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

Not Reportable

Case no: 2671/2024

In the matter between:

TAU MINING CONTRACTORS (PTY) LTD	Applicant
and	
AVENG MOOLMANS (PTY) LTD	1st Respondent
BLACK MOUNTAIN MINING (PTY) LTD	2nd Respondent

Coram: LEVER J.

Heard: 26 January 2026.

Delivered: 06 February 2026.

Summary: Execution of a *spoliation* order – Notwithstanding application for leave to appeal same – Section 18(3) of the Superior Courts Act 10 of 2013 – Applicant to prove exceptional circumstances – Irreparable harm – No exceptional circumstances or irreparable harm established – Application unsuccessful.

ORDER

1. The late filing of the applicant's replying affidavit is condoned.
2. The second respondent is granted leave to file a further affidavit.
3. The section 18(3) application is dismissed.
4. In respect of the first respondent, there is no order as to costs.
5. In respect of the application for condonation, there is no order as to costs.
6. In respect of the section 18(3) application, the applicant will pay the second respondent's costs. Such costs are to be taxed on scale "C" and are to include the costs of two counsel where two counsel were actually engaged in the matter.

JUDGMENT

Lever J

[1] This judgment involves an application under the provisions of section 18(3) of the Superior Courts Act[1] ("the Act") to enforce a *spoliation* order I granted on 1 November 2024 notwithstanding an application for leave to appeal in the same matter. The said order returns possession to the applicant of a certain area of the Gamsberg mine, referred to as the 'mining area' in this application as well as in the original *spoliation* proceedings. The 'mining area' defined by annexure "FA4" in the *spoliation* proceedings is a limited area of the mine as distinct from the entire Gamsberg mine.

[1] 10 of 2013.

[2] Prior to the spoliation application, the applicant was employed as a mining contractor on the Gamsberg mine. The second respondent is the owner of the mining right to the Gamsberg mine. A contractual relationship existed between them. This contractual relationship was ultimately terminated prior to the institution of the relevant *spoliation* application. However, the date and circumstances of the termination of this contract are in dispute.

[3] The applicant claims both a debtor-and-creditor as well as an enrichment lien over the relevant mining area.

[4] Rule 49(11) which previously regulated the enforcement of judgments during the appeal process has been repealed.[2] The common law relating to enforcement of a judgment despite a pending appeal has been replaced by section 18 of the Act. The relevant parts of section 18 of the Act read as follows:

> "18 (1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
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> . . .
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> (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.
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> (4) (a) If a court orders otherwise, as contemplated in subsection (1)-
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> (i) the court must immediately record its reasons for doing so;

[2] Repealed on 22 May 2015.

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal."

[5] The position under the common law has been authoritatively set out by Corbett JA in the matter of *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*[3] ("*South Cape*"). The intention behind the common law rule was to prevent irreparable harm to the party seeking to exercise its right to appeal.[4]

[6] It is apparent from the wording of section 18 of the Act that the prevention of irreparable harm to the party seeking to exercise their right of appeal is still the primary consideration. However, when one examines the differences between the common law rule and the requirements of section 18(1) as read with section 18(3) of the Act, the current position under section 18 is more onerous on the party seeking to enforce the relevant order pending the completion of the appeal process than it was under the common law.[5]

[7] The position under the common law, before section 18 of the Act came to regulate the position when an order is put into effect whilst an appeal process is still pending, gave the relevant High Court a broad general discretion as to whether to grant relief or not.[6] This is no longer the case.

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[3] 1977 (3) SA 534 (AD) at 544H to 545H.

[4] *Supra* at 545B.

[5] *University of the Free State v Afriforum and Another* 2018 (3) SA 428 (SCA) paras 9 to 11.

[6] *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) para 20.

[8] Again, under the common law, where there was potential for irreparable harm to both parties should the order be put into effect before the appeal process was finalised, the court would weigh up the balance of hardship as one of the factors to be considered in making the decision relating to the enforcement of the order pending the finalisation of the appeal.[7] This balance of hardship is no longer a consideration under the provisions of section 18 of the Act. This is evident from section 18 itself.

