

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 2025-220239

1. NOT REPORTABLE 2. NOT OF INTEREST TO OTHER JUDGES Date: 24 March 2026 Signature: Khaba AJ

In the main urgent application between:

F[...] J[...] L[...]

Applicant

[Identity Number: 8[...]]

And

T[...] G[...] O[...] (formerly L[...])

Respondent

[Identity Number: 8[...]]

In re: the application for leave to appeal between:

F[...] J[...] L[...]

Applicant

[Identity Number:8[...]]

And

T[...] G[...] O[...] (formerly L[...])
 [Identity Number: 8[...]]

Respondent

In re: in the section 18(3) urgent application between:

T[...] G[...] O[...] (formerly L[...])
 [Identity Number:8[...]]

Applicant

And

F[...] J[...] L[...]
 [Identity Number: 8[...]]

Respondent

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

JUDGMENT

Neutral Citation: *F[...] J[...] L[...] v Tarry G[...] O[...] (220239/2025)* [2026] ZAGPJHC
 ---- (24 March 2026)

Coram: Khaba AJ

Heard: 14 January 2026

Delivered: 24 March 2026 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date for hand-down is deemed to be 24 March 2026.

Summary: Application for leave to appeal – s 17(1)(a)(i) of the Superior Courts Act 10 of 2013 – an applicant now faces a higher and a more stringent threshold – leave to appeal refused. The paramountcy principle in crisis: balancing finality, appeals, and the minor's children's best interest under section 18 of the Superior Court's Act- No facts pleaded in order to support defence- applicant's exceptional circumstances were prevalent - applicant's application in terms of section 18 (3) granted.

ORDER

1. The application for leave to appeal is dismissed with costs, inclusive of the costs of counsel on scale C.
2. The application in terms of 18(3) of the Superior Courts Act, No. 10 of 2013, is enrolled as urgent, and non-compliance with the Uniform Rules of Court relating to time periods, forms, and service is condoned in terms of Rule 6(12)(a).
3. The operation of the order granted on 04 December 2025 shall not be suspended and shall be immediately enforceable in accordance with section 18(3) and (4) of the Superior Courts Act, No. 10 of 2013.
4. The costs of the section 18(3) application, shall be paid by the respondent in the section 18(3) application, being Mr. F[...] J[...] L[...], inclusive of the costs of counsel on scale C.

JUDGMENT

KHABA AJ:

- [1]. I shall refer to the parties as referred to in the original main urgent application. This composite judgement deals with two interrelated applications; for leave to appeal and an urgent application in terms of section 18(3) of the Superior Courts Act, No.10 of 2013. The applications were both set down to be heard on 13 January 2026, however the applicant filed his answering affidavit in the urgent section 18(3) application on 12 January 2026, less than 24 hours before the hearing, for which condonation was

sought. The matter was then rolled over until 14 January 2026 to allow the respondent opportunity to file her replying affidavit. The respondent filed her replying affidavit in the section 18(3) application on 13 January 2026. Given the truncated time frames and the imperative to finalise these matters before the minor children were due to commence with their 2026 academic year.

- [2]. The applications were heard together on 14 January 2026, and both applications have their genesis in the decision of this court delivered in the urgent family court on 04 December 2025. During the course of the hearing, firstly, both counsels confirmed that they do not intend to persist with any condonation applications.

- [3]. Although these applications are addressed in a single consolidated judgment, clarity will be served by considering and determining each separately, having regard to the specific facts of each. To describe the parties as having been reluctant to litigate would be an understatement, they have over several months, been engaged in protracted litigation.

- [4]. Before this court are two applications. The first is an application for leave to appeal, filed by the applicant, against the entirety of the order I handed down in the urgent family court on 04 December 2025. The second application is an urgent application brought by the respondent in terms of section 18(3) of the Superior Courts Act, No. 10 of 2013, seeking an order that, pending any application for leave to appeal to the Supreme Court of Appeal, the operation of the court order dated 04 December 2025 shall not be suspended and that it be enforced immediately in accordance with sections 18(3) and (4) of the Superior Courts Act, No. 10 of 2013.

- [5]. Both applications concern the best interest of two minor children namely, D[...] F[...] L[...] a boy born on 19 December 2012 (now 13 years of age), (“D[...]”) and O[...] R[...] L [...], a girl born on 03 June 2015 (now 10 years of age), (“O[...]”). The minor children have attended R[...] School since they were three and four years old respectively and were due to commence the 2026 academic year on 14 January 2026.

