



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

- (1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

DATE 17/06/2025

BRAND AJ

Case number: 134443/2023

Date: 17 June 2025

In the appeal between:

HOMII LIFESTYLE (PTY) LTD

First Appellant

URBAN LIFESTYLE INVESTMENT

Second Appellant

HOLDINGS (PTY) LTD

and

UNEMPLOYMENT INSURANCE FUND

First Respondent

PUBLIC INVESTMENT CORPORATION SOC LTD

Second Respondent

In re

UNEMPLOYMENT INSURANCE FUND

First Applicant

PUBLIC INVESTMENT CORPORATION SOC LTD

Second Applicant

and

PATRICIA CATHERINE JOHNSON
HOMII LIFESTYLE (PTY) LTD
URBAN LIFESTYLE INVESTMENT
HOLDINGS (PTY) LTD

First Respondent
Second Respondent
Third Respondent

JUDGMENT

BRAND AJ (with MLAMBO JP and BARNARDT AJ concurring)

Introduction and background

[1] This is an appeal against an order of this court, per Davis J in terms of section 18(3) of the Superior Courts Act 10 of 2013 ('the Superior Courts Act') that an earlier order of his against which an appeal is currently pending before the Supreme Court of Appeal (the SCA), remains in force and may be executed while that appeal is pending.

[2] The first appellant, Homii Lifestyle ('Homii') is a property development and management company. The second appellant, Urban Lifestyle Investment Holdings ('Urban'), is Homii's holding company.

[3] The first respondent is the Unemployment Insurance Fund ('the UIF'), a statutory body with the main purpose of accepting contributions from employers, from which to pay unemployment insurance to those who lose their jobs. The second respondent, the Public Investment Corporation ('the PIC'), is likewise a statutory body with the mandate to invest public money for a return on behalf of the State.

[4] The genesis of the dispute between the parties is a series of agreements between them, concluded in 2019. The first was a loan agreement, referred to as the 'Mezzanine Agreement', in terms of which the UIF, through the PIC, lent a sum of R410,000,000.00 to Homii. Homii was required to make six-monthly interest payments on this loan and also to provide the UIF annually with its audited financial statements and each of its 'approved budget(s)' as well as those of its 'guarantors'.

[5] To secure this loan, the UIF further entered into the second agreement with

Urban, styled the 'Cession and Pledge Agreement'. In terms of this agreement Urban ceded and pledged all its rights and interest in its shares, shareholders' claims and 'related rights' in Homii, explicitly as security for Homii's 'entire indebtedness', including interest, fees or costs.

[6] The rights that Urban so 'ceded and pledged' to the UIF included the right to attend all shareholders' general meetings and cast all votes attached to the ceded shares. These rights would become operative (in the sense that the UIF could exercise them) only should Homii default on any of its obligations in terms of the Mezzanine Agreement.

[7] Over a prolonged period Homii failed to pay any of the six-monthly interest amounts required. Homii also failed to provide the UIF with any of the information it was supposed to in terms of the Mezzanine Agreement. When this default persisted despite repeated demand, the UIF wrote Urban in October 2023 that it perfected the session and demanded hand-over of all Urban's shares in Homii and particulars of all shareholders' claims and related rights.

[8] The perfection of the cession meant that the UIF had replaced Urban as Homii's sole shareholder. As such, it demanded from Homii's sole director, Patricia Catherine Johnson ('Johnson'), that a general shareholders' meeting be convened, among other things to appoint a new board of directors.

[9] When neither Johnson nor Homii complied with this demand, the UIF and PIC approached this court with an application for a declaration that the UIF is entitled to exercise voting rights concerning all Urban's shares in Homii and an order that a general shareholders' meeting be held within 14 days, among other things to appoint new directors (the 'main application').

[10] This main application was first heard as urgent, before Strijdom J, who struck the matter from the roll because the necessary facts to establish the jurisdiction of this Court, had not been pleaded.

[11] When the matter was re-enrolled with supplemented papers now pleading facts concerning jurisdiction, it came before Collis J, who directed that it be moved to the ordinary roll. The matter was finally heard on the ordinary roll before Davis J on 15 May 2024, who, in a judgment dated 30 July 2024 granted the application.

[12] Davis J dismissed an application for leave to appeal against his 30 July

judgment in the main application on 18 September 2024, whereupon Homii and Urban approached the SCA. That court granted leave to appeal on 3 December 2024. This prompted an urgent approach to this court by the respondents in this appeal, in terms of section 18(3) of the Superior Courts Act to have Davis J's 30 July order in the main application declared enforceable pending the appeal to the SCA.

[13] In a judgment and order dated 13 December 2024, Davis J granted the section 18(3) order sought (the 'enforcement order'), rendering the order in the main application enforceable despite the appeal against it pending before the SCA. The appellants promptly, on 23 December 2024 and in exercise of their automatic right to appeal in terms of section 18(4) of the Superior Courts Act, noted an appeal against the section 18(3) enforcement order. This is the appeal before us.

