding on the agreement contended for in this counter application) were relevant to the BRP's complaints regarding his failure to publish the business rescue plan, the duration of the business rescue, as well as the increase in liabilities of the companies. Moreover the court erred in determining the counter

application by making a finding on the probabilities. It is settled law that motion proceedings are not there to resolve factual issues.

[41] It is reiterated that the counter application was instituted belatedly, in fact long after the institution of the “removal” application. It was not in dispute that the application for the removal of the BRP could be determined independently from the counter application. Furthermore only one aspect was canvassed in the counter application, namely, whether the parties had reached an agreement that COSATMA would fund the amount of R615 million?

[42] My factual findings were premised on the pleadings together the common cause correspondence, relevant documents and submissions made by both parties. In essence, my finding was that the agreement could never have come into existence without COSATMA's approval to fund the R615 million. Another court presented with the same facts would not come to a different conclusion in respect of the very issue that the court was required to make a determination upon.

SECTION 18(3) APPLICATION

[43] COSATMA instituted the Section 18(3) application upon the application for leave to appeal being filed by the BRP. It sought that the order of removal of the BRP become operative pending the final determination of the application for leave to appeal.

[44] I am mindful that by refusing the application for leave to appeal, the order *inter alia* for the removal of the BRP and the counter application stands. However, this Section 18(3) application warrants a separate determination. It can be determined even in instances where no application for leave to appeal was filed. Moreover the BRP may decide to persist with the appeal process.

[45] Section 18(1) of the Superior Courts Act stipulates that the operation and execution of a decision, which is subject to an application for leave to appeal or an appeal, is suspended pending the decision of the application or of an appeal unless exceptional circumstances exist. Section 18 reads:

“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 subsections (1) or (2). If the parties who apply to the court or to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm, if a court does not so order and that the other party will not suffer irreparable harm if the court so orders.”⁷

⁷ My underlining

[46] This entails that the operation and execution of the order is suspended, unless exceptional circumstances present themselves. In order to determine if exceptional circumstances exist, a factual enquiry is required, namely:

- (i) whether exceptional circumstances exist; and
- (ii) whether the other party will suffer irreparable harm if the suspension orders are uplifted.

EXCEPTIONAL CIRCUMSTANCES

[47] Whether or not exceptional circumstances exist is a factual enquiry.⁸ COSATMA claims that the following factors present exceptional circumstances namely:

- 47.1 business rescue proceedings are not only a temporary measure to rescue a financially distressed company, but it is also an expedited process. If the suspension of the order remains intact until the appeal has been finalized, the Section 18(3) application would become moot;
- 47.2 the removal application was launched on an urgent basis and premised upon the need to remove the BRP due to his incompetence and to replace him with a competent BRP;
- 47.3 the BRP has caused the NTI companies' indebtedness to increase by R500 million. If he is allowed to remain, the indebtedness would increase exponentially;

⁸ Incubeta Holdings supra at paragraph 20

- 47.4 the BRP only furnished the financial statements in February 2025, despite his undertaking to do so by July 2024;
- 47.5 the salaries of the NTI Companies have not been paid. Moreover without financial statements COSATMA cannot just provide funding in the hope that the BRP would utilize the funds for the intended purposes;
- 47.6 despite receiving various contributions from the applicant, the BRP has elected to pay certain creditors instead of the employees;
- 47.7 there are no prospects of success in the BRP's application for leave to appeal.

[48] The Supreme Court of Appeal in *Knoop*⁹ has enunciated the principles which would assist in determining exceptional circumstances, namely:

- 48.1 exceptional circumstances require that there must be something sufficiently out of the ordinary and unusual to warrant a departure from the ordinary rule that court orders are suspended pending the outcome of an appeal;
- 48.2 such exceptional circumstances must arise from the facts and circumstances of each particular case;
- 48.3 the mere fact that a court finds that there is a removal of office of the BRP, does not in itself constitute exceptional circumstances. There must be something more on the facts that endorses the immediate implementation of the removal order necessary;

⁹ *Knoop* (Execution) supra, paragraphs 44 to 49.

See also *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 SCA at paragraph 37

- 48.4 hence the need to establish exceptional circumstances is likely to be closely linked to the fact that irreparable harm would be suffered if the implementation of the removal of the BRP is not granted immediately;
- 48.5 there must be real and substantial risk of immediate and irreparable harm being suffered while waiting for the outcome of the appeal.