- [6]. The procedural history is complex and requires a brief exposition. On 04 December 2025, having heard arguments presented by both counsels, I delivered an order in the urgent family court (*“the main application”*). In terms of the order, the minor children were to remain enrolled at R[...] School for the 2026 academic year, with the parties having to co- sign the contract of enrolment. The applicant was ordered to pay the 2026 school fees and to continue paying the arrears in accordance with the acknowledgment of debt he had concluded with R[...] School.
- [7]. Aggrieved by this decision, on 05 December 2025, the applicant requested written reasons for the order in terms of Rule 49(1)(c). Simultaneously with the request for written reasons; on 09 December 2025, a day before the applicant was required to sign the contract of enrolment, the applicant launched an application for leave to appeal to the Supreme Court of Appeal alternatively to a full Bench of this Division, which has the effect of automatically suspending the operation and execution of the order delivered on 04 December 2025 in terms of section 18(1) of the Act. The written reasons were delivered on 11 January 2026. The written reasons are comprehensive, and I stand by them as set out therein. The respondent opposed the application for leave to appeal.
- [8]. The respondent in the main urgent application, having been unsuccessful in securing a formal undertaking from the applicant in the main urgent application to co-sign the enrolment contract pending the application for leave to appeal. The respondent launched an urgent application in terms of section 18(3) of the Superior Court’s Act, No.10 of 2013 (*“the Act”*). According to the respondent, this application is required to secure the minor children’s enrolment for the academic year commencing on 14 January 2026, having regard to the current suspension of the court order. In essence, the respondent is seeking an order in terms of section 18(3) to confirm that the court order referred to above becomes immediately operable and is not suspended in terms of section 18(1) of the Act, pending; firstly the outcome

of an application for leave to appeal, and secondly, pending any subsequent appeal which may arise from the application for leave to appeal.

- [9]. The factual matrix of this matter is fully set out in my written reasons handed down on 11 January 2026, which I do intend to repeat in this judgment, save to highlight the salient features relevant to this judgment. In summary, the main urgent application consists of Part A and Part B. Part A being the urgent application. In the main urgent application, the applicant sought orders primarily to enrol both minor children at B[...] P[...] M[...] School (“BPM”) for the 2026 school academic year. The applicant further sought ancillary relief to compel the respondent to sign any and all documents on written demand, in order to have both minor children enrolled at (“BPM”) within 48 hours period from receipt of such demand, failing which the applicant be authorised to sign any and all documents required for and on behalf of the respondent, in order to effect such enrolment.
- [10]. The respondent opposed the main urgent application, simultaneously launching an urgent counter application seeking *inter alia* an order that the applicant be found in contempt of the court order dated 25 June 2019, under case number: 56267/2016 granted at the Pretoria High Court. The respondent further sought ancillary relief that the applicant be ordered and directed to make payment of the outstanding R[...] school fees, as well as the school fess for the academic year commencing in January 2026, within seven (7) days’. The amount of R 277, 078.50 to be paid directly to R[...] School in respect of the arrear school fees due in respect of D[...] and O[...] in the amounts of R 155 099.50 and R 122, 069.00 respectively. The amount of R 379 500.00 to be paid directly to R[...] School in respect of school fees in advance, for the academic year of 2026 in respect of both D[...] and O[...], failing which the applicant be committed to imprisonment for contempt of court for a period of thirty (30) days.
- [11]. The parties approached this court on an urgent basis. The applicant’s urgency stemmed from R[...] School cancellation of the contract of enrolment (“COE”) for the 2026 academic year and the imminent closure of the 2026

school registration period. The respondent's urgent counter application was presented as inextricably linked to the same factual matrix concerning the minor children's schooling and the applicant's maintenance obligations.