[14] In addition and finally, on 24 March 2025, the appellants filed an application for leave to rely on section 45 of the Companies Act 71 of 2008 ('the Companies Act') and to introduce new evidence relating to that in this appeal against the enforcement order.

Issues

[15] In light of this background there are only two issues for this Court to decide in this appeal:

[15.1] Whether to grant leave to the appellants to rely on section 45 of the Companies Act and to introduce new evidence related to that in this appeal; and

[15.2] whether to uphold or set aside Davis J's section 18(3) enforcement order.

We deal with these issues in turn below.

Analysis

Reliance on section 45 and introduction of new evidence

[16] The appellants in this appeal seek to introduce both a new defence against the respondents' claim, not pleaded before, and new evidence to support that new defence. This is apparent from their notice of motion concerning this, where they pray for an order for, among other things, leave 'for purpose of [this] appeal ... to rely upon Section 45 of the Companies Act 71 of 2008 and to introduce the evidence in relation thereto contained in the Founding Affidavit'.

[17] Section 45 of the Companies Act that they seek to rely on relates to the provision of financial assistance by one company to another. Summarised in relevant part it determines that if a company wishes to provide financial assistance to a related company, such a decision must be approved by its board and a special meeting of shareholders, and its board must be 'satisfied that immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test'.¹ Failure to comply with these two requirements renders any resultant agreement void from the outset.²

[17] The defence they wish to raise anew on appeal is that both the Mezzanine and the Session and Pledge agreements are void from the outset for want of compliance with section 45. The evidence they seek to introduce now are share-holders' resolutions and a director's resolution that on their version show non-compliance with section 45. In sum the appellants' position is that the respondents were required by law to plead compliance with section 45 before the court *a quo* but failed to do so. This, they say, rendered their main application excipiable. The appellants wish to raise this defence now, in the appeal against the section 18(3) enforcement order. They wish to do so to show that they will suffer irreparable harm in being held to agreements that are void should the enforcement order be upheld on appeal.

[18] Leave to raise a new defence on appeal is not there for the asking – it is given only in certain circumstances. The reason for this is obvious: An appeal court considers and must pronounce on the cogency of the judgment of the court *a quo*. Logically, it must as a rule do so in light of the case presented to that court. To consider a different case than that turns the appeal into a re-hearing of the matter rather than an assessment of the judgment of the Court *a quo*.³

[19] To persuade us to allow them to raise the section 45 defence on appeal, the appellants placed great stock in the well-known dictum of Jansen JA in *Paddock Motors (Pty) Ltd v Igesund*⁴ that it 'would create an intolerable position if a Court were

¹ Section 45(2) and (3).

² Section 45(6).

³ *Cole v Government of the Union of S.A.* 1910 AD 263 at 272 ('*Cole*') per Innes JA: '[T]he duty of an appellate tribunal is to ascertain whether the Court below came to a correct conclusion on the case submitted to it'.

⁴ *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) ('*Paddock Motors*').

to be precluded from giving the right decision on accepted facts, merely because a party failed to raise a legal point, as a result of an error of law on his part'.⁵

[19] They were correct to do so. The circumstances under which a new defence may be raised on appeal are indeed comprehensively described in *Paddock Motors*, drawing on the earlier judgment in *Cole v Government of the Union of S.A.* where Innes JA set out the position as follows:⁶

'If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the party against whom it is directed, the Court is bound to deal with it. And no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record, and there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset.'

[20] From this arise two requirements that must be met before a new point of law may be raised on appeal: the point must be 'covered by the pleadings'; and its consideration on appeal should not cause any unfairness for the party against which it is directed.

[21] In sum the inquiry is whether it is in the interest of justice to allow the new defence on appeal, in the sense that 'a refusal by a Court of Appeal to give effect to a point of law fatal to one or other of the contentions of the parties would amount to the confirmation by it of a decision clearly wrong'.⁷

[23] As to the first of the two requirements, the appellants submitted that their section 45 defence was covered in the pleadings in the negative: The respondents, to plead existence of valid agreements on which to found their main application, were required to plead compliance with section 45. Their failure to do so was evident on the papers *a quo* and as such covered by the pleadings.

[24] These submissions are very tenuous. From *Barkhuizen v Napier* it is clear that what is meant with the requirement that the point raised on appeal must have been 'covered in the pleadings' before the court *a quo*, is that all the facts required for

⁵ *Paddock Motors* (above) at 23F.

⁶ *Cole* (above) at 272-273. See also *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC) ('*Barkhuizen*') at para [39].

