IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 14077/2024P

In the matter between:

eTHEKWINI TENNIS ASSOCIATION	**FIRST APPLICANT**
EVOLV OUTDOOR (PTY) LIMITED	**SECOND APPLICANT**

And

THE CITY MANGER, eTHEKWINI METROPOLITAN MUNICIPALITY	**FIRST RESPONDENT**
eTHEKWINI METROPOLITAN MUNICIPALITY	**SECOND RESPONDENT**

JUDGMENT

<u>BEZUIDENHOUT J</u>:

[1] Applicants seek an order in terms of section 18(1) of the Superior Courts Act putting into effect the order of Seegobin J of 24 October 2025 and accordingly that it does not be suspended due to the notice of appeal to the Supreme Court of Appeal which was filed by Respondents.

[2] It was submitted that in terms of section 18(1) and (3) the Court is empowered to suspend the implementation of the suspension of the order pending the application for leave to appeal. There must however:

1. Be exceptional circumstances
2. On a balance of probabilities that he or she will suffer irreparable harm if the order is not granted.
3. On a balance of probabilities that the other party will not suffer irreparable harm if the Court so orders.

It was submitted that Respondents did not point to any harm.

[3] Respondents submitted that Applicants should have brought the application earlier. It was submitted that Applicants were notified of the application on 23 December 2025. It was submitted that section 18 applications are by their nature urgent. It was submitted that it was only on 22 December 2025 that the section 18 application became necessary when the application was launched at the Supreme Court of Appeal. Due to miscommunication Applicants only became aware of the application for leave to appeal to the Supreme Court of Appeal on 22 January 2026 and thereafter acted with urgency. The matter was then dealt with on an urgent basis.

[4] There is no general rule about what constitutes exceptional circumstances each case having to be decided on its own facts. Exceptional circumstances denotes something out of the ordinary or of an unusual nature. The second and third requirements are the two sides of the same coin. It was submitted by Applicants that in the case of University of the Free State v AfriForum 2018(3) SA 428 SCA in paragraph 15 it was held that the prospects of success are relevant in deciding whether a case is exceptional. It was submitted that in his judgment Seegobin J set out seven grounds for setting aside the decision of the Municipal Manager. It was therefore submitted that there was no prospects of success on appeal. It was submitted that the seven reasons on which Seegobin J set aside the decision of the manager and the rejection that the land was public open space showed that the manager did not apply his mind properly to the bylaw. It was submitted that each of the grounds set out by Seegobin J were sufficient for setting aside the decision. Respondents would thus have to satisfy on appeal that the court *a quo* was wrong not only on one but on five of the seven grounds of the judgment. The categorisation of the land as public space for purposes of the bylaw is an error of law which means that the decision fell to be set aside in terms of section 6(2)(d) of PAJA and the rejection of the appeal on the grounds that the land was public open space and that the manager therefore did not apply his mind.

[5] It was submitted that Respondents only challenged three grounds namely those dealing with section 7(5)(b) of the bylaw. It was submitted that as Respondents did

not include the grounds relating to the finding that the property was public open space Respondents have no prospects of success.

[6] The ground of appeal deals with the court's reliance on a traffic report filed and it is contended that the court accepted this report when it set aside the manager's decision. It is admitted that it did not do so on the basis that it was something which the decision maker ought to have taken into account. The report did not exist at the time that the decision was made and therefore could not have been taken into account. It was submitted that the court relied on the report coming to the conclusion that the matter should not be referred back to the manager but instead should make a substitution order. There have been delays by Respondents in this matter and the boards can be removed after it had been erected.

[7] It was further submitted in respect of irreparable harm that First Applicant faced imminent closure because of the delay in having the board erected. Second Applicant will lose approximately R250 000.00 per month in lost revenue for every month that the board is not operational. Second Applicant will lose approximately R1 500 000.00 in revenue and R1 000 000.00 in profit for every month that the board is not operational. Applicants rely on the financial loss to show irreparable harm. It is submitted that financial loss should be taken into account to determine irreparable harm.

[8] It was further submitted that there was no harm to Respondents if the boards were erected. They will suffer no prejudice because the boards can be removed if the

appeal succeeds and the board would be compliant with the bylaws as appears from the report of Emerald Sky. It is submitted that as far as costs are concerned the conduct of Respondents is deserving of censure and justifies a punitive costs order.