- [12]. I was satisfied that both applications met the threshold for urgency. The central issue was the schooling and educational stability of the two minor children for the forthcoming year, which was inherently urgent, given the imminent commencement of the 2026 academic year in January 2026 and the need for certainty regarding the minor children's school placement. A delay in resolving the matter would have rendered the primary relief sought by neither party nugatory, as the schools' placements would have been finalised. Furthermore, the respondent's claim that the applicant's alleged contempt was a deliberate strategy to create the crisis amplified the need to consolidate an expeditious adjudication. The question of school fees, the applicant's non-compliance with the divorce order, and the alleged contempt were all fundamental in determining the dispute between the parties. It was neither practical nor in the interest of justice to sever the issues. Therefore, I condoned the non-compliance with the Rules and enrolled the applicant's main urgent application and the respondent's urgent counter application as urgent.
- [13]. The 2019 court order is central. It obliges the applicant to pay the minor children private school fees. The applicant's case was that his financial circumstances had deteriorated, rendering him unable to afford R[...] school fees. The applicant contended that enrolling the minor children at ("*BPM*") was the only viable option to secure their education and it was in their best interest. During the hearing of the main urgent application counsel on behalf of the applicant, Ms. Bezuidenhout handed up from the bar an acknowledgement of debt ("*AOD*") dated 01 December 2025, which the applicant entered into with R[...] School for arrears school fees. The applicant had subsequently made payment in the amount of R 40 338.63 to R[...] School on 01 December 2025. Ms. Bezuidenhout contented during the hearing of the main urgent application that the signed *AOD* renders the respondent's urgent contempt application moot.

- [14]. The respondent's case presented a fundamentally different picture. The respondent demonstrated a protracted history of the applicant's unlawful defaulting on his maintenance obligations, including school fees, even during periods of where he evidently enjoyed a lavish lifestyle involving international travel, luxury vehicles and multiple properties. This pattern suggested the current default was not due to the inability to pay, but rather a deliberate strategy to unilaterally vary the 25 June 2019 court order.
- [15]. The evidence strongly indicated that the applicant allowed R[...] School contract to be terminated and withheld information, creating a crisis to force a move to a cheaper school and thereby sidestepping his court- ordered obligations. A variation application to reduce maintenance is pending in the Randburg Magistrate's Court. The urgent application to change schools was in substance, an attempt to achieve a *de facto* variation of the 25 June 2019 court order, through a different forum, undermining the pending process.
- [16]. The applicant sought to compel the respondent's cooperation or dispense with her consent. The respondent's refusal to agree to ("*BPM*") was not shown to be unreasonable or contrary to the minor children's best interests. To the contrary, the respondent's stance sought to uphold the *status quo* and the existing court order.
- [17]. The paramount consideration in this matter is fundamentally guided by the best interests of the minor children which is paramount consideration in all matters concerning minor children under section 28(2) of the Constitution and section 7 of the Children's Act 38 of 2005. I found the respondent's evidence comprehensively set out in her answering affidavit.
- [18]. The applicant bore the onus to demonstrate that uprooting the minor children from their long- standing school was in their best interest. The applicant failed to discharge this onus. The applicant's case focused predominantly on his alleged financial constraints, not a substantive, child centred evaluation of the minor children's educational needs and emotional merits regarding the B[...] P[...] M[...] School versus R[...] School debacle.

- [19]. The applicant contended that the contract with R[...] school was cancelled., leaving both minor children without a school. The applicant presented B[...] P[...] M[...] School as the only logical and available alternative. The applicant contended that the respondent was obstructing the joint decision making and the court, as the upper guardian has wide powers to intervene.
- [20]. I accepted the respondent's evidence, which was largely uncontroverted, that the applicant orchestrated the present emergency. The applicant unilaterally stopped paying R[...] School fees from March 2025. The applicant knowingly allowed for the contract of enrolment be terminated on 09 October 2025 and withheld the information from the respondent. The applicant launched the main urgent application, only after these actions had created a scenario where the minor children's placement at R[...] School was in jeopardy. This conduct occurred against the backdrop of a habitual breaches of the maintenance order, as detailed in the respondent's affidavit.

The best interest of the minor children, R[...] School vs B[...] P[...] M[...] School:

- [21]. On the balance assessment to the factors in section 7 of the Children's Act, the evidence strongly favoured the minor children remaining at R[...] school. The stability and continuity of the minor children have been at R[...] School since their early years. Uprooting them, especially D[...] who would be in his final primary school year and who is facing another move to a high school shortly, would have cause significant and unnecessary disruption.
- [22]. The respondent provided cogent evidence of the minor children's strong opposition to moving schools, including their emotional attachment to R[...] School and their friends. The applicant's belated and generic assertions in reply did not adequately address these specific concerns, particularly those of O[...].
- [23]. The applicant's alternative proposal involving ("BPM") and a speculative bursary at St. John College was uncertain, disjointed and did not demonstrate to be in the best interest of the minor children. The applicant's claim of a dire financial change was not substantiated to the degree required

to justify ignoring a court order. Counsel on behalf of the respondent, Ms. K Mitchell, contented that the applicant's disclosures in the pending variation application at the Randburg Magistrate's Court demonstrated substantial income and assets. The applicant's lifestyle includes international business-class travel, luxury holidays, and maintaining high value properties and vehicles, as detailed by the respondent -was irreconcilable with the plea of inability to afford school fees. This court could not find on the papers that the applicant's failure to pay school fees was due to genuine inability, rather than simple wilful default.

- [24]. The respondent's evidence on the applicant's financial conduct and the history of non-compliance with the divorce court order to be compelling and largely uncontroverted on the papers. This history, as chronicled in the respondent's answering affidavit, demonstrated a pattern of avoiding maintenance obligations. The submissions that the applicant had orchestrated a crisis by allowing the R[...] School contract to lapse to force a move to a cheaper public school, carried significant weight.

- [25]. The best interest of the minor children are not to be determined in a vacuum. The stability and consistency and the fulfilment of existing agreements that provide for their care are critical factors. The uprooting of both minor children from long standing private school environment to a public school, primarily due to one parent's unilateral desire to reduce expenses (despite evidence of ability to pay), would not serve their best interests. This disruption and potential impact of such a move, against their expressed wishes, outweighed the applicant's financial arguments.

- [26]. Counsel on behalf of the applicant, Ms. Bezuidenhout, contented that the fact that the applicant entered into an acknowledgment of debt with R[...] School regarding the payment of arrear school fees, rendered the respondent's arrears moot and purging any contempt which there may have been. I rejected this submission. The acknowledgment of debt, while a step towards addressing the arrears, did not *extinguish* the debt nor absolve the applicant from his obligations under the 25 June 2019 court order. It was a private agreement. The core relief in the respondent's urgent counter application

was not merely about collecting debt, but about upholding the authority of the court order and addressing the applicant's contemptuous conduct. The pattern of arrear, leading to the cancelation of the school, constituted a *prima facie* breach of the 2019 court order.

- [27]. The acknowledgment of debt ("AOD") did not address only historical arrears. The core contempt lay in the ongoing refusal to comply with the obligation to pay private school fees, an obligation that extends to the 2026 fees. The ("AOD") did not resolve this forward-looking obligation. Furthermore, the manner in which the arrears arose through alleged wilful default remained a live issue relevant to costs and the court's discretion. The applicant's last-minute production of the ("AOD"), signed after the launch of the contempt application, did not purge the contempt application but was a factor in the appropriate remedy.
- [28]. The respondent's urgent counter application also sought an order for the R[...] School fees for the 2026 academic year, which the ("AOD") did not cover. The applicant's obligation to pay future fees at a private school as per the 2019 court order remains live and contentious. The requirements for civil contempt are the existence of a court order, service of the court order and the non-compliance beyond reasonable doubt. The two elements were left undisputed. On the third, the applicant's conduct, history of breaches, and the applicant's lack of credible evidence proving an inability to pay established wilfulness and *mala fides* on the balance of probabilities. The timing and nature of the ("AOD") did not purge this contempt but was a remedial step. Nevertheless, I affirmed the ongoing validity of the court order dated 25 June 2019. Consequently, the issue of contempt was postponed for final determination alongside Part B of the main application. The respondent was entitled to approach this court on an urgent basis to enforce the maintenance order through contempt proceedings as a *process-in-aid* given the imminent threat to the minor children placement caused by the applicant.
- [29]. This judgement addresses both the application for leave to appeal and the urgent section 18(3) application. I have had regard to the comprehensive heads of arguments filed by both counsels, the extensive affidavits and

annexures, and the legal authorities cited. I deal first with the application for leave to appeal.