⁷ *Cole* (above) at 272; *Mokweni and Others v Plaatjies and Others - Appeal* (A178/2022) [2023] ZAWCHC 266 (26 October 2023) ('*Mokweni*') at para [25].

determination of the point of law now raised on appeal must have been on the papers before the Court *a quo*.⁸ In both *Barkhuizen* and *Paddock Motors* this was manifestly the case: both were decided on agreed facts. Indeed, in *Paddock* the point of law later raised on appeal was initially raised *a quo*, with the facts to support it, but then later abandoned.

[25] In this matter, the opposite is true. The very fact that the appellants now seek to introduce new evidence before this Court on appeal to sustain the point of law they want to raise (evidence that they had in their possession all along) shows that these facts were not on the papers *a quo*, so that the section 45 defence is not covered by the pleadings. In short, there may have been enough facts on the papers *a quo* to raise the section 45 point, but not to determine it.

[26] This conclusion is underscored by the reliance Mr Wasserman SC for the respondents placed on the matter of *Yannakou v Apollo Club*.⁹ This case involved a contractual dispute in which the party against whom the contract was sought to be enforced on appeal for the first time raised the defence that the contract in question was void due to an illegality, as it was in contravention of a statutory prohibition. Trollop JA held that if a defendant 'relies on a particular section of a statute, he must either state the number of the section and the statute he is relying on or formulate his defence sufficiently clearly so as to indicate that he is relying on it' and that 'if his defence is illegality, which does not appear *ex facie* the transaction sued on but arises from its surrounding circumstances, such illegality and the circumstances founding it must be pleaded'.¹⁰

[27] In this light there was in fact a duty on the appellants to raise the provisions of the Companies Act on which they now seek to rely to establish that the contracts were void for non-compliance with section 45, in the Court *a quo*. There is also nothing on the record to show that this non-compliance and resultant voidness appeared on the face of the pleadings before the Court *a quo* so that it should have taken cognisance of it *mero motu*.

⁸ *Barkhuizen* (above) at para [41]. See also *Yannakou v Apollo Club* 1974 (1) SA 614 (A) ('*Yannakou*') at 26H.

⁹ *Yannakou v Apollo Club* 1974 (1) SA 614 (A) ('*Yannakou*').

¹⁰ *Yannakou* (above) at 623F-H.

[28] Apart from the fact that in my view the appellants fail to establish that the section 45 defence they now seek to raise was covered by the papers, their raising this defence now, on appeal, is unfair to the respondents. One of the examples that Innes JA lists in *Cole* of unfairness to the other party resulting from the raising of a new point on appeal that was not raised *a quo*, is if there are grounds ‘for thinking that further or other evidence would have been produced had the point been raised at the outset’.¹¹

[29] There were two routes through which the appellants could have raised non-compliance with section 45 in the main application: it could have excepted to the application on grounds that it failed to disclose a cause of action (in motion proceedings the more uncommon route) or it could simply have raised this defence in its answering affidavit. In both cases the appellants’ raising of the defence at that stage would have afforded the respondents the opportunity to raise evidence up to then not on the papers to rebut the defence.

[30] If the appellants excepted and the exception was upheld, in the ordinary course the offending pleading would have been set aside, and the respondents would have been given leave to amend it within a prescribed period.¹² If the section 45 defence was raised in the answering affidavit, the respondents could have raised evidence to rebut it in their reply. For the appellants not to raise this defence *a quo* in the main application (as it is, following *Yannakou*, required to do), precluded the respondents from raising evidence to rebut it and it is for that reason that it is unfair.¹³

[31] In addition to this unfairness, it would in my view also not be in the interests of justice for us to allow the appellants to raise this defence anew in this appeal. The ‘intolerable position’ that Jansen JA warns of in *Paddock Motors*,¹⁴ refers to the manifest injustice that would arise if a Court on appeal must confirm and uphold a decision of the Court *a quo* that is ‘*clearly wrong*’¹⁵ in light of a defence that a party is precluded from raising on appeal simply because it did not raise it at the outset. In other words, there should be no reasonable dispute on the merits of the defence raised

¹¹ *Cole* (above) at 272.

¹² *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 602D.

¹³ *Yannakou* (above) at 625H.

¹⁴ *Paddock Motors* (above) at 23F.

¹⁵ Per Innes JA in *Cole* (above) at 272 (emphasis added).

on appeal and certainly no need to introduce new evidence on appeal on the basis of which the defence must be decided.

[32] This is evidently not so with the appellants' attempted reliance on section 45. The fact that there was need for the appellants to apply for leave to introduce new evidence on appeal on its own already shows that the appellants' section 45 point is not *clearly* right and that the two agreements were not *clearly* void from the outset. But quite apart from that, Mr Wasserman for the respondents submitted (persuasively to my mind) that the merits of the appellants' section 45 defence are decidedly thin – at best arguable.

[33] I emphasise that the purpose now is not to decide the merits of the appellants' purported section 45 defence one way or the other. Instead, we must consider the merits of that defence only to determine whether it is clearly right or open to reasonable doubt. If the latter, then it would not be in the interests of justice to admit it at this stage.