[9] The probability of success in the contemplated appeal process is not mentioned anywhere in the wording of section 18 of the Act. However, the Supreme Court of Appeal (SCA) has determined that the prospect of success still plays a role.[8]

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

[11] It is evident from the provisions of section 18(1) that a person who seeks to put a judgment and order into effect before the finalisation of the appeal process, must establish 'exceptional circumstances' to depart from the norm of an appeal process suspending the operation of such order pending the finalisation of the appeal. Reading section 18(1) together with section 18(3), the onus of establishing such 'exceptional circumstances' would fall on the applicant for such relief.

[12] In addition to establishing 'exceptional circumstances', the applicant must, under the provisions of section 18(3), establish on a balance of probabilities

[7] *South Cape* (*Supra*) fn 3 at 545F.
[8] *University of the Free State v Afriforum and Another* (*Supra*) fn 5 paras 14 and 15.

that it would suffer irreparable harm if the order being the subject of an appeal is not put into effect, and that the opposing party (the appellant) will not suffer irreparable harm if such order is put into effect.

[13] In developing the law relating to the application of section 18, Sutherland J in the case of *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another*[9] ("*Incubeta*") set out the position on determining 'exceptional circumstances'. I quote the relevant passages:

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

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

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

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

1. What is ordinarily contemplated by the words "exceptional circumstances" is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; "besonder", "seldsaam", "uitsonderlik", or "in 'n hoë mate ongewoon".
2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.
3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.

[9] 2014 (3) SA 189 (GJ).

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.'

Significantly, although it is accepted in that judgment that what is cognisable as 'exceptional circumstances' may be indefinable and difficult to articulate, the conclusion that such circumstances exist in a given case is not a product of a discretion, but a finding of fact.

The survey of authorities addressed by Thring J included a broad range of circumstances, and his summation or compendium appears to be of universal application. Nevertheless, it seems to me, to be necessary to express caution about importing from one kind of enquiry into another kind of enquiry an *understanding* of a familiar phrase. It is important to appreciate that Thring J was not addressing the phrase in s 18 of the SC Act but in the provisions of s 5(*a*)(iv) of the Admiralty Regulation Act 105 of 1983, which confers a power on a competent court to direct an examination of various things in order to procure evidence.

A given phrase in any statutory provision has a function specific to that provision and to that specific statute and the primary aim of the interpreter is to discover the function it performs in that specific context. It may perform a different function in another statute and one must avoid being seduced by beguiling similarities.

The context relevant to s 18 of the SC Act is the set of considerations pertinent to a threshold test to deviate from a default position, ie the appeal stays the operation and execution of the order. The realm is that of procedural laws whose policy objectives are to prevent avoidable harm to litigants. The primary rationale for the default position is that finality must await the last court's decision in case the last court decides differently – the reasonable prospect of such an outcome being an essential ingredient of the decision to grant leave in the first place. Where the pending happening is the application for leave itself, the potential outcome in that proceeding, although conceptually distinct from the position after leave is granted, ought for policy reasons to rest on the same footing.

Necessarily, in my view, exceptionality must be fact-specific. The circumstances which are or may be 'exceptional' must be derived from the actual predicaments in which the given litigants find themselves. I am not of the view that one can be sure that any true novelty has been invented by s 18 by the use of the phrase.

. . .

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

[14] The SCA, in the matter of *Tyte Security Services CC v Western Cape Provincial Government and Others*[11] ("*Tyte*"), took a more nuanced and less formalistic approach to the application of section 18(1) as read with section 18(3) of the Act. In the *Tyte* case, it was argued before the SCA that each of the three requirements set out in section 18(1) and (3) were distinct, separate and self-standing. The response to this argument is important.

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

[16] The relevant passages in the *Tyte* case, showing the SCA's response to the argument that the three requirements that need to be established under the

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[10] *Supra* paras 16 to 24.

[11] 2024 JDR 2306 (SCA); 2024 (6) SA 175 (SCA).

provisions of section 18(1) and (3) are distinct, separate and self-standing, read as follows:

"Whilst there are indeed statements in those judgments that would appear to support counsel's fundamental hypothesis, they seem to have been made in passing. They thus call for closer examination in this matter. An important point of departure, so it seems to me, is that consideration of each of the so-called three requirements is not a hermetically sealed enquiry and can hardly be approached in a compartmentalised fashion.

