REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case Number: **006216/25**

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

09/03/2026 [redacted]
DATE SIGNATURE

In the matter between:

ZAHEER CASSIM *N.O*	First Applicant
STEPHEN SMITH *N.O*	Second Applicant
BUSMARK 2000 (PTY) LTD	Third Applicant
and	
BOMBELA CONCESSION COMPANY (RF) (PTY) LIMITED	First Respondent
INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LIMITED	Second Respondent

APPLICATION FOR LEAVE TO APPEAL AND SECTION 18(3) APPLICATION JUDGMENT

MANOIM J:

[1] In this judgment I am dealing with two applications. First, an application for leave to appeal brought by Bombela Concession Company (RF) (Pty) Limited (Bombela) which was the first respondent in what I will term the main matter. The second, is an application brought in terms of section 18(3) of the Superior Courts Act, 10 of 2013, by the successful parties in the main matter. They are Busmark 2000 (Pty) Ltd (in business rescue), (Busmark), a firm in business rescue, and its two business rescue practitioners, Zaheer Cassim and Steven Smyth. For convenience I will refer to the BRPs and Busmark as the applicants, as they were in the main matter and as they are in the section 18(3) application, and to Bombela by name.

[2] The two applications are intertwined and with the agreement of both parties I heard them at the same time.

The main application

[3] Busmark manufactures buses. One of its customers was Bombela which has a concession from the Gauteng Province to run the Gautrain for which, inter alia, it requires buses. Bombela awarded Busmark a contract for the manufacture of various sizes of buses in 2018 (the Supply Agreement). The ones that concern this matter are three classes – 9, 12 and 18, meter buses.

[4] The Supply Agreement regulated the relationship between the two parties, providing inter alia for delivery times, warranties and penalties. Pursuant to it, Busmark procured a performance guarantee from the IDC, the second respondent in the main application. But then things went wrong. Eventually Busmark's board of directors placed it into business rescue in 2021. Cassim and Smyth were appointed as the BRPs. I outline this history in my judgment in the main application and need not repeat it here. After the business rescue had commenced, the BRPs and Bombela had amended certain performance terms in the Supply Agreement, but this too did not improve the situation. In brief, at the behest of the BRPs, the applicants brought an application to set aside certain of Busmark's obligations in terms of the Supply Agreement. To found their application, the BRPs relied on the provisions of section 136(2)(b) of the Companies Act, No. 71 of 2008 ("the Act").[1]

[5] This provision allows a BRP to approach a court to inter alia cancel any obligation that the company has in terms of a contract. The Act says the obligation must arise from a contract that the company was party to at the commencement of the business rescue proceedings. The Supply Agreement was extant at the commencement of the BR proceedings. But, as noted, it was amended in some respects after business rescue commenced. Questions that arose in the main application were: Could the BRPs in those circumstances still invoke the section. Furthermore, since a Business Plan had been adopted, did this amount to an impermissible amendment of the business plan. These were

[1] The applicants had originally sought much more sweeping relief but trimmed their cloth in final argument to one of their alternative formulations

the matters I had to decide but, in the end, I found in favour of the applicants and gave the following order:

"The obligations of the third applicant to the first respondent, in relation to the manufacture and delivery of the 7 x 18 metre Units (articulated units) <u>and the warranties and defects as provided for in the Supply Agreement, be cancelled in terms of section 136(2)(b) of the Act;"</u> (My emphasis).

Application for leave to appeal

[6] It is now common cause that the 18 meter buses were never delivered and that Bombela no longer seeks relief in this regard. That deals with the first phrase of the order. But it is the second phrase, that I have underlined that gives rise to the application for leave to appeal. The Supply Agreement provided for warrantees and defects in respect of the 9 and 12 meter buses, which it is common cause were delivered.

[7] The first question that arose in the application for leave to appeal was whether this underlined phrase can be interpreted as extending to the 9 and 12 meter buses, despite not being expressly mentioned in the first part of the phrase. The reason it is relevant is that it is common cause that Bombela seeks to hold Busmark liable in this respect and that Busmark cannot honour these obligations, and hence, if it is excused from these obligations by way of the cancellation this may implicate the performance guarantee with the IDC.

[8] Let me start by stating that this was not an order for relief that I had reformulated. It is in the exact terms provided for in paragraph (e) of the Notice

of Motion, albeit as one of the alternative formulations. Its implications were therefore known to Bombela at the time the case was heard.