[34] The respondents to my mind clearly cast considerable doubt on the merits of the section 45 defence, broadly in two ways. First, Mr Wasserman submitted that section 45 does not apply to the Mezzanine agreement, so that its requirements need not have been complied with there.

[35] He points out that section 45 applies only to financial assistance extended by a company to a 'director or prescribed officer of the company or of a related or inter-related company, or to a related or inter-related company or corporation, or to a member of a related or inter-related corporation, or to a person related to any such company, corporation, director, prescribed officer or member'. The only part of this excerpt from the section that can conceivably apply to the Mezzanine Agreement (concluded between the UIF and Homii) is the reference to a 'related or inter-related company or corporation'. When the Mezzanine Agreement was concluded (and also thereafter) there was no relation or interrelation between the UIF and Homii. It was an ordinary, arms-length commercial transaction between two unrelated companies. For that reason, so the submission concludes, section 45 does not apply. There is merit in this submission.

[36] Second, concerning the Cession and Pledge Agreement, the submission was that even if Section 45 applied to it, the documents that the appellants seek to admit on appeal show that it was complied with. These are in the first place a shareholders'

resolution in which the Cession and Pledge Agreement is approved and a resolution signed by the sole director of the appellants at the time, Ms Johnson in which she likewise approves the agreement and confirms her satisfaction that immediately after the provision of the financial assistance concerned, the company would satisfy the solvency and liquidity test.

[37] To be sure, Mr Harpur SC for the appellants offered cogent rejoinders particularly to the respondents' submissions concerning the Cession and Pledge Agreements (concerning the shareholders' resolution that it was passed by the previous sole shareholder in Homii, A1, while the UIF had at that time by agreement already been give a 42% share stake in Urban, so that the resolution was invalid due to the UIF's non participation in voting, and that it was not properly a special resolution as required; and concerning the Board resolution that an *ex post facto* report on Urban's financial position later acquired showed that objectively the solvency and liquidity test was not satisfied).

[38] But the point at this stage again is not which of the two is correct – instead it is simply that there is no clear resolution to the dispute. Reasonably, it will remain in dispute until fully ventilated and decided on the basis of relevant facts. As such it clearly cannot be said that Davis J's judgment and order in the main application is clearly wrong so that it would be 'intolerable' to confirm it despite a potential cogent challenge that cannot be raised on appeal simply because it was not raised earlier.

[39] For these three reasons then (that the section 45 defence was not covered by the pleadings; that admitting it would be unfair to the respondents; and that it would not offend the interests of justice to exclude it), taken together and each on its own, I conclude that the appellants cannot be permitted to rely on section 45 in this appeal. Accordingly, their application for leave to do so must be dismissed.

[40] This conclusion of course puts paid also to their application for leave to introduce new evidence on appeal, in support of the section 45 defence – the two parts of the application are mutually supportive and interrelated. I nonetheless for sake of completeness proceed briefly to consider also this aspect of the application for leave.

[41] The point of departure in dealing with applications to introduce new evidence

on appeal is that it should be allowed only exceptionally.¹⁶ The reason for this is much the same as applies in the case of raising a new defence. If the purpose of a Court on appeal is to assess the judgment of the Court *a quo*, then it can properly fulfil that purpose only if it assesses that judgment against the evidence upon which it was arrived at alone.

[42] In *Coleman v Dunbar*¹⁷ it was held that a party seeking to introduce new evidence on appeal must at a minimum provide a cogent explanation for why the evidence was not introduced in the Court of first instance and show that the evidence concerned is material to the outcome of the matter and at face value true.¹⁸ Below I consider each of these requirements in turn in relation to the appellants' case.

[43] The only explanation that the appellants offer for their failure to raise the section 45 defence at the outset is that their legal advice when first faced with the main application was that the jurisdiction point on which that application was initially struck from the roll and with which they now persist on appeal was clearly dispositive of the application so that alternative defences to the application were at that stage not pursued. The reason why their counsel at the time did not then alert them also to the section 45 defence, is that he was not 'alive to' it. They were only alerted to the section 45 defence when they briefed new counsel for purposes of their opposition to the application for the section 18(3) enforcement order. He immediately informed them that the defence was available to them, but by then, of course, the proverbial horse had bolted.

[44] This is simply no explanation at all, let alone a cogent or persuasive one as required. It does not say why they didn't raise the defence at the outset.¹⁹ Instead, it is simply a restatement of the appellants' predicament: Whether by design or oversight, they didn't raise the section 45 defence at the outset and they seek to do

¹⁶ *Ibex RSA Holdco Ltd & Another v Tiso Blackstar Group (Pty) Ltd & Others* [2024] ZASCA 166 ('*Ibex*') at para [28].

¹⁷ *Coleman v Dunbar* 1933 AD 141 ('*Coleman*') at 162. See also for a more recent affirmation of *Coleman*, *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) ('*Rail Commuters*') at para [43].