[49] Having regard to the factors raised together with the response of the BRP, in my view, a case for exceptional circumstances has been made for the reasons set out below:

- 49.1 at all relevant times, even though the matter was not heard in urgent court, a request was made for the urgent hearing of the matter. It was upon that basis that the matter received a special allocation and the hearing was expedited. It therefore cannot be disputed that the applicant sought the BRP's removal on an urgent basis;
- 49.2 the order for the removal of the BRP should be considered together with other factors that would justify the immediate implementation of the order sought in terms of Section 18(3). The additional factors raised by COSATMA is illustrative of the fact that the circumstances are exceptional;
- 49.3 the NTI Companies remain in extensive debt, even on the version of the BRP;
- 49.4 neither the predated nor the current financial statements were made available during the period 2022 to January 2025 (during the BRP's term of office). Furthermore only the financial statements for the year ending 2024 had been furnished in February 2025;

- 49.5 the salary issue has been one of the focal points in this litigation. The BRP still maintains the view that the decisions he took, in preferring Tansnat's claims over the salaries, were lawful and justified. Hence there is no undertaking that the salaries would be paid regularly. Furthermore COSATMA has throughout persisted that funding could and would be made available if the relevant financial disclosures were made by the BRP. COSATMA indicated that it cannot make payment to the BRP without being privy to the manner in which its funds are utilized. This is understandable as the MEC is accountable to Treasury at the end of the day;
- 49.6 lastly, the negative prospects of success in the application for leave to appeal would be a factor that should be taken into consideration. The prospects of success plays a role in the exercise of the court's discretion.¹⁰

IRREPARABLE HARM

[50] The test for determining if there is irreparable harm, was correctly set out in

Incubeta holdings v Ellis¹¹ where the court stated:

"In blunt terms it is asked: who will be worse off if the order is put into operation or is stayed, but Section 18(3) seems to require a different approach. The proper meaning of that subsection is that if the loser who seeks leave to appeal will suffer

¹⁰ Minister of Social Development and Others v Justice Alliance of South Africa [2016] ZAWCHC 34 at paragraph 2 and Zero Azania (Pty) Ltd v Caterpillar Financial Services and a similar appeal 2024 (2) SA 574 GJ, paragraphs 40 & 41

¹¹ Incubeta Holdings v Ellis 2014 (3) SA 189 GJ 194J – 195I, UFS v Afriforum and Another [2016] ZASCA 165 (17 November 2016) cited with approval the approach of Incubeta

irreparable harm, the order must remain stayed, even if the stay will cause the victim irreparable harm too. In addition, if the loser will not suffer irreparable harm, the victim must nevertheless show irreparable harm to itself... Two distinct findings of fact must now be made rather than the weighing to discern a preponderance of equities...¹²

[51] Two distinct findings of fact must be made in this instance: firstly, if it is found that the BRP would suffer irreparable harm, the order must remain stayed, even if the stay will cause COSATMA irreparable harm too. Secondly, if it is found that the BRP will not suffer irreparable harm, COSATMA has to show that it will suffer irreparable harm if the suspension order is not uplifted.

[52] The BRP argued that COSATMA failed to show that it suffered any irreparable harm. He presented the following facts to dispel the applicant's case:

- 52.1 prior to his appointment, the NTI Companies suffered from extensive maladministration and financial mismanagement. Their state of affairs was recorded extensively in the GTAC report. Realistically it could never have been possible to turn around the businesses of the entities in a truncated time period (3 months as prescribed in terms of the Act);
- 52.2 during his term as the BRP, the management, staff, employees as well as the applicant failed to cooperate with him;

¹² My underlining

52.3 moreover COSATMA reneged in its undertaking to provide funding, which resulted in insufficient funds for the payment of salaries as well as the creditors;

52.4 he proffers that despite these difficulties, he managed to make positive inroads, specifically to root out corruption and keep the NTI businesses afloat. The buses were running and commuters were transported. This enabled COSATMA to comply with its constitutional mandate to service commuters. Moreover the companies are in a far better position now than when they were before business rescue.

[53] Post the judgment, the BRP contended that the cracks were beginning to appear again, *inter alia*:

53.1 the maladministration and financial mismanagement of the entities was evident;

53.2 basic operational expenses including the fact that suppliers were not paid;

53.3 there were allegations of arson where certain buses were burnt;

53.4 penalties were imposed on buses that were not operational;

53.5 the likes of incompetent management such as Mr Kenoshi has taken control over the companies again;

53.6 prior to his removal, the employment figures were almost finalized. The biometric systems put in place to monitor the actual number of employees, was now being tampered with. The relevant individuals who were monitoring the system, now cannot gain access thereto;

53.7 the financial statements that were outstanding have now been prepared with the assistance of SAIRA;

53.8 COSATMA has failed to address how it intends to counteract the apparent maladministration. The present circumstances provide no protection to the NTI companies;

53.9 moreover in the event that he succeeds on appeal, he will have to start all over again.

[54] The BRP explained that the aforesaid circumstances prevailed when he was stripped of his position as the BRP. In my view, the situation would have to be dealt with by a business rescue practitioner. The core function of a business rescue practitioner is to take control and manage the affairs of the entities. In this case, the new BRP will have to regain such control and efficiently manage the affairs of these entities.

[55] The BRP alleged that he would suffer harm “by the immediate implementation of the order, particularly given the highly publicized and politically charged nature of this application”.

[56] He explained that COSATMA has repeatedly issued defamatory media releases about him premised on not only the removal order but on other aspects unrelated to the application. He argued that the press releases perpetuate a damaging narrative, despite the fact that a higher court may ultimately overturn the findings.

[57] If I am to understand the BRP, he contends that if the removal order is implemented with immediate effect, he will suffer irreparable harm.

