



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: 2025-121270

In the matter between:

TWK AGRI (PTY) LTD

Applicant

and

DE LANGE, COERT FREDERICK

First Respondent

INTERSURE FINANCIAL SERVICES (PTY) LTD

Second Respondent

Heard: 8 August 2025

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and by publication on Caselines. The date for hand-down is deemed to be 19 August 2025.

Summary: Application to enforce an earlier order of this Court pending the outcome of an appeal. The requirements of section 18(3) of the Superior Courts Act No 10 of 2013 were met, and the earlier order of this Court, which is sought to be appealed, remains operative and effective.

JUDGMENT

GANDIDZE, J

Introduction

[1] TWK Agri (Pty) Ltd (TWK Agri), the applicant herein, seeks the interim enforcement of Daniels J's Order, dated 30 June 2025, issued against De Lange Coert Frederick (De Lange), the first respondent herein. Enforcement is sought pending the determination of an application for leave to appeal against the Daniels J order:

1.1 Interdicting De Lange from soliciting the custom of or dealing with or in any way transacting with, in competition to TWK Agri, any business, company, firm, undertaking, association or person, which during the period of 36 (thirty-six) months preceding the date of termination of employment of De Lange has been a client of TWK Agri, in the Republic of South Africa for a period of 24 months calculated from 1 May 2025.

1.2 That De Lange be interdicted from directly or indirectly revealing or disclosing or in any way utilising, whether for De Lange and Intersure's own purposes, or for the purposes of any third party, any of TWK Agri's confidential information and/or trade secrets and or client particulars.

[2] The application is in terms of section 18(1), read with section 18(3) of the Superior Courts Act¹, (SC Act), and seeks to alter the usual or default position² that an application for leave to appeal suspends the operation of a court order being appealed, unless the court orders otherwise.

Urgency

[3] It was submitted for TWK Agri that the application concerns further relief regarding a restraint judgment and that restraint matters are inherently urgent.³ In

¹ Act 10 of 2013.

² *Ntlemeza v Helen Suzman Foundation and Another (Ntlemeza)* 2017 (5) SA 402 (SCA); [2017] 3 All SA 589 (SCA) at para 25.

³ *E-Merge IT Recruitment CC v Brits & another (E-Merge)* (2016) 37 ILJ 1145 (LC); [2015] ZALCJHB 426 at para 37.

addition, it was submitted that De Lange and Intersure Financial Services (Pty) Ltd (Intersure), the second respondent, were forewarned as early as 11 July 2025 that the current application would be brought if they applied for leave to appeal the Daniels J order.

[4] De Lange's submissions on urgency pertain to events before and after the restraint application was filed, but prior to the Daniels J judgment being issued. That chronology was relevant to the urgency of the restraint application and has no bearing on the urgency of the current application.

[5] It is not in dispute that De Lange's application for leave to appeal was filed on 21 July 2025. This was the trigger for the current application, brought on 24 July 2025. It follows that the threat of a contempt application made by TWK Agri against De Lange is of no relevance in deciding whether TWK Agri delayed in bringing the current application. As I said, the immediate trigger for an application such as the present is an application for leave to appeal⁴. Accordingly, I am satisfied that TWK Agri acted swiftly in filing this application, once De Lange filed the application for leave to appeal.

[6] I have also considered that unless this application is entertained on an urgent basis, TWK Agri cannot obtain redress in the ordinary course.

[7] For these brief reasons, I am therefore satisfied that the matter is urgent.

De Lange's preliminary issues

[8] TWK Agri is in the business of short-term insurance brokerage, marketing and administering policies with various insurers through insurance brokers. De Lange was one of its insurance brokers until he resigned. The Daniels J order enforced a restraint in favour of TWK Agri against De Lange.

⁴ See section 18(5) of the SC Act.

[9] In the current application, De Lange argues non-joinder, specifically that the clients he is alleged to have poached from TWK Agri, should have been joined as parties to the application. Mr Bester, for De Lange, submitted that the non-joinder issue did not arise in the restraint application or in the application for leave to appeal, but only emerged for the first time in the interlocutory application. He further argued that the Court was not being asked to set aside the Daniels J's order on the grounds of non-joinder, but rather to issue an order stating that the clients ought to have been joined to the current application.