¹⁸ *De Aguiar v Real People Housing (Pty) Ltd* [2010] ZASCA 67; 2011 (1) SA 16 (SCA) ('*De Aguiar*') at paras [10] and [11].

¹⁹

so now. The application to introduce new evidence on appeal thus falls at the first hurdle.

[45] The second requirement, materiality, means that the evidence, if admitted and shown true for the purpose for which it was admitted, would have a bearing on the outcome of the matter – could decisively influence or determine the outcome, that is. Much of the evidence the appellants seek to introduce also fails this test in that it is not self-evidently even relevant, let alone material to the outcome of the matter. Indeed, this can be said about all but the shareholders' and director's resolutions. Both these latter two documents certainly pass the test of materiality – if they say and show what the appellants allege they do (that the requirements of section 45 were not complied with, something the respondents of course dispute) then they potentially prove that at least the Cession and Pledge agreement is void, so that the respondents would not be entitled to the relief they seek in the main application.

[46] But herein lies the rub: are the shareholders' and directors' resolutions true on the face of it, in the sense that without more, they show the non-compliance with section 45 that the appellants say they do? The answer must be no.

[47] As already traversed in outline above, the respondents submit that these two documents in fact show exactly the opposite to what the appellants say they do – compliance instead of non-compliance with section 45 and so validity instead of voidness of the Cession and Pledge Agreement.

[48] The appellants submit that the shareholders' resolution was invalid because the UIF, which at that time had already acquired a 42% shareholding in Urban, had not participated in adopting it. The respondents counter this and say that, even after you have acquired the relevant shares, one becomes a shareholder only once your name has been entered in the share register. They argue that the appellants had placed no evidence before this Court that this had occurred, so that it was unclear whether the UIF could have voted on the resolution.

[49] The appellants say that the director's resolution is invalid because a subsequent auditors' report shows that despite the sole director's satisfaction to the contrary, Urban did in fact not satisfy the solvency and liquidity test immediately after conclusion of the Cession and Pledge Agreement. The respondents reply that the section 45 requirement is subjective – the Board (in this case the sole director) must

be so *satisfied* – and that Ms Johnson was so satisfied and cannot now attempt to disavow that.

[50] Also in this context the point now is not to decide who is right and who is wrong concerning this. Instead, for purposes of determining whether new evidence may be admitted on appeal it needs only be determined whether the evidence is on its face, without more, true. The fact that such level of dispute exists on the meaning, import and implications of the evidence shows clearly that it is not.

[51] I conclude from this that the appellants' application to introduce further evidence on appeal also on its own terms does not meet all the requirements for leave for such introduction to be allowed, so that the application concerning this must also be dismissed.

[52] In sum concerning the appellants' attempt to rely on section 45 and to introduce new evidence in support of that reliance in this appeal, I conclude that the appellants may do neither.

The appeal against the section 18(3) enforcement order

[53] The appellants seek to challenge Davis J's section 18(3) enforcement order and judgment on three grounds, namely that he erred in holding that:

[53.1] there were exceptional circumstances that warranted the grant of the enforcement order;

[53.2] the respondents would suffer irreparable harm should the enforcement order not be granted; and

[53.3] the appellants would not suffer irreparable harm in the event it were granted.

[54] Despite the section 18(3) order being an interim order *pendente lite* there is no reason for us in this appeal to apply anything other than the usual standard applied by Courts of appeal, which is to ask simply whether Davis J's judgment and order was correct on the law and the facts,²⁰ or, put differently, whether the respondents' section

²⁰ *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) ('*Knox D'Arcy*' at 362G).

18(3) application 'should have achieved a different outcome'.²¹

[55] The appellants' grounds of appeal track the requirements for the grant of a section 18(3) enforcement order that were applied by Davis J in reaching his judgment. Derived from the text of section 18 itself (section 18(1) read with (3)) these are that an enforcement order may be granted a) only in exceptional circumstances, if a Court is persuaded on a balance of probabilities that b) the party applying for the order will suffer irreparable harm if it is not granted, and c) the party against which it is sought will not suffer irreparable harm if it is granted.²²

Exceptional circumstances

[56] The first arrow in the appellants' bow concerns the first requirement that an enforcement order may be granted only in exceptional circumstances. They seize upon the following excerpts from Davis J's judgment concerning this:

'[T]he relief sought was not ordinary in nature. It was neither a money judgment [n]or the customary order for execution against property by way of a sale.'²³

and

'When a debtor fails in its obligations, the UIF as lender needs to secure the debtor's indebtedness by taking control thereof. This is done by exercising shareholders' voting rights and thereby appointing new directors for the debtor. ... [T]he relief securing these rights, can only be described as "exceptional".'²⁴

[57] They object to these excerpts that it is not the relief that a party seeks to enforce through a section 18(3) order that must be exceptional but the circumstances in which the parties find themselves; and that the mere fact of the existence of a debtor/creditor relationship between the parties and the existence of default in that relationship cannot constitute exceptional circumstances for purposes of section 18(1).