[58] It is necessary to shed light on the press releases he relies upon. On my reading it is evident that the HOD of COSATMA in his reporting highlighted the ongoing pressing issues *inter alia* the dispute regarding the payment of salaries and the BRP's failure to account to COSATMA.

[59] I have also noted that it was very briefly reported that this Section 18 application was also instituted by COSATMA and that the purpose was to seek the immediate implementation of the order. This was the only aspect relating to the application.

[60] I find that the harm that he alleges has already ensued.¹³ The BRP's competence was questioned at the time the application for his removal was instituted and then on the pronouncement of the judgment. The irreparable harm he pleads cannot be a ground for refusing the order. The press releases/reporting by the HOD of COSATMA addressed the very similar complaints that were raised against BRP and which formed part of the removal application. The harm had ensured already and is not a consequence of S18(3) application.¹⁴

¹³ National Director of Public Prosecutions v Zuma and Others [2007] J4 ALL SA 791 D at 792

¹⁴ Helen Suzman Foundation and Another v Minister of Police and Others [2017](JOL) 37904 GP at paragraph 27 to 29

- [61] Moreover even if there is any harm that the BRP may suffer, he may be vindicated in due course if a finding is made in his favour.¹⁵ He is entitled to persist with the appeal.
- [62] Additionally, the BRP cannot insist on clinging to his position, particularly when removed by virtue of a court order. It could never have been envisaged that business rescue practitioners can oppose enforcement orders due to allegations of reputational damage. This would entail that business rescue practitioners who are removed are entitled to claim reputational damage.
- [64] It was further argued that the only other harm that he would encounter is in the form of financial interest. It is no secret that he has earned substantial fees during his term of office. The BRP correctly did not raise this as a factor for irreparable harm.
- [64] This brings us to the second stage of the enquiry, namely would COSATMA and the NTI entities suffer irreparable harm?
- [65] There can be no doubt that the NTI entities as well as the employees will continue to suffer irreparable harm if the immediate implementation of the order is not granted. In particular, the belated attempts by the BRP to execute his tasks post the application stage is very concerning. Bearing in mind that in the first nine

¹⁵ Malebana v The South African Nuclear Energy Corporation Soc Ltd, Labour Court S1727/19; 8/10/2019 at par 15.

months since his appointment, no draft plan was circulated. In the 18 months whilst he was in control of the NTI entities as the BRP, no financial statements were prepared, the salary dispute persisted, COSATMA was left in the dark as to the challenges of the BRP and more particular the financial status of the NTI entities. The BRP failed to report to the MEC and the Provincial Treasury as to *inter alia* the ongoing financial status of the entities, hence my finding of non-compliance with the PFMA and other prescripts.

[66] As late as 6 November 2024, when COSATMA requested *inter alia* the NTI companies' financial statements for the last two financial years, the monthly management account and the budget for the next 12 months. There was no response from the BRP on this matter.

[67] After all, the BRP's primary duty was to assess the NTI companies' financial prospects and the extent of their distress, a responsibility that he has been unable to fulfil during his term as the BRP. Furthermore, it is no secret that the relationship between the parties is strained and one of mistrust. The harm to COSATMA, the entities, and the employees is ongoing and such harm is irreparable. The debts are escalating as each year passes.

[68] Since the entities remain under business rescue, it is evident that a new BRP would have to be appointed and take control of the entities. The board and management of the entities would under no circumstances assume any control. The new BRP would have to however consult with the creditors and COSATMA

on the approved plan. The new BRP would further have to comply with his/her statutory reporting obligations to COSATMA and Treasury.

[69] Even if the new BRP has to familiarize himself/herself with the affairs of the entities, he/she will have to act efficiently. Section 7(k) states:

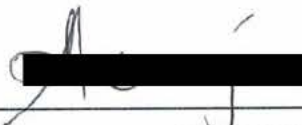
"The Act prescribes that there must be efficient rescue of the distressed entities in a manner that balances the rights of all the stakeholders, which includes creditors, employees and shareholders."

[70] Business rescue proceedings are not intended to continue indefinitely. Mr Samons, who has been removed as a business rescue practitioner by this court, cannot cling to his position, particularly for personal reasons.

[71] COSATMA, together with the NTI entities, has shown, on a balance of probabilities, that it will suffer irreparable harm, if the orders are not immediately executable. Under the circumstances, the Section 18(3) application succeeds.

COSTS

[72] In exercising my discretion on costs, I follow the general principle, namely costs should follow the result. In the circumstances, the first to the fifth respondents are liable for the costs, upon the employment of two counsel, on scale C.


H KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

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(The Member of the Executive Council for COSATMA): Adv. PG Cilliers SC
Adv. AA Basson

Instructed by: De Swardt Myambo Hlahla Attorneys

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Instructed by:

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(The Business Rescue Practitioner and the Companies): Adv. AJ Daniels SC
Adv C de Villiers-Golding

Instructed by:

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*Counsel for the applicant (The Member of the Executive
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Instructed by:

Adv PG Cilliers SC
Adv AA Basson
De Swardt Myambo Hlahla Attorneys

Date heard:

12 February 2025

Date of Judgment:

27 March 2025