REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: **2025-248625**
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES
DATE **27 FEBRUARY 2026**
SIGNATURE

In the matter between:

WANDERING INVESTMENTS (PTY) LTD	Applicant
and	
MUKS BUS TRUCKS AND TRAILERS (PTY) LTD	Respondent

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be* ***27 February 2026.***

JUDGMENT

KUBUSHI, J

Introduction

[1] The applicant launched an urgent application in terms of section 18(3) of the Superior Courts Act 10 of 2013 (the Act) seeking an order that the eviction order granted on 23 January 2026 by Strijdom J, operate and be executed notwithstanding the application for leave to appeal. The eviction order directed the respondent to vacate the commercial property known as ERF 5[...] W[...] P[...] Manor x65, Pretoria (the property), within fourteen (14) days.

[2] The respondent is the lessee and occupier of the property in question, the lawfulness of which is in dispute. The parties concluded a lease agreement in April 2024 for the occupation date of 1 May 2024 until 1 June 2027, effectively a 3-year lease period. The respondent fell behind on rental, and on 28 October 2025, after persistent non-compliance, the applicant purported to cancel the lease on one month's notice in terms of clause 26.1.6 of the lease agreement. The respondent disputed that the lease was validly cancelled on the basis that the applicant failed to comply with clause 35 when exercising clause 26.

[3] The dispute was heard by Strijdom J who decided that the respondent was in unlawful occupation of the property, ordered the cancellation of the lease agreement and made an order evicting the applicant from the property within fourteen days of the order. On 4 February 2026, the respondent delivered an application for leave to appeal the eviction order and, as such, in terms of section 18(1) of the Act, the eviction order was automatically suspended pending the finalisation of the application for leave to appeal and any appeal thereafter, unless this Court orders otherwise.

Urgency

[4] In support of its argument that the matter be heard on an urgent basis, the applicant contends that the matter is urgent because it has secured an incoming tenant on a five- year lease in respect of the property. It appears that the said tenant was to take occupation by 1 February 2026, but because of a direct consequence of the respondent either only vacating the premises within fourteen days of the eviction order, or in the event of non-compliance by respondent, after the sheriff has

executed the court order to evict the respondent, the applicant was compelled to renegotiate the commencement date of the lease to 1 March 2026. The applicant was as a result compelled to approach this court on an urgent basis first, due to the respondent's application for leave to appeal and its consequential suspension of the eviction order, and second because it required two weeks within which to prepare the property for occupation by the new tenant.

[5] The applicant submits that it cannot obtain substantial redress in due course if the matter is enrolled in the ordinary course. This it contends is so because if the application is not heard urgently, it will suffer immediate and ongoing financial prejudice, including loss of a secured long-term tenant, rental income, continued deprivation of possession, and the inability to commercially utilise or lease the property. The application warrants urgent determination, particularly given the imminent occupation date of the incoming tenant on 1 March 2026, so it is argued.

[6] My take is that that this matter should continue to be heard on an urgent basis pursuant to the urgency that was granted when the matter was argued before Strijdom J, which urgency remains prevalent in the present application. The matter was declared urgent then, and it should remain urgent before this Court.

Applicable Law

[7] The requirements for the implementation of an execution order pending an appeal is governed by section 18 of the Act. The provisions of section 18, in relevance, 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) … … …
>
> (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.

(4) If a court orders otherwise, as contemplated in subsection (1)—

(i) the court must immediately record its reasons for doing so;

(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."

[8] The parties referred me to several judgments wherein the requirements for the implementation of an execution order pending an appeal have been discussed. The Supreme Court of Appeal has recently, in *Tyte Security Services CC v Western Cape Provincial Government and Others,*[1] had an opportunity to relook at these requirements. The following is stated in that judgment:

> "This Court has examined the requirements for the implementation of an execution order pending an appeal in *University of the Free State v Afriforum* (*Afriforum*); *Ntlemeza v Helen Suzman Foundation*; *Premier of Gauteng v Democratic Alliance*; *Knoop v Gupta (Knoop)*; and, most recently, in *Zuma v Downer and Another*. Relying, in part, on some of the statements made in those judgments, in particular *Afriforum* and *Knoop,* counsel for Tyte, argued that it was for an applicant for an execution order (in the position of Royal), to establish three separate, distinct and self-standing requirements, namely: *first*, exceptional circumstances (the *first*); *second*, that it will suffer irreparable harm if the order is not made (the *second*); and, *third*, the party against whom the order is made (in this case Tyte) will not suffer irreparable harm if the order is made (the *third*).
>
> 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.