[58] As authority for this proposition they rely on the judgment of the Constitutional

²¹ *Makhado Local Municipality and Another v Makhado and Another* (HCAA04/2020; 542/2020) [2020] ZALMPPHC 45 (3 July 2020) ('*Makhado*') at para [2].

²² *Knoop NO v Gupta (Tayob intervening)* 2021 (3) SA 135 (SCA) ('*Knoop*') at [45]; *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* 2014 (3) SA 189 (GJ) ('*Incubeta*') at para [16].

²³ Enforcement judgment at para [16].

²⁴ Enforcement judgment at para [18].

Court in *S v Liesching*, where it was held in a different context²⁵ that the term ‘exceptional circumstances’ is fact-specific to individual litigants and ‘should be linked to either the probability of grave individual injustice ... or a situation where, even if grave individual injustice might not follow, the administration of justice might be brought into disrepute’.²⁶

[59] They conclude that the mere fact of default in the debtor/creditor relationship between the UIF and Homii and the precarious financial position in which Homii (and Urban) find themselves cannot qualify as the kind of fact-specific grave injustice or affront to the administration of justice referred to in *Liesching* – it is nothing different from the situation that may pertain in any other debtor/creditor relationship. On this basis they then conclude that Davis J erred in finding that there were exceptional circumstances.

[60] This criticism of the judgment *a quo* is misconceived. Simply put, by reducing Davis J’s judgment in this respect to a finding that the exceptional circumstances exist because the remedy the respondents wish to enforce is an exceptional one, the appellants mischaracterise it.

[61] A proper reading of paragraphs [16] to [19] of Davis J’s judgment where the issue of exceptional circumstances is canvassed, shows that the reference to the exceptionality of the remedy is simply an entry point for Davis J into a description of the exceptionality of the UIF as creditor and of the relationship between the UIF and Homii as a debtor/creditor relationship. That is, the exceptionality of the remedy is an indication of the exceptionality of the UIF and PIC as lenders, the exceptionality of the relationship they have with their creditors, the exceptionality of their purpose and the exceptionality of the nature and scope of the risks that they face if their debtors default.

[62] The UIF and PIC are both public bodies and not private commercial entities. They participate in commercial activity such as investing money in the private sector not for any private commercial gain, but to advance public interests. The UIF does so to protect and nurture the funds paid to it by employers to secure against unemployment on behalf of all employees in South Africa – to protect millions of

²⁵ *Liesching* concerned the reconsideration by the President of the Supreme Court of Appeal of a refusal of leave to appeal to that court, in a criminal matter.

²⁶ *Liesching* at para [138].

vulnerable workers. The PIC in turn does so to advance more generally the interests of the state.

[63] It is these public responsibilities that prompted them in the first place to conclude the Cession and Pledge agreement on the terms concerning their remedies in case of default by Homii that they did. And it is the fact of, and the enormity and urgency of these public responsibilities (more than R600,000,000.00 of these public funds at risk due to the continuing default by the appellants and the generally precarious financial position in which they find themselves) that constitute the exceptional circumstances that justify their resort to section 18(3) for enforcement of the order they had obtained.

[63] So understood, Davis J's finding of exceptional circumstances easily meets the requirements of context-specificity set in *Lieschink* and those described in the more clearly applicable *Incubeta* decision: that exceptional circumstances are those that depart (to a special degree) from the norm;²⁷ that they must arise from and be specific to the case at hand;²⁸ and that they are not a matter of discretion but of fact.²⁹

[64] Accordingly, Davis J's conclusion that exceptional circumstances exist must be upheld and the appellants' challenge to it dismissed.

The respondents' irreparable harm

[65] Concerning the second requirement that it must be shown on a balance of probabilities that, should the enforcement order not be granted, the party seeking it (here the respondents) will suffer irreparable harm, Davis J held that 'if no control is taken of [the] delinquent debtor, there is a *real risk* that funds which would be needed to pay unemployment insurance claims (and which had been lent to Homii) might

²⁷ *Incubeta* (above) at para [17]: '[T]he primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different'.

²⁸ *Incubeta* (above) at para [17]: 'To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.'

²⁹ *Incubeta* (above) at para [17]: '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.'

never be recovered'.³⁰

[66] This risk of irreparable harm was for Davis J founded in fact. He listed the fact of several years of persistent default on the side of Homii. But he also, and more importantly referred to the range of unrefuted allegations by the respondents that the group of companies of which Homii and Urban are part (the A1 Group) are facing severe financial strain, such that several companies that are part of the group have applied for voluntary liquidation and that public money lent to some of these companies by the PIC in terms of other loan agreements has been diverted from their intended purpose.