[10] The current application is interlocutory. It arises due to the Daniels J order, as well as De Lange's application for leave to appeal against that order. If non-joinder is an issue now, it should have been raised before Daniels J, or at least during the application for leave to appeal the Daniels J order. Non-joinder cannot, belatedly, be raised for the first time in this interlocutory application.

[11] In any event, I am also not persuaded that the clients in question have a direct and substantial interest in the outcome of the matter in the sense that the relief sought by TWK Agri against De Lange cannot be sustained and carried into effect without necessarily prejudicing their interests.⁵ An order enforcing the Daniels J order pending the outcome of the appeal will cause negligible prejudice, if not mere inconvenience, to the concerned clients. They remain insured, with the only difference being that De Lange cannot act as their broker until the appeal has been determined. This settles De Lange's preliminary point of non-joinder.

[12] The final preliminary point concerns the fact that the current application was issued under a different case number, which is argued to be an attempt to prevent the Court from becoming aware of the parties' cases in the restraint application. The complaint confirms my earlier conclusion that the current application is interlocutory. I have previously addressed the absence of the restraint application papers when the matter was first before Phakade AJ. Regarding the new case number, I have considered the explanation provided on behalf of TWK Agri and accept that the

⁵ *Gordon v Department of Health: KwaZulu-Natal* 2008 (6) SA 522 (SCA); (2008) 29 ILJ 2535 (SCA) at paras 9-10; *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A); 1949 (2) PH K191 (SCA); at 657 and *ABSA Bank Ltd v Naude NO and Others* 2016 (6) SA 540 (SCA); [2015] ZASCA 97 at para 10.

Registrar likely issued a new case number due to an administrative error, and that this was unrelated to any intention by TWK Agri to conceal information from the Court regarding the current application.

[13] With the preliminary points out of the way, I proceed to deal with the merits of the enforcement application.

Section 18 SC Act applications

[14] Section 18 of the SC Act provides that:

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

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

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

[15] Therefore, the three requirements to be satisfied in such applications are (a) exceptional circumstances, (b) proof on a balance of probabilities that the applicant will suffer irreparable harm if the operation and execution of the order are not granted interim effect, and (c) that the party against whom the order was granted will not suffer irreparable harm if the order is enforced in the interim.

[16] The provision applies to applications for leave to appeal in this Court, which has a status similar to that of the High Court.⁶

[17] In *Tyte Security Services CC v Western Cape Provincial Government and Others (Tyte)*,⁷ the SCA explained section 18(3) as follows:

‘... The overarching enquiry is whether or not exceptional circumstances subsist. To that end, the presence or absence of irreparable harm, as the case may be, may well be subsumed under the overarching exceptional circumstances enquiry...

Although it has been postulated that the *second* and *third* are distinct and discrete enquiries, they are perhaps more accurately to be understood as being two sides of the same coin. The same facts and circumstances, which by that stage ought largely to be either common cause or undisputed, will inform both enquiries... Insofar as the *third* goes, although s 18(3) casts the onus (which does not shift) upon an applicant, a respondent may well attract something in the nature of an evidentiary burden. This would be especially so where the facts relevant to the *third* are peculiarly within the knowledge of the respondent. In that event it will perhaps fall to the respondent to raise those facts in an answering affidavit to the s 18 application, which may invite a response from the applicant by way of a replying affidavit.’

[18] What constitutes exceptional circumstances was explained in *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and Another (MV Ais)*⁸ in the following terms:

‘1. What is ordinarily contemplated by the words "exceptional circumstances" is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; "besonder", "seldsaam", "uitsonderlik", or "in hoë mate ongewoon".

2. To be exceptional the circumstances concerned must arise out of, or

⁶ *Road Traffic Management Corporation v Tasima (Pty) Ltd & others* (2019) 40 ILJ 1785 (LAC); [2019] 5 BLLR 434 (LAC) at para 14.