[1] (479/2024) [2024] ZASCA 88; 2024 (6) SA 175 (SCA) (7 June 2024) paras 9 -17.

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, 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. In its consideration of s 17(2)*(f)* of the Act, the Constitutional Court pointed out in *Liesching and Others v S*:

> ‘As with section 18(1), section 17(2)(f) prescribes a departure from the ordinary course of an appeal process. Under section 17, in the ordinary course, the decision of two or more Judges refusing leave to appeal is final. However, section 17(2)(f) allows for a litigant to depart from this normal course, in exceptional circumstances only, and apply to the President for reconsideration of the refusal of leave to appeal.

In *Ntlemeza*, the requirement of exceptional circumstances is viewed as a “controlling measure.” In terms of section 17(2)(f), the President has a discretion to deviate from the normal course of appeal proceedings – such discretion can only be exercised in exceptional circumstances. The requirement of the existence of exceptional circumstances before the President can exercise her discretion is a jurisdictional fact which may operate as a controlling or limiting factor.’ It has long been accepted that it is ‘undesirable to attempt to lay down any general rule’ in respect of ‘exceptional circumstances’ and that each case must be considered upon its own facts. In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas and Another*, Thring J summarised the approach to be followed. He said that ‘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.’

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: ‘the 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.’ The same, I daresay, 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.

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. The logical corollary of an applicant suffering irreparable harm, will invariably – but not always – be that the other party has not. The enquiry into each can thus hardly be mutually exclusive, particularly because as far as the *third* is concerned, unlike the *second*, the onus cast upon an applicant would be to prove a negative, in accordance with the usual civil standard. This suggests that, as with the exceptional circumstances enquiry, a court considering both the *second* and *third* must have regard to all of the facts and circumstances in any particular case. 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.

What counsel's argument boiled down to was that as each of the *second* and the *third* so-called requirements had to be approached as discrete, isolated enquiries, there was accordingly to be no weighing-up of the irreparable harm of the one as against the other. In that regard, reliance was placed on *Afriforum*, which, in turn, referred with approval to *Incubeta Holdings and Another v Ellis and Another*, where Sutherland J is reported to have said:

> 'A hierarchy of entitlement has been created . . . Two distinct findings of fact must now be made, rather than a weighing-up to discern a "preponderance of equities".'

It is not clear what the learned Judge sought to convey by 'a hierarchy of entitlement has been created.' Counsel experienced some difficulty in trying to explain – or support – such a characterisation." (footnotes omitted)

Exceptional Circumstances

[9] The takeaway from the above judgment is that the existence of 'exceptional circumstances' is a necessary prerequisite for the exercise of the court's discretion under section 18 of the Act. If the circumstances are not truly exceptional, that is the end of the matter. It was also held that '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.'

[10] The exceptional circumstances that the applicant relies on is that it has a secured five-year lease, and that if the suspension is not uplifted it will lose the tenant because the compliance of the obligations of the contract will not be fulfilled.

[11] It has been factually established that the applicant has a secured five-year tenant. This is confirmed by the signed agreement of lease between the applicant and the said tenant. According to that agreement of lease, the tenant is to take occupation of the property on 1 March 2026. The question is whether a secured five-year tenant is something out of the ordinary and of unusual nature, something

uncommon, rare or different, to render it exceptional. I am not persuaded that a secured five-year tenant can be considered as something that is out of the ordinary and of unusual nature, something uncommon, rare or different.

[12] The applicant's argument that further exceptional circumstances are that the respondent is in unlawful occupation of the property because it has been confirmed in the original order that the lease agreement has been cancelled, and that what is suspended by the section 18(1) of the Act is only the execution of the eviction order, has no merit. The eviction order hinges on the cancellation of the agreement of lease. The court would not have ordered the eviction without having cancelled the lease agreement. It cannot at this stage be conclusively said that the respondent is in unlawful occupation until the appeal has been decided. The effect of section 18(1) of the Act is that the whole order is suspended.