[67] He concluded that, against this background there was a real and substantial risk that Homii or Urban will likewise be liquidated or the money lent Homii would be diverted to other companies in the group. Should that happen, the harm would be irreparable – the UIF would no longer be able to recover the money that it needed to pay unemployment insurance claims.³¹

[77] The appellants challenge these conclusions on two grounds. They first point to the fact that Davis J uses the phrase 'real risk' to describe that which he holds is irreparable harm ('...there is a *real risk* that ... funds might never be recovered').

[78] To them the use of this phrase indicates that the harm that is anticipated is not imminent enough – ie, too remote – to justify the drastic intervention that a section 18(3) enforcement order entails. In support of this point, they submit that the respondent's complaint of Homii's default dates from 2021, so that it is not open to them now to argue that the risk of losing their funds is imminent.

[79] Second, the appellants seek to refute the respondents' averments concerning the precarious financial position of the group of companies of which they are part. They submit that the respondents provide no evidence to back up those averments, so that they cannot withstand scrutiny. This to them renders the respondents' fears of Homii being liquidated voluntarily or diverting funds to other companies in the A1 Group so that the respondents would be unable to recover their debt, speculative.

[80] Neither of these points can be sustained. In *Knoop*, the SCA describes the test

³⁰ Enforcement judgment at para [20] (emphasis added).

³¹ Enforcement judgment at para [21] to [25] and [28].

to determine whether there is irreparable harm for purposes of section 18 as that there must be a 'real and substantial risk of immediate and irreparable harm being suffered while waiting for the enrolment, hearing and outcome of the appeal'.³² Davis J was in this light clearly correct to use the phrase 'real risk'; and it could not be otherwise at the stage of applying for a section 18 enforcement order that there can as yet only be an apprehension of harm that has not yet realised – a risk of harm rather than already harm itself.

[81] And although *Knoop* says that the harm, in addition to being irreparable must also be immediate, this cannot mean that an applicant for an enforcement order must be able to fix a date and time to the harm actualising – it simply means that the harm must indeed be threatening in the sense that it can occur any day and time.

[82] And this does seem to be the case here: In the context of by now more than four years of seemingly wilful default on the side of the appellants, the respondents have become aware that the A1 Group of companies of which the appellants are part is crumbling, with several of the appellants' sister companies opting for voluntary liquidation and creditable allegations of the syphoning off and redistribution of public money invested within the group. Given in particular the financial information blackout the appellants have directed the past four years at the respondents, there clearly is a 'real and substantial risk' that Homii will follow the example of its sister companies. Should it do so, the loss of the public money that the UIF has invested with Homii will be irrevocable.

[83] The appellants' attempt to refute on appeal the respondents' averments concerning the financial position of the A1 Group simply has no wings. To state the obvious: In motion proceedings an applicant places the facts on which its application is based before Court in a founding affidavit. The respondent can then attempt to refute those facts by placing contradicting facts before the Court in its answering affidavit. Bald denials as the appellants have offered up to now, not undergirded by documentary or other evidence do not contradict the respondents' averments in the founding and any further affidavits. This is so in particular where, as here, the denying party (the appellants) has all the information at its exclusive disposal with which, were it possible, to dispel the averments in the respondents' affidavits. The only conclusion

³² *Knoop* (above) at para [47].

that can be drawn from the fact that the appellants have not despite ample opportunity produced such evidence, is that there is none. In sum, these averments concerning the A1 group's financial condition stand, and this appeal must be decided on their basis, as was the case with Davis J's enforcement judgment.

[84] Accordingly, the appellants' challenge to Davis J's conclusion that the respondents will suffer irreparable harm should the enforcement order not be granted must be dismissed and the holding in this respect upheld.

The appellants' irreparable harm

[85] This leaves only the question whether the appellants would suffer irreparable harm should the enforcement order be allowed to stand.

[86] At the outset in considering this issue I must mention that it is only here that the appellants' purported reliance on section 45 of the Companies Act and the further evidence in that respect that it wished to have admitted would have been relevant had leave been given. As I understood it, the appellants wished to raise the alleged *ab initio* voidness of the agreements due to non-compliance with section 45 as a further factor indicating their irreparable harm. To them, it would be an injustice adding to their supposed irreparable harm if they were to be held to agreements in the interim, with serious consequences, that they know are void and will be declared such on appeal.

[87] If I characterise their submissions correctly concerning this, then they add nothing. That a party subject to a section 18(3) order is held to an earlier order that may later on appeal be set aside is inherent to the mechanism of an enforcement order. This is true whatever the grounds of appeal are. While it is so that the prospects of success on appeal may be higher on one ground than another, the prospects of success on appeal are in the ordinary course not supposed to influence a Court in its decision whether or not to grant an enforcement order. To do otherwise would inevitably prefigure the appeal proper. So understood, it is unclear to me how, had we given leave to the appellants to rely on section 45 and to introduce new evidence, this would have assisted them in this appeal – how, indeed, this new defence and the evidence supporting it, eminently relevant to the appeal itself, are at all relevant in this appeal against the section 18(3) enforcement order.