⁷ 2024 (6) SA 175 (SCA); [2024] ZASCA 88 at paras 14-15.

⁸ 2002 (6) SA 150 (C). This test was approved by the Constitutional Court in *Liesching and Others v S* [2018] ZACC 25; 2019 (4) SA 219 (CC).

be incidental to, the particular case.

3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.

4. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.

5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.⁹

Has TWK Agri met the section 18(3) SC Act test?

[19] The right to enforce a restraint exists for a limited period, and this constitutes exceptional circumstances warranting the enforcement of an order sought to be appealed against, as any delay in enforcing the right substantially diminishes the right itself. In *E-Merge*¹⁰ it was held as follows:

‘In this instance, by its very nature, the restraint order contemplates “exceptional circumstances” since it provides immediate protection of the protectable interest and elimination of continued risk in relation to confidential information...’

[20] Unless the Daniels J order is implemented, De Lange does not have to comply with its terms. It is not known how long the application for leave to appeal, and ultimately the appeal itself (or the petition and then an appeal) will take to process. Unless the order sought is granted, TWK Agri’s victory before Daniels J would have been in vain.¹¹

⁹ *MV Ais* at 156I-157C; *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another (Incubeta)* 2014 (3) SA 189 (GJ); [2013] ZAGPJHC 274 at para 17, and *Ntlemeza* at para 37.

¹⁰ (2016) 37 ILJ 1145 (LC) at para 15. See also *Coetzer and another v Actom (Pty) Limited (Actom)* [2015] JOL 34286 (GP) at para 16.

¹¹ *Incubeta* at paras 27-28. See also *Shoprite Checkers (Pty) Ltd v Jansen & another* (2018) 39 ILJ 2751 (LC); [2017] ZALCJHB 503 at para 32.

[21] TWK Agri has no alternative remedy. It is entitled to protect a contractual obligation related to an investment in the customer base and the relationships established there, which a damages claim cannot remedy.¹² It does not lie in the mouth of De Lange to say that if this application is dismissed, he will not process the clients who have already jumped ship. The evidence suggests that he has continued to engage with TWK Agri's clients, albeit he claims that they are approaching him, rather than the other way around.

[22] If the customers are valuable to De Lange's business and his livelihood depends on them, then they are equally important to TWK Agri's business. According to De Lange's version, he resigned from TWK Agri without the intention of 'poaching' its clients, and thus, he must find his own clients. He is skilled and experienced enough to do so. He is not prohibited from working in the insurance industry or from competing with TWK Agri in the Agriculture sector. All he is required to do is to stay away from its clients.

[23] If the appeal succeeds, De Lange can pursue a damages claim against TWK Agri and therefore would not suffer irreparable harm if the restraint is enforced pending the appeal. Conversely, if the Daniels J order is not enforced, TWK Agri does not merely suffer a commercial inconvenience as argued on behalf of De Lange. The 10 clients are important to its business, and Daniels J has already vindicated that right. Proving damages in due course against De Lange will be challenging.

[24] Before concluding, I address one other issue that dominated the submissions of the respective parties, namely, whether prospects of success play any role in determining similar applications, such as this one.

Relevance, if any, of prospects of success on appeal

[25] The parties presented divergent submissions on whether a respondent's prospects of success on appeal should be considered in these applications.

¹² See also *Actom* at para 19.

[26] TWK Agri referred to conflicting judgments on the issue. On one hand, there are judgments to the effect that prospects of success are not relevant to a section 18 SC Act inquiry, and in that regard, reference was made to *Incubeta Holdings (Pty) Ltd and Another v Eliss and Another*¹³ (*Incubeta*) and *Liveiro Wilge Joint Venture and Another v Eskom Holdings Soc Ltd (Liveiro)*¹⁴.

[27] On the other hand, reference was made to a decision of the full bench in *Minister of Social Development Western Cape and Others v Justice Alliance of South Africa and Another (Justice Alliance)*¹⁵ which found that the Court *a quo* should consider the prospects of success of a pending appeal as part of its wide discretion.¹⁶ Reference was also made to *University of the Free State v Afriforum and Another (Afriforum)*,¹⁷ which endorsed *Justice Alliance*, but also accepted that section 18(3) replaced the test espoused in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd (South Cape Corporation)*¹⁸ in its entirety.