It is important to recognise that the existence of 'exceptional circumstances' is a necessary prerequisite for the exercise of the court's discretion under s 18. If the circumstances are not truly exceptional then that is the end of the matter. The application must fail and falls to be dismissed. If, however, exceptional circumstances are found to be present, it would not follow, without more, that the application must succeed.

. . .

What constitutes irreparable harm is always dependent upon the factual situation in which the dispute arises, and upon the legal principles that govern the rights and obligations of the parties in the context of that dispute. It was accepted in *Knoop* that <u>'(t)he need to establish exceptional circumstances is likely to be closely linked to the applicant establishing that they will suffer irreparable harm if the ... order is not implemented immediately'</u>. The same, I dare say, can be said of its counterpart, the absence of irreparable harm to the respondent. In that sense, the presence or absence of irreparable harm, as the case may be, can hardly be entirely divorced from the exceptional circumstances enquiry. It would perhaps be logically incoherent for a court to conclude, on the one hand, in favour of an applicant that exceptional circumstances subsist, but, on the other, against an applicant on either leg of the irreparable harm enquiry.

The argument, as I have it, is that, as the language of s 18(3) is clear – it is for an applicant, in addition to exceptional circumstances, to prove on a balance of probabilities that it will suffer irreparable harm and conversely the other party would not. A court is thus required to undertake what would be in the nature of a tick-box exercise by enquiring into and satisfying itself as to the *first,* then the *second* and finally the *third,* in that order. Unless each box is successfully ticked, the applicant must fail. Here, so the argument proceeds, the High Court failed to undertake such an exercise; had it done so, it could not permissibly have ticked the third box; consequently, the s 18 application should have failed. Even accepting that the legislature has employed the words 'in addition [to exceptional circumstances] proves on a balance of probabilities' in s 18(3), it would be passing strange that, if an applicant comes short in respect of either the *second* or *third* requirements, it would nonetheless still be able to successfully meet the exceptional circumstances threshold. The use of the words 'in addition proves' in s 18(3) ought not to be construed as necessarily enjoining a court to undertake a further or additional enquiry. The overarching enquiry is whether or not exceptional circumstances subsist. To that end, the presence or absence of irreparable harm, as the case may be, may well be subsumed under the overarching exceptional circumstances enquiry. As long as a court is alive to the duty cast upon it by the legislature to enquire into, and satisfy itself in respect of, exceptional circumstances, as also irreparable harm, it does not have to do so in a formulaic or hierarchical fashion."[12] (References omitted and the emphasis is mine.)

[17] In the *Tyte* case, as can be seen from the passages quoted above, the SCA recognises the fact that in most cases, the irreparable harm would be subsumed into the 'exceptional circumstances'. In those circumstances, one would of necessity rely on the same facts to establish both requirements.

[18] In the *Incubeta* case, it is emphasised that exceptional circumstances is a finding of fact and not an exercise of a judicial discretion. It was also emphasised in the *Incubeta* case that a finding of exceptional circumstances must emerge and be evident from the factual predicament that the litigants find themselves in.

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[12] *Tyte* (*Supra*) fn 11 paras 10 to 14.

[19] In the present matter, the application for leave to appeal the spoliation judgment and order and this application were heard on consecutive days. I have written a separate judgment in the application for leave to appeal, which will be handed down on the same day as this judgment. In that application for leave to appeal, I gave both applicants in that matter (the respondents in this matter) leave to appeal on several grounds. Self-evidently, this means that on those grounds where leave to appeal has been granted, the respondents have a reasonable prospect of success. On the strength of the authorities referred to above, this is one of the factors I must consider in assessing the existence or otherwise of irreparable harm.