The Applicant's Application for Leave to Appeal:

- [30]. The applicant raised several grounds of appeal to say the least, which I do not intend to repeat in this judgment. Stated broadly and as set out in the applicant's application for leave to appeal, may be summarised as follows: The court *a quo* erred in finding that the respondent's counter application was urgent. The court *a quo* erred in ordering that the minor children shall remain enrolled at R[...] School and ordering the applicant to ensure the minor children at R[...] School; the court *a quo* erred in ordering the applicant to pay the 2026 R[...] School fees, and to pay instalments in terms of the acknowledgment of debt, and to continue paying R[...] School fees until divorce order is varied and/or substituted by a competent court. The court *a quo* erred in ordering the applicant to pay costs on scale C. The applicant contends that the order effectively imposed obligations upon R[...] School without the school being a party to the proceedings and that it exposed danger of impossibility of performance. The applicant contends that the court *a quo* arbitrarily deprived him of parental responsibilities and rights. The court *a quo* disregarded his inability to pay. The court *a quo* interfered with the pending maintenance proceedings in the Randburg Magistrates Court.

Applicant's Submissions on Leave to Appeal:

- [31]. It was submitted by counsel on behalf the applicant, Ms. Bezuidenhout that the appeal enjoys reasonable prospects on several reasons. It was further argued that the court *a quo* erred in finding urgency in respect of the respondent's counter application, as the contempt application was rendered moot by the applicant's conclusion of the acknowledgment of debt with R[...] School on 01 December 2025. It was further argued that the respondent could be afforded substantial redress at a hearing in due course, as evidenced by the court order postponing the contempt issue *sine die* to be heard with Part B of the main application.

- [32]. Ms. Bezuidenhout further submitted that the order requiring the minor children to remain enrolled at R[...] School was legally incompetent as it imposed obligations on third party, R[...] School, which was not joined in the proceedings. Reliance on the principles enunciated in *Myeni v Organisation Undoing Tax Abuse NPC and Others* [2020] ZASCA 40; 2020 (5) SA 404 (SCA)¹, where the court held that non joinder arises where another party has a direct and substantial interest in the matter, determined by the relief sought. It was argued that R[...] school had such an interest, and that the Court order could not be sustained without prejudicing its interests.
- [33]. On the issue of parental responsibilities, Ms. Bezuidenhout contented that the court order authorising the respondent to sign the contract of enrolment on behalf of the applicant arbitrarily deprived the applicant of his parental rights and responsibilities, contrary to the provisions of the Children's Act 38 of 2005. It was argued that no case was made out that the applicant was capable of unreasonably refusing to contract on behalf of the minor children, and the court order placed the applicant's rights at peril of being arbitrarily usurped. It was further submitted that the court are *quo* disregarded the applicant's material change in circumstances and the applicant's pending variation application in the maintenance court. It was argued that the order effectively granted a new stand-alone order in addition to the divorce order, and that it limited the discretion of the maintenance court to decide otherwise. Ms. Bezuidenhout relied on the principle that a court should not interfere with *lis pendens* proceedings in another competent court.
- [34]. Finally, on costs, Ms. Bezuidenhout submitted the applicant was acting in the minor children best interests. The respondent did not achieve substantial success, as her urgent counter application was not entertained. It was argued that the costs order on scale C constituted a material misdirection requiring the appellant division.

¹ *Myeni v Organisation Undoing Tax Abuse NPC and Others* [2020] ZASCA 40; 2020 (5) SA 404 (SCA) at para 21.

The Respondent's Submissions in Opposition on Leave to Appeal:

- [35]. It was submitted by counsel on behalf of the respondent, Ms. Mitchell, that the application for leave to appeal falls to be dismissed with costs in its entirety, as none of the grounds raised and or relied upon by the applicant have any reasonable prospects of success, nor is there any compelling reasons why the appeal should be heard.
- [36]. On the issue of urgency Ms. Mitchell directed the court's attention to paragraphs 4 and 5 of the written reasons, where I found that both applications met the threshold for urgency because the central issue- the schooling and educational stability of the minor children- was inherently urgent given the imminent commencement of the 2026 academic year. She submitted that the respondent's claim that the applicant's alleged contempt was a deliberate strategy to create a crisis amplified the need expeditious adjudication.
- [37]. It was argued that the applicant's contention that the ("AOD") rendered the contempt application moot was expressly rejected in the written reasons at paragraph 21 and 22. Ms. Mitchell referred to my finding that the ("AOD") addressed only historical arrears and did not purge the contempt, as the core contempt lay in the ongoing refusal to comply with the obligation to pay private school fees, which extend to the 2026 fees.
- [38]. The applicant contented that the court order-imposed obligations on a non-party, R[...] School, and exposed him to impossibility of performance. Ms. Mitchell submitted this argument was without merit. Firstly, the court order did not compel R[...] School to do anything, it directed the parties, as parents and guardians, to take the necessary steps to effect enrolment. Ms. Mitchell pointed to R[...] School own correspondence dated 10 December 2025, in which the school confirmed that it would proceed with the enrolment process on the basis contemplated in the court order dated 04 December 2025, in the best interests of the minor children, unless and until a court order issued a

further directive. This she submitted, demonstrated that R[...] School did not consider itself prejudiced by the court order.