[9] It was submitted on behalf of Respondents that the decision maker did not have the report and that it could therefore not take it into account and the court should therefore not have accepted the report. There was no specific definition of irreparable harm and there was nothing exceptional in this case. Applicants were not in a position to show that there was exceptional circumstances.

[10) It would appear that the main thrust of Respondents submissions is that the report of Emerald Sky which Seegobin J took into account at page 62 of the papers in paragraph 37 was incorrect. Paragraph 37 reads:

> "It is clear from the above that had the advice from the municipalities LUC been heeded and the report of Emeral Sky accepted, the advice of the ETA would have been different. I accordingly consider that the failure to utilise the provisions of section 7(5)(b) of the bylaw on the issue rendered the process unfair in the circumstances."

It was therefore contended by Respondents that the matter should have been sent back for hearing with the report of Emeral Sky.

[11] In University of Free State v AfriForum and Another 2018 (3) SA 428 (SCA) it was held that what was required was proof on a balance of probabilities that the

Applicant will suffer irreparable harm if the order is not granted. And conversely that Respondent will not if the order is granted. Further that the exceptional circumstances 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.

[12] In Multisure Corporation (Pty) Ltd v KGA Life Limited and Another 2780/2021 (2022) ZAECQBC dated 30 August 2022 it was held in paragraph 30:

> "The requirements for Multisure to demonstrate that it will suffer irreparable harm if the relief it seeks is not granted is in this instance closely linked to the duration of exceptional circumstances. In Premier for the Province of Gauteng and Others v The DA and Others the Supreme Court of Appeal confirmed that there is no prohibition on the set of facts giving rise to irreparable harm and exceptional circumstances. The ordinary meaning of harm is injury, damage or ill effect. For harm to be irreparable the effects or consequences must be irreversible or permanent. The financial harm occasioned to Multisure is continuous and serious as described. The business is losing money with each passing month. Multisure has downsized and being forced to rely on its saving and the sale of shares. The onus placed on immovable property on the market in order to raise further capital. It has established on a balance of probabilities that it will suffer irreparable harm if the relief sought is not granted."

[13] It was held in Incubeta Holdings v Ellis 2014 (3) SA 189 (GJ) in paragraph 27:

"The forfeiture of substantive relief because of procedural delay, even if not protracted in bad faith by a litigant ought to be sufficient to cross the threshold of exceptional circumstances."

[14] In Knoop N.O. v Gupta 2021 (3) SA 135 (SCA) it was held in paragraph 48 that it was not a balancing exercise between the two as set out in the judgment of the University of The Free State v AfriForum but both must be established on a balance of probabilities. If Applicants cannot show that Respondents will not suffer irreparable harm by the grant of the execution order that is fatal.

[15] It must therefore be considered if there are exceptional circumstances and whether on a balance or probabilities there will be irreparable harm to Applicants and none to Respondents. To do so the facts of the case must be considered.

[16] As set out above Applicants are suffering severe financial prejudice which was also found to be a factor in the Multisure Corporation (Pty) Ltd case. Respondents will not suffer any prejudice as appears from the papers and the submissions and it was also not contended on behalf of Respondents that it would suffer any financial prejudice. It was not even indicated that it would suffer prejudice of any sort.

[17] In respect of the prospects of success it was submitted that the report should not have been taken into account by Seegobin J in his judgment. However it appears that it was placed before him and that there was no objection thereto and the parties

were satisfied that he consider it in his judgment as he did. He therefore exercised his judicial discretion not to refer the matter back but to make a substituted order. It would accordingly appear to me that the prospects of success in this appeal is not of such a nature that one can say that another court would come to a different conclusion.

[18] I do not consider it necessary in these circumstances that an order of costs on attorney and client scale be awarded. Respondents are entitled to exercise their rights in respect of an appeal as is set out in the Act and Rules.

The following order is made:

1. The order of Seegobin J on 24 October 2025 shall not be suspended pending the final determination of the applications for leave to appeal against the order.
2. Respondents are ordered to pay Applicants costs on scale (c).

[redacted]

P C BEZUIDENHOUT J.

JUDGMENT RESERVED ON: 5 FEBRUARY 2026

JUDGMENT HANDED DOWN: 16 FEBRUARY 2026

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