[9] The issue now is whether it applies as well to the 9 and 12 meter buses. The applicants state that it clearly does and indeed its application to the delivered buses was the whole purpose of the relief they sought.

[10] Bombela's stance was curious. Counsel partly contended that I had not intended this outcome. This is because the reasons he argued only deal with the 18 meter buses and could not be understood to refer in the underlined phrase to the 9 and 12 meter buses.

[11] I cannot in a leave to appeal re-interpret my reasons. They are there for all to read, but as the applicants argue there are several problems with this approach by Bombela. The first point is the trite, one appeals an order not reasons. As Ponnan JA put it in *Tecmed*;

> *"...appeals do not lie against the reasons for judgment but against the substantive order of a lower court. Thus, whether or not a Court of Appeal agrees with a lower court's reasoning would be of no consequence if the result would remain the same."*[2]

[12] Second, if Bombela reads the order more narrowly, so that the underlined phrase is understood to only apply to the 18 meter buses, then why is it here since it has no further issues it says regarding the 18 meter buses.

[2] *Tecmed Africa (Pty) Ltd v Minister of Health and another* [2012] 4 All SA 149 (SCA) at para 17.

[13] Third, if it thought the error was mine and needed to be rectified, it should have applied in terms of the relevant rule to correct it. It has not done so. It has sought leave to appeal.

[14] I would suggest the reason it has not sought rectification is that the rationale for the decision is clear and applies equally to the delivered buses. That is the continued exposure of liability to Bombela if the obligations were not cancelled.

[15] Were this the only ground of appeal I would have refused leave. The other grounds, however, deal with the interpretation of section 136(2)(b) of the Act. This section, both counsel tell me, has not been previously decided in any case where the facts are similar to the facts of this case. It goes to the heart of what the powers of a BRP are under this section, in respect of pre-business rescue contracts that remain extant post business rescue but get amended as in this case. This alone does raise an issue that merits granting leave to appeal to the Supreme Court of Appeal.

[16] Related to that issue is a second, although self-standing point. That is whether there is a conflict between that section and section 152(4) of the Act which binds the company, creditors and holders of securities to an approved business plan. Can a BRP apply to cancel a contractual obligation once a business plan has been approved. This raises the related question of whether section 136(2)(b) must be read as being subordinate to section 152(4), despite no legislative indication that it should be. [3] Linked to this is a question of fact. Did the terms

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[3] Bombela complains that I did not deal with this point but only section 154 . But as this was an argument about whether one section is subordinate to another; the same reasoning as I gave in respect of section 154 would apply to interpreting section 152(4)'s impact on section 136(2)(b). (See paragraph 29 of the judgment.)

of the business plan mean that cancelling the obligations in the Supply Agreement led to an amendment of the business plan. This is a question of interpretation of the text of the plan that the parties do not agree on. Again, this is an important point of law and fact that another court, on the basis of some decided cases on the binding nature of business plans, might well decide differently. [4]

[17] Bombela put the issue succinctly in its heads of argument thus:

"The Supreme Court of Appeal has not pronounced on the interpretation of s136(2)(b) of the Act, nor on the effect of an adopted plan and s152(4) of the Act on the right to seek cancellation of obligations, and it is submitted that this matter is deserving of that Court's attention."

[18] I therefore grant leave to appeal to the Supreme Court of Appeal.

ORDER

It is ordered that:

1. Leave to appeal to the Supreme Court of Appeal is granted to Bombela;

2. Costs are to be costs in the appeal.

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[4] See *Vantage Goldfields SA (Pty) Ltd and Others v Argomanzi (Pty) Ltd* 2023 (4) SA 568 (SCA) paragraphs 24- 25. But see also the remark in *Knoop v Gupta* that business rescue plans are not writ in stone.

Section 18(3) Application

[19] I turn now to the applicants' section 18(3) application.

[20] Section 18 states in the relevant parts:

"(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."

[21] In *Knoop v Gupta* the SCA summarised the requirements as follows:

" ... an applicant for an execution order must prove three things, namely exceptional circumstances; that they will suffer irreparable harm if the order is

not made; and that the party against whom the order is sought will not suffer irreparable harm if the order is made." [5]

[22] However these criteria are not to be understood to apply rigidly as Ponnan JA held in *Tyte Security Services CC v Western Cape Provincial Government and others* where he explained that:

".. An important point of departure, so it seems to me; is that consideration of each of the so-called three requirement is not a hermetically sealed enquiry and can hardly be approached in a compartmentalised fashion."[6]

[23] Approaching the issue in this way I first consider whether the applicants have made out a case of exceptional circumstances. The factual basis for this was already laid out in the main application and the section 18(3) is largely a reprise and update of these facts. Essentially, the applicants contend that they will be able to end the business rescue if they can conclude an agreement to buy Busmark, with a firm known only as the Strategic Equity Partner or SEP.