[28] TWK Agri submitted that *Incubeta* and *Liveiro* were correct. It argued that before the promulgation of section 18 of the SC Act, the test that applied was formulated by the erstwhile Appeal Court in *South Cape Corporation*¹⁹, which required courts to exercise a wide discretion to determine what was just and equitable, having regard to four factors, one of which was the prospects of success of the pending appeal.²⁰ Secondly, it was submitted that the power to make a decision under section 18 of the SC Act was replaced with the three factors listed there, which do not include prospects of success. In the second place, it was submitted that while the power to determine an application for leave to appeal rests with the court *a quo*, the power to decide a petition and the appeal lies with the appeal court. Furthermore, it was contended that the court *a quo*, which determines

¹³ 2014 (3) SA 189 (GJ); [2013] ZAGPJHC 274 at para 17.

¹⁴ [2014] ZAGPJHC 150 at para 30.

¹⁵ [2016] ZAWCHC 34.

¹⁶ *Ibid* at paras 26 and 27.

¹⁷ 2018 (3) SA 428 (SCA); [2016] ZASCA 165 at para 10.

¹⁸ 1977 (3) SA 534 (A); [1977] 4 All SA 53 (A).

¹⁹ *Ibid*.

²⁰ *South Cape Corporation* at 545D-G.

a section 18(3) SC Act application, cannot usurp the powers of an appeal court by deciding the merits of an application for leave to appeal or the appeal itself. Lastly, it was also submitted that allowing a Court *a quo* to hear the section 18(3) application and consider the prospects of success, which have already been considered, gives the losing party a second bite at the cherry.

[29] The submission for TWK Agri was further that because *Afriforum* did not consider the prospects of success of the matter before it, as it did not have the appeal record, it follows that prospects of success are not a consideration in determining section 18(3) SC Act applications. Reference was also made to other decisions of this Court²¹ and the High Court, which found that prospects of success were an irrelevant consideration in determining section 18(3) SC applications.

[30] On behalf of De Lange, it was submitted that prospects of success were a relevant consideration, and that in *Caterpillar Financial Services South Africa (Pty) Ltd v Zero Azania (Pty) Ltd*²², the Court found that *Afriforum* overtook *Incubeta* when the Court agreed with the approach in *Justice Alliance* that:

‘...the less sanguine a court seized of an application in terms of section 18(3) is about the prospects of the judgment at first instance being upheld on appeal, the less inclined it will be to grant the exceptional remedy of execution of that judgement pending the appeal. The same quite obviously applies in respect of the Court dealing with an appeal against an order granted in terms of section 18(3).’

[31] Notably, paragraph 8 of *Afriforum* records that divisions of the High Court had considered section 18 of the SC Act, and the matter before it was the first time that the SCA was being called upon to interpret a “*novel*” provision. In that matter, the SCA found that “*the appeal record in the review application was not before us. The prospects of success shall not feature in our consideration of whether or not the order of the Full Court should be upheld*”.²³

²¹ *Minister for Local Government, Environmental Affairs & Development Planning, Western Cape v Bitou Municipality & others (Bitou Municipality)* (2020) 41 ILJ 1154 (LC) at para 8.

²² [2023] ZAGPHC 1117 at para 19.

²³ *Ibid* at para 15.

[32] After *Afriforum*, other decisions of the SCA dealt with the interpretation of section 18 of the SC Act.²⁴ In *Knoop NO and another v Gupta (Tayob as intervening party)*²⁵ (*Knoop*), the SCA had occasion to clarify its position on the issue of prospects of success and section 18(3) SC Act applications as follows:

[49] In *Justice Alliance*, it was held that the court has a wide discretion to grant or refuse an execution order once the statutory requirements are satisfied, and that prospects of success in the appeal have a role to play in considering the exercise of that discretion. There is a *dictum* in *UFS v Afriforum* that supports this approach, but in both that case and *Ntlemeza* the record in the main appeal was not before this court and the appeals had perforce to be decided without the full record or any consideration of the merits of the main appeals.