[20] At this point, I need to mention the standing of the first respondent herein (Aveng Moolmans). The first respondent belongs to a group of companies (the Moolmans Group), and from 1 April 2025, a different corporate entity in that group took over the bulk mining contract with the second respondent (Black Mountain Mining or BMM). This issue came up in the application for leave to appeal and I dealt with it as briefly as circumstances would allow. In the application for leave to appeal, I ruled that the first respondent herein (the first applicant in the application for leave to appeal), had legal standing in the application for leave to appeal by virtue of the original court order I made against it. The position is very different in these proceedings. I made my *prima facie* views known to the parties in open court. Ms Cane SC, who represented the first respondent herein, was given an opportunity to take instructions. After taking such instructions, Ms Cane informed the court that her client was willing to accept the court's *prima facie* view of what the end result would be – that there be no order of costs against the first respondent in these proceedings, and that there also be no order of costs in favour of the first respondent in these proceedings. However, Ms Cane indicated that her client wanted her to place certain things on the

record before doing so. Ms Cane placed such facts on the record. They are not directly relevant to this judgment. I asked Mr Hollander who appeared for the applicant herein what his client's position was in regard to the first respondent's position. Mr Hollander said his client did not seek a costs order against the first respondent in these proceedings. In regard to the first respondent herein, that is the order I intend to make.

[21] I need to consider an application by the applicant to condone the late filing of its replying affidavit which was filed several months out of time. Consequently, should the applicant be granted such condonation, the respondent's conditional application to file a further affidavit responding to new material raised in the replying affidavit will need consideration.

[22] The exact extent of the lateness of the replying affidavit is contested by the parties, but it was at least 90 days out of time. The explanation given was that, shortly after the spoliation judgment was handed down, the applicant went under business rescue. During that time period, the applicant was dealing with another court application to prevent the second and first respondents from using certain mining equipment that belonged to the applicant or that the applicant was responsible for. Further, the business rescue practitioner appointed his own attorneys who had to familiarise themselves with the matter. Also, the business rescue practitioner needed assistance and input of the chief executive officer (CEO) of the applicant, who at the time had to be out of the country because his son suffered from a rare genetic disorder and his son could only receive the necessary treatment overseas.

[23] Mr La Grange SC pointed to gaps in the time line that were not, on his submission, adequately explained, and submitted that the business rescue

practitioner and the CEO could have been in contact by electronic means, such as a video conference.

[24] On balance, my view is that the applicant has, despite the shortcomings pointed out by Mr La Grange, established a just cause. The second respondent has filed an additional affidavit dealing with such new matter as needed to be traversed. I believe the late filing of the applicant's replying affidavit ought to be condoned, and that the second respondent be granted leave to file the additional affidavit which has already been conditionally filed. Neither party will suffer any prejudice in these circumstances. Such issues as the gaps not explained in the timeline, and the unnecessary proliferation of documents in these proceedings, which the second respondent is largely responsible for, will be revisited when dealing with the issue of costs.

[25] Mr Hollander, for the applicant, argues that the applicant has both a debtor-and-creditor lien as well as an improvement lien over the mining area as defined in annexure "FA4" to the founding affidavit in the *spoliation* application. That these liens only have value to the applicant by virtue of the ore under the mining area. That the second respondent, through the other mining contractors it employs, is now mining the ore contained under the relevant mining area. That this ore deposit will be mined out in a period of thirty months. In these circumstances, he submits that by the time that any possible appeal is finalised in this matter, the ore in the relevant mining area will be mined out. Accordingly, he argues that the liens would then be worthless to his client by the time that any appeal process would be finalised. Mr Hollander also submits that the second respondent is facing an application for its winding-up. He submits that this constitutes both the exceptional circumstances his client relies upon, and the irreparable harm

that his client will suffer if it is not afforded the relief prayed under section 18 of the Act. Further, Mr Hollander contends that the second respondent would suffer no irreparable harm as it could simply mine elsewhere on the Gamsberg mine or on any of the two other mines the second respondent operates.