[13] The applicant's reliance on *SA Retail Properties (Pty) Ltd v Golden Tee Investments (Pty) Ltd (SA Retail)* [2] in support of its argument that the eviction order only suspends the operation of the original order, is misplaced. The applicant relies on this judgment on the basis that the two judgment are similar. I do not agree. The two judgments are clearly distinguishable. In the *SA Retail* judgment, the findings of the court were based on the invalidity of the agreement and the *mala fides* of the applicant therein, whereas in the current application the validity of the agreement and the *mala fides* of the applicant are not in question.

I have to conclude that the circumstances are not exceptional.

Irreparable Harm

[14] Even if I am wrong in my conclusion that the applicant's circumstances are not exceptional, I do not think that the applicant has been able, on a balance of probabilities, to establish the other two requirements of irreparable harm. In terms of section 18(3) of the Act, an applicant, in addition to exceptional circumstances, has to prove on a balance of probabilities that it will suffer irreparable harm and conversely the other party would not.

[2] (Case No: 2025/189819), delivered 17 November 2025.

[15] The applicant's supposition is that it will lose the 5-year tenant who is supposed to take occupation on 1 March 2026 and that it would, obviously, continue to suffer at the hands of the respondent not paying rental whilst in occupation.

[16] It was argued on behalf of the applicant that the irreparable harm for the applicant, let alone the monetary amount, is double-sided. This it was argued is so because on the one hand the applicant continues to incur loss of rental income because of the respondent not vacating the premises and being in unlawful occupation. On the other hand, the applicant stands to lose a secured 5-year lease that cannot be revived.

[17] However, what tips the scale in favour of the respondent in this regard, is that in such circumstances, the applicant would have a damages claim against the respondent. The contention by the applicant that a damages claim against the respondent may not be realised because of its believe that the respondent has no means, is meritless.

[18] The court in *Dlamini v Ncube and Others*[3] held that an amount owing for rental is not irreparable harm even when there is a very little chance of getting it back because the person owing is indigent or does not have money. I agree that that judgment is not on point with the present application because it dealt with spoliation and residential premises, when the present application is dealing with commercial property and an agreement of lease. However, the abovementioned principle find application in the present matter. The applicant has, as such, not proven the irreparable harm it will suffer.

[19] The applicant has, also, not proven that the respondent will not suffer any irreparable harm. The applicant alleges in its affidavit that should any harm befall the respondent it will be addressed in due course. The applicant does foresee the possibility of the respondent suffering irreparable harm in that is states that if any

---

[3] (01355/2023) [2023] ZAGPJHC 379 (18 April 2023).

harm is suffered by the respondent, it will be addressed in due course. The Supreme Court of Appeal in *Tyte Security Services*[4] held that

> "Any irreparable harm (or even the potentiality of irreparable harm) to a respondent, no matter how slight would irredeemably tip the scales against an applicant. It thus would matter not that the irreparable harm of a respondent was relatively slight or inconsequential or that it was significantly outweighed by that of the applicant. The mere fact of irreparable harm in respect of the respondent, irrespective of its nature or extent, would per force non-suit the applicant. In other words, unless there was no (as in 'zero', in the words of counsel) irreparable harm to a respondent the s 18 application had to fail."

[20] On all of the above reasons, the application falls to be dismissed.

Costs

[21] The Respondent seeks costs on attorney and client scale. This is the scale at which the two parties were litigating. However, the applicant sought punitive costs on the basis of the terms agreed to by the parties stated in the agreement of lease. The respondent on the other hand, has to prove abuse of process by the applicant in order to qualify for a punitive cost order. There is no evidence of any abuse of process by the applicant in this matter. The respondent is, thus, not entitled to such costs. The party and party scale of costs should be awarded on scale B.

Order

[22] The application is dismissed with costs on scale B.

E.M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

[4] Ibid para 17.

APPEARANCES:

For the Applicant:	Adv F A Darby – (082 782 0634)
Instructed by:	Kisch Africa Inc
	Tel: 083 327 6490
For the Respondent:	Adv Y K Ndziba – (078 862 5650)
Instructed by:	Risenga Attorneys (065 933 7796)
Date of the hearing:	12 February 2026
Date of judgment:	27 February 2026