[88] Turning back to the judgment *a quo*, on the issue of the appellants' possible

irreparable harm should the 18(3) order be allowed to stand, Davis J held that all that will happen if his order in the main application were enforced pending appeal, is that the required shareholders' meeting will be held and a new Board of Directors appointed. This in itself presents no harm to the appellants: the new directors, as were the old would be subject to the Companies act and their more general fiduciary duties and the remedies those entail.

[86] Davis J proceeded to hold that there is nothing in the papers to sustain the submissions on behalf of the appellants that such newly appointed directors would do the appellants harm, whether by neglect or intent. On the contrary: Instead of effecting a 'hostile take-over', as the appellants darkly warned before us, it would clearly be in the interest of the respondents once in control to do their best to save Homii rather than destroy or dissipate it. This would secure the respondents' investment, which is the reason why the 'exceptional remedy' of a controlled take-over of Homii by the respondents instead of simply a calling up of debt in the case of Homii's default was preferred in the Mezzanine and Cession and Pledge agreements.

[87] In any event, so Davis J concludes, should the appeal to the SCA be successful, the situation concerning control of Homii will simply revert to what it was before the new directors were appointed, with nothing on the papers to show that Homii (and Urban) would be any worse off than before. Accordingly, he concluded that no irreparable harm in the event of grant of the enforcement order was shown by the appellants.

[88] Before us, the appellants offered nothing in their challenge to Davis J's holding concerning their irreparable harm that had not already been properly canvassed and, to my mind correctly, rejected in the Court *a quo*. There was only one seemingly new submission: Mr Harpur strongly pressed us to accept the possibility that, should new directors for Homii be appointed pursuant to the enforcement order, they may direct that the pending appeal before the SCA be abandoned. In this way, he continued, the respondents would in this litigation become judges in their own cause.

[89] Apart from being circular, this warning takes the matter no further. First, as with all the other warnings of irreparable harm for the appellants should new directors be appointed, this one is entirely speculative. We simply don't know, and no evidence is on the record to show, exactly what the new directors will or will not do. What we do

know, for which there is ample substantiation on the papers is that the respondents and any new directors appointed by them have every incentive to act in, rather than contrary to Homii's interests. Should they do differently, the speedy remedies afforded by the Companies Act and by virtue of the directors' fiduciary duties would be at the appellants' disposal.

[90] More importantly and to the point: Even were Mr Harpur's warning to become true and newly appointed directors abandoned the appeal to the SCA, this in and of itself has nothing to do with the question of irreparable harm. It may very well be that such a decision, other than ending the long trail of litigation between the parties, is in some way harmful to the appellants' interests. If that is sufficiently the case, the appellants' ordinary remedies for directorial misconduct remain. But it may equally be in the appellants' best interest to abandon the appeal. This Court does not and cannot now know. What is clear is that any decision to abandon the appeal is not inherently harmful, irreparably or otherwise, to the appellants.

[91] Accordingly, the appellants' challenge in this appeal to Davis J's holding that they will suffer no irreparable harm should the enforcement order be granted, must be dismissed. In light of this and my conclusions above concerning exceptional circumstances and irreparable harm for the respondents, this means that the appeal itself in its entirety also stands to be dismissed.

Costs

[91] During the hearing of this appeal, before us and in the respondents' various sets of heads of argument, at various points oblique references were made to the possibility that this appeal was tactical and intended only to delay the process of the respondents getting and implementing what they said was inevitable relief. In this sense there were suggestions that the appeal was brought in bad faith.

[92] None of these were taken any further or canvassed before us. In this light there is no reason that costs should be ordered at anything other than the ordinary scale. Likewise, there is no reason, both in the appeal and concerning the appellants' section 45 application, to depart from the general rule that costs follow the result.

[93] This means that the appellants are liable to pay the costs, including the costs of three counsel (the employment of which the complexity of this matter clearly warranted), arising from both the appeal itself and the application to rely on section 45

and to introduce new evidence.

[94] In this light we order that:

1. The application for leave to rely on section 45 of the Companies Act 71 of 2008 and to introduce new evidence on appeal, is dismissed.
2. The appeal is dismissed.
3. The appellants are ordered to pay the respondents' costs, including the costs of three counsel, on scale C, in the application for leave to rely on section 45 of the Companies Act and to introduce new evidence, and in the appeal.

A handwritten signature in black ink, appearing to be 'JFD Brand', is written over a solid black rectangular redaction box.

JFD Brand
Acting Judge of the High Court
Gauteng Division, Pretoria

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DATE OF THE HEARING:

13 May 2025

DATE OF JUDGMENT:

17 June 2025