[26] In answer to Mr Hollander's submissions, Mr La Grange argues that: A lien has no inherent value; The work done by the applicant, including the so called improvements, was contemplated and provided for by the contractual arrangement that existed between the parties at the material time; That accordingly, liability for payment for work done needed to be established in accordance with the mechanisms provided for that purpose in the contract between them; The said contract provided mechanisms for both undisputed amounts and disputed amounts to be resolved; The applicant never raised a dispute in relation to payment for the alleged improvements from the start of the contract until a letter dated 11 September 2024 (annexure "AA22"), about six weeks before the contract came to an end on the version most favourable to the applicant; That the improvements upon which the enrichment lien were based were not *sine causa*; In respect of the debtor-creditor-lien, the second respondent has provided security for that claim in the order of about R28 000 000 (Twenty-eight Million Rand); and That the life of the mine is in excess of ten years, which should provide ample time for the applicant to pursue payment for the alleged improvements to the mine, either under the mechanisms provided by the contract (arbitration) or by instituting action in an appropriate court. Further, in relation to the winding-up application his client faced, Mr La Grange submits that the application was brought by the present applicant and that it was an abuse of the court process. He also submits that it was not being actively pursued.

[27] On the view I take of the matter, this second last submission is the most persuasive. One must remember that the purpose of section 18 of the Act is the same as was provided under the common law. That is to protect the initial loser, who decides to exercise its right of appeal, from suffering irreparable harm if at the end of the day it succeeds in its appeal. The irreparable harm contemplated by section 18 of the Act, in my view, means just that, that such harm is irreparable. In other words, it is harm that cannot otherwise be recovered from, and would leave the applicant with no remedy to recover the amount it claims in respect of the improvements it alleges it made to the mine.

[28] Exceptional circumstances and irreparable harm are to be decided upon on the facts as they exist between the parties at the material time. On the facts as they were presented to this court, the life of the mine is ten years plus. The applicant does not have to wait until the appeal process is finalised to pursue its claims for enrichment against the second respondent. Nothing stops the applicant with proceeding with such claims immediately. Indeed, the applicant has not explained why it has not done so yet.

[29] I accept that the applicant will lose the utility of holding its security provided by the claimed liens against the second respondent. Thereby, it also loses the leverage the holding of the lien might have as against the second respondent. However, this harm is not irreparable in the sense contemplated by section 18 of the Act. The applicant can still institute its claims either by arbitration or action to establish and quantify its enrichment claims. Further, I accept that once this is done, there will still be value in the mine itself against which the applicant might execute to satisfy any ruling or judgment that it might obtain in its favour. In these

circumstances, I hold that the applicant has not established either the exceptional circumstances it claims or the irreparable harm it might suffer.

[30] On the costs issue, there are three matters to be considered. The first is the issue of the costs relating to the first respondent. The second is the costs occasioned by the application for condonation. Finally, the costs relating to the section 18(3) application.

[31] On the first issue, the facts and circumstances have already been set out above. There is no dispute, therefore, there will be no order in favour of, or against the first respondent. In short, there will be no order as to costs as far as the first respondent is concerned.

[32] On the issue of the costs relating to the application for condonation, the applicant sought costs in the event that the condonation was opposed. It was in fact opposed. However, Mr La Grange had a valid point that there were aspects that were not adequately explained. Nonetheless, the second respondent was responsible for a vast proliferation of papers in the condonation proceedings which were not strictly necessary. Taking all these factors into account, I believe it would be equitable in the circumstances to make no order as to costs in respect of the condonation proceedings.

[33] On the issue of costs of the section 18(3) application. There is no reason why costs should not follow the event. The issues are such that the matter warranted the employment of two counsel. For the same reason, costs are to be taxed on scale "C".

[34] Accordingly, the following order is made:

1. The late filing of the applicant's replying affidavit is condoned.
2. The second respondent is granted leave to file a further affidavit.
3. The section 18(3) application is dismissed.
4. In respect of the first respondent, there is no order as to costs.
5. In respect of the application for condonation, there is no order as to costs.
6. In respect of the section 18(3) application, the applicant will pay the second respondent's costs. Such costs are to be taxed on scale "C" and are to include the costs of two counsel where two counsel were actually engaged in the matter.

[redacted]

L.G. LEVER
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION, KIMBERLEY

Appearances

For Applicant:	Adv L Hollander & Adv J Harmse
Instructed by:	Van De Wall Inc.
For 1st Respondent:	Adv Cane (SC), Adv Schafer & Adv Ndlovu
Instructed by:	Duncan & Rothman Inc.
For 2nd Respondent:	Adv WG La Grange (SC) & Adv DS Hodge
Instructed by:	Duncan & Rothman Inc.