[50] We had the full record in the main appeal before us and had read it in anticipation of dealing with the main appeal, but the argument on the urgent appeal did not include any debate over prospects of success in the main appeal. Our finding that the three requirements for making an execution order were not established means that we did not have to consider whether there is a discretion once they are present and, if so, whether the prospects of success should affect its exercise. There may be difficulties if the high court takes the prospects of success into account in granting an execution order, because it is not clear that the court hearing an urgent appeal under s 18(4) will always be in a position to assess the weight of this factor. As I have noted, in both *UFS v Afriforum* and *Ntlemeza* the court disposed of the appeal by disregarding the prospects of success on appeal. The urgency of the appeal almost inevitably dictates that in this court and possibly in a full court, the appeal court will not have the record before it and will be confined to assessing the prospects of success in the main appeal from the judgment alone. The usual principle that an appeal court decides the appeal on the record before the high court cannot apply in those circumstances. If the language of s 18(4) confers a discretion, is that a full discretion or a power, combined with a duty to exercise that power on proof of the requirements for

²⁴ *Ntlemeza and Premier for the Province of Gauteng and Others v Democratic Alliance and Others* [2020] ZASCA 136; [2021] 1 All SA 60 (SCA).

²⁵ [2021] 1 All SA 17 (SCA); 2021 (3) SA 135 (SCA).

its exercise? These issues may warrant a reconsideration of the approach in *Justice Alliance* on an appropriate occasion.’

[33] Therefore, and as I understand it, what is to be distilled from *Knoop* is that if the requirements in section 18(3) are not satisfied, it becomes unnecessary to consider prospects of success and that an application to enforce an order pending the outcome of an appeal must fail. Secondly, *Knoop* states that there may be difficulties if a Court *a quo* hearing a section 18(3) application considers prospects of success, because it is not clear that an urgent appeal under section 18(4) will always be in a position to assess the weight of this factor. Thirdly, *Knoop* clarifies that in *Afriforum* (and *Ntlemeza*), the appeals were disposed of “by disregarding the prospects of success on appeal”. Fourthly and finally, *Knoop* proposes a reconsideration of the *Justice Alliance* approach, which required the Court *a quo* hearing a section 18(3) SC Act application, to consider the prospects of success on appeal.

[34] *Knoop* has not clarified matters, but based on my understanding of the judgment, De Lange’s prospects of success in the pending application for leave to appeal is a matter for Daniels J to assess and determine when considering that application. Moreover, ultimately, the appeal court, whether leave to appeal is granted or a petition is granted, will decide whether Daniels J correctly enforced the restraint. If the above approach is found to be a misunderstanding of the *Knoop* decision or incorrect, and if prospects of success are taken into account, this is not one of those cases where it can be said that TWK Agri’s prospects on appeal are so weak that this Court should refuse to enforce the Daniels J order while awaiting the outcome of De Lange’s appeal against it.

[35] In all the circumstances, TWK Agri has satisfied the requirements of section 18(3) of the SC Act. It has demonstrated the existence of exceptional circumstances, irreparable harm to itself, and that the respondents will suffer no irreparable harm if the Daniels J order is not enforced pending an appeal process. TWK Agri has no alternative remedy, and a failure to order the interim enforcement of the Daniels J order would render its rights ineffective, if not useless, and make the Daniels J order nugatory.

Costs

[36] Both parties sought costs against each other. TWK Agri was successful in its application.

[37] In the premises, the following order is made:

Order

1. The matter is heard as one of urgency.
2. The orders granted in terms of paragraph 47 of the Daniels J judgment handed down on 30 June 2025 shall not be suspended and shall continue to remain operative pending the outcome of the appeal process instituted by the first respondent, which process shall include the application for leave to appeal and/or petition for leave to appeal and/or any appeal noted, if at all.
3. The first respondent is ordered to pay the applicants' costs.

T Gandidze

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Dr RJC Orton
Instructed by: Snyman Attorneys

For the Respondent: Advocate BC Bester
Instructed by: Matthew Klein Attorneys