- [39]. Secondly, it was submitted that the applicant's reliance on *Myeni* was misplaced. In *Myeni*, the court held that non joinder arises where another party has a direct and substantial interest in the matter, determined by the relief sought². In this matter, the relief sought was directed at the parties, not R[...] School. The court did not require R[...] School to do anything, it required that applicant to ensure enrolment and, failing his co signature, authorised the respondent to sign. It was submitted that this ground fundamentally ignores the central finding, that the applicant orchestrated the crisis by unilaterally stopping payment of school fees from March of 2025, allowing the contract to be terminated on 09 October 2025 and withholding this information from the respondent. Ms. Mitchell relied on the principle articulated in the written reasons at paragraph 19:

"A party cannot unilaterally create circumstances to evade such an order and then approach a court for relief on those self- created circumstances".

- [40]. On parental responsibilities, Ms. Mitchell submitted that the order was a practical mechanism to ensure the minor children's enrolment in circumstances where the applicant demonstrated a pattern of obstructive conduct. Ms. Mitchell referred to written reasons at paragraph 13 that the applicant knowingly allowed the contract to lapse, withheld information from the mother, and launched the present main urgent application only after creating the crisis. It was argued that the court order did not terminate or suspend the applicant's parental responsibilities; it provided a remedy for potential non- compliance, which was justified given the applicant's conduct.
- [41]. The applicant contended that the court order disregarded his alleged inability to pay and interfered with the pending maintenance proceedings. Ms. Mitchell submitted that this argument must fail for several reasons. Firstly, she referred to the written reasons at paragraph 16 that the applicant claim of financial inability was not substantiated. The applicant's lifestyle –

² Ibid at para 64.

involving international business class travel, luxury holidays and maintaining high value properties was irreconcilable with the plea of inability to afford school fees. The court was entitled to draw inference from this evidence that his non-payment was wilful rather than due to genuine inability.

- [42]. Secondly, it was submitted that the (“AOD”) was a contract that the applicant freely and voluntarily concluded with R[...] School on 01 December 2025. It was not an order of court imposed upon him; it was his own undertaking to settle arrears. The court order merely required him to comply with his own arrangement. The applicant cannot now complain that being held to his own bargain, constitutes an injustice.

- [43]. Thirdly, it was submitted that the court order did not interfere with the pending maintenance proceedings. It specifically recorded that the divorce order of 25 June 2019 shall remain in full force and effect until varied by a competent court. The maintenance court remains seized with the variation application. The court order merely enforced the *status quo* pending that determination.

- [44]. Fourthly, reliance was placed in the written reasons at paragraph 25 that the respondent was entitled to approach this court on an urgent basis to enforce the maintenance order through contempt proceedings as a “*process in aid*” given the imminent threat to the minor children’s scholarly placement caused by the applicant’s default. Ms. Mitchell submitted that the principle of *lis pendens* does not deprive this court of jurisdiction to act in the best interests of the minor children, as the upper guardian, the High Court has concurrent jurisdiction to protect the children’s interest, particularly where urgent intervention is required.

- [45]. The applicant contended that the costs order was a misdirection because he was acting in the minor children’s best interests and the respondent did not achieve success. Ms. Mitchell submitted that this argument is untenable.

- [46]. It was submitted that the applicant did not succeed in any of the relief he sought, his application to enrol the minor children at (“BPM”) was dismissed.

The respondent's counter application, while postponed in part, succeeded in securing the minor children continued enrolment at R[...] School and the applicant's enforcement of the applicant's maintenance obligations. The costs follow the result.

- [47]. It was submitted that scale C was appropriate given the complexity of the matter and the applicant's conduct in creating the urgency. The matter involved extensive affidavits, multiple issues and required a full day hearing. The applicant's conduct in allowing the contract to lapse and withholding information from the respondent necessitated the litigation. In the exercise of my discretion, I considered these factors and concluded that Scale C was just and equitable.