[24] The SEP is not willing to buy a business with an ongoing and possibly unlimited liability. This was the basis for the relief sought. If the order is suspended pending the appeal, the SEP will likely withdraw its offer. If it does so the BRPs consider that Busmark will have to be liquidated, with all the consequences that entails, including for its employees. Moreover, they argue that the relief sought in terms of section s136(2)(b), to relieve the company of burdensome

[5] 2021 (3) SA 135 (SCA) at p 154 para 45.
[6] 2024 (6) SA 175 (SCA). 180 paras 10-11; p 182 paras 14-15.

obligations, is by its nature urgent and hence exceptional given the purpose of achieving successful business rescue.

[25] As Sutherland J (as he was then) stated in *Incubeta:*

"In my view the predicament of being left with no relief, regardless of the outcome of an appeal, constitutes exceptional circumstances which warrant a consideration of putting the order into operation. The forfeiture of substantive relief because of procedural delays, even if not contracted in bad faith by a litigant, or to be sufficient to cross the threshold of "exceptional circumstances".[7]

[26] Nor are the applicants' prospects on appeal without merit. The key issues raise policy issues over the interpretation of the business rescue provisions in the Companies Act. In my view the BRPs had put up a compelling argument for their interpretation.

[27] Bombela contends that these are not exceptional circumstances, but it puts up no facts of its own to refute this. It has no basis to question the BRP's contentions regarding the SEP's position, nor to refute the consequences for Busmark if the SEP walks away.

[28] I consider that the applicants have made a case for exceptional circumstances. The same facts illustrate that the applicants will suffer irreparable harm if the relief is not granted. It is a legitimate approach to consider these criteria together. As Ponnan JA stated in *Tyte Security:*

[7] *Incubeta Holdings (Pty) Ltd and another v Ellis and another* 2014 (3) SA 189 (GJ) at paragraph 27

"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."[8]

[29] I now turn to whether Bombela will suffer irreparable harm if the relief is granted. Bombela's prejudice is indirect and at the moment speculative. Currently, Bombela is engaged in litigation against the IDC in respect of a guarantee that the IDC had issued for the performances of Busmark under the contract. Put differently, if Bombela suffers damages in respect of the buses that have been delivered under the contract, it considers that the IDC guarantee is the only place it can go for compensation, but this is speculative. The applicants raise a number of legal arguments about why the relief I granted in the main application does not have a bearing on the question. But even if the applicants are wrong in this respect, it is significant that although the IDC has filed its papers in that matter, it has not raised my order as one of its defences. This is despite the fact that the papers were filed after my order was given, and it can be safely assumed that as the IDC is cited as a party in this matter, it is aware of my order.

[30] Counsel for Bombela argued that the IDC could always file a supplementary affidavit in which this defence is raised. That is a possibility, but a weaker one

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[8] *Tyte* ibid.

than the probability that the SEP might walk away. In any event, Bombela can still persuade the appeal court that its case has merit. Any prejudice it may suffer, which is highly speculative and legally open to question, is temporary if it prevails on appeal in this matter.

[31] I am satisfied then that the applicants have made out a case for section 18(3) relief. As they have been successful in this regard, they should be entitled to their costs including the costs of senior counsel.

ORDER

It is ordered that:

1. The operation and execution of paragraph 1 of my order dated 16 May 2025, which reads*:*

"The obligations of the third applicant to the first respondent, in relation to the manufacture and delivery of the 7 x 18 metre Units (articulated units) and the warranties and defects as provided for in the Supply Agreement, be cancelled in terms of section 136(2)(b) of the Act;"

is not suspended pending any appeal, leave to appeal or petition;

2. Bombela is liable for the applicants' costs, including the costs of two counsel taxable at Scale C.

[redacted]

MANOIM J
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES:

For the Applicants:	N Redman SC and R Bhima
Instructed by:	Shaheed Dollie Inc
For the Respondents:	J E Smit SC
Instructed by:	ENS Africa
Date of hearing:	05 February 2026
Date of Judgment:	9 March 2026