The Evaluation of the Grounds of Appeal:

- [48]. Having considered the grounds of appeal against the backdrop of the written reasons, and having weighed the submissions of both counsels, I am not persuaded that the appeal would have a reasonable prospect of success, nor that there exists any compelling reason why the appeal should be heard.
- [49]. The applicant's grounds of appeal fundamentally mischaracterise the court order and ignore the factual findings underpinning the judgment. They fail to engage with the central finding that the applicant orchestrated the crisis, that his claim of inability to pay was irreconcilable with his lifestyle, and that the acknowledgement of debt did not purge his contempt.
- [50]. The applicant's reliance of *Myeni* is misplaced, as the court order did not impose obligations on a non-party. The applicant's reliance on the principle of *lis pendens* ignores that this court, as upper guardian, has concurrent jurisdiction to protect the minor children's interest. The applicant's submission about parental rights and responsibilities ignores that the court order was a practical mechanism justified by his own obstructive conduct.
- [51]. The applicant contended that this application for leave to appeal raises important issues which implicate the minor children's best interest. The

important issue sharply raised by this matter is the protection and promotion of the best interest of the minor children versus upholding the sanctity of a court order which remain extant. The applicant contends that leave to appeal is required because of great public interest and importance that an appellate court determines what approach our courts should take where there is court order compelling a parent to pay private school fees and such an order remains extant, whilst there is a separate variation/ reduction application but that party bearing that obligation can no longer objectively comply with the order.

- [52]. The applicant further contended that there are reasonable prospects of success, and that there are compelling reasons why leave to appeal should be granted. During argument, emphasis was placed on these compelling reasons.

- [53]. Nothing new has been raised by the applicant in this application for leave to appeal. In my written reasons, I have dealt with most, if not all, of the issues raised by the applicant in this application for leave to appeal and it is not necessary for me to repeat those in full. Suffice to restate what I have already said in the paragraphs above.

- [54]. The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another Court can come to a different conclusion to that reached by me in my judgment. This approach has now been codified in s 17(1)(a)(i) of the Superior Courts Act 10 of 2013, which came into operation on the 23rd of August 2013. Leave to appeal may only be granted where a Court is of the opinion that the appeal would have reasonable prospects of success, which prospects of success are not too remote. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.

- [55]. An application for leave to appeal faces a higher threshold than under the repealed Supreme Court Act. Leave to appeal may only be given where a judge concerned is of the opinion that the appeal would have a reasonable prospect of success. The test is simply whether there are any reasonable

prospects of success in the appeal. It is not whether a litigant has arguable case or a mere possibility of success.

- [56]. It is trite that if a court is unpersuaded of the prospects of success, it must still enquire into whether there is compelling reasons to entertain the appeal. However, the merits remain vitally important and are often decisive. In considering the existence of compelling reasons as envisaged by s 17(1)(a)(ii) of the Act, I am also not persuaded that such reasons exist in this matter, when considering in the context of prospects of success on the merits.
- [57]. In *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021) ³, the SCA held that the test of reasonable prospects of success postulates a dispassionate decision, based on the facts and the law that a court of appeal ‘could’ reasonably arrive at a conclusion different to that of the trial court. These prospects of success must not be remote, but there must exist a reasonable chance of succeeding. An applicant who applies for leave to appeal must show that there is a sound and rational basis for the conclusion that there are prospects of success.
- [58]. The ratio in *Ramakatsa* simply followed *S v Smith* 2012 SACR 567 (SCA)⁴, in which Plasket AJA (Cloete JA and Maya JA concurring), held as follows at para 7:

‘What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that the Court of Appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success. That the case is arguable on appeal or that the case

³ *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021).

⁴ *S v Smith* 2012 (1) SACR 567 (SCA) at para 7.

cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal. In *Mont Chevaux Trust v Tina Goosen*⁵, the Land Claims Court held (in an obiter dictum) that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. I agree with that view, which has also now been endorsed by the SCA in an unreported judgment in *Notshokovu v S*⁶. In that matter the SCA remarked that an appellant now faces a higher and a more stringent threshold, in terms of the Superior Court Act 10 of 2013 compared to that under the provisions of the repealed Supreme Court Act 59 of 1959. The applicable legal principle as enunciated in *Mont Chevaux* has also now been endorsed by the Full Court of the Gauteng Division of the High Court in Pretoria in *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*⁷. The word “would” in section 17 (1)(a)(i) of the Superior Courts Act No: 10 of 2013 has been held to denote “a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against and that the test for leave to appeal to be successful is more stringent than the traditional test.”

[59]. In *Notshokovu v S (157/15) [2016] ZASCA 112*⁸ the Supreme Court of Appeal held as follows on the test “...an appellant, on the other hand faces a higher and stringent threshold in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959.”

[60]. In *MEC for Health Eastern Cape v Mkhitha and Another (157/15) [2016] ZASCA 112*⁹, Schippers AJA provided the following guidance on the test:

⁵ *Mont Chevaux Trust v Tina Goosen*, LCC 14R/2014 (unreported).

⁶ *Notshokovu v S*, case no: 157/2015 [2016] ZASCA 112 (7 September 2016).

⁷ *Acting National Director of Public Prosecutions and Others v Democratic Alliance in Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others (19577/09) [2016] ZAGPPHC 489* (24 June 2016).

⁸ *Notshokovu v S (157/15) [2016] ZASCA 112* (7 September 2016)

⁹ *MEC for Health, Eastern Cape v Mkhitha and Another (1221/2015) [2016] ZASCA 176* (25 November 2016) at para 16-17.

“[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17 (1)(a) of the Supreme Courts Act 10 of 2013 makes it that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”

[61]. I am not persuaded that the issues raised by the applicant in this application for leave to appeal are issues in respect of which another Court is likely to reach conclusions different to those reached by me. I am therefore of the view that there are no reasonable prospects of another court making factual findings and coming to legal conclusions at variance with my factual findings and legal conclusions. The applicant has failed to demonstrate that another Court would reach a different decision, and that the applicant should be granted leave to appeal. In light of the all the circumstances alluded to above, it is my view that the applicant has not presented facts demonstrating that he has any prospects of success; therefore, it would not serve any interest of justice to grant leave to appeal to the applicant.

[62]. Having considered the papers filed on record and the submissions made by the parties, it follows that the application for leave to appeal, must therefore fail. There is no reason to deviate from the normal principle that costs follow the result. I am persuaded that a punitive costs order is warranted, as sought by the respondent. Considering the issues and complexities which arise in this application, costs of counsel on scale C is warranted.

The Section 18(3) Application:

The Legal Framework- Section 18 of the Superior Court's Act No.10 of 2013.

[63]. Section 18 of the Superior Courts Act 10 of 2013 provides as follows:

“(1). Subject to subsection (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of 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 final judgment, which is the subject matter 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 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 so orders otherwise, as contemplated in subsection (1)-

- (a) the court must immediately record its reasons for doing so;
- (b) the aggrieved party has an automatic right of appeal to the next Highest court;
- (c) the court hearing such an appeal must deal with the matter of extreme urgency and;
- (d) such order will be automatically suspended, pending the outcome of such appeal...”

[64]. For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.

[65]. The statutory scheme is clear: suspension pending appeal in the norm, and execution pending appeal is the exception. The threshold is high. An applicant must establish on a balance of probabilities the existence of

exceptional circumstances; the irreparable harm if the order is not granted; that the other party will not suffer irreparable harm if the order is not granted.

- [66]. These requirements are cumulative. Failure to prove any one is fatal to the application. However, the enquiry is not hermetically sealed- the presence or absence of irreparable harm may be subsumed under the overarching exceptional circumstances enquiry.

The Concept of Exceptional Circumstances- The Authorities:

- [67]. The concept of “exceptional circumstances” is not defined in the Act. In *Premier for the Province of Gauteng and Others v Democratic Alliance and Others* [2020] 4 All SA 559 (SCA)¹⁰, the Supreme Court of Appeal held:

“The concept of exceptional circumstances” is not defined in the Act. In my view the concept is sufficiently flexible to be considered on case-by-case basis, since circumstances that be regarded as “ordinary” in one case, may be treated as “exceptional” in another. This may explain the reason for the reluctance by courts to lay down the general rule”

- [68]. In *Ntlemeza v Helen Suzan Foundation* [2017] (5) SA 402 (SCA)¹¹ at paragraph 37, the Supreme Court of Appeal referred with approval to the discussion of concept:

“What is ordinarily contemplated by the words exceptional circumstances is something of the ordinary and of an usual nature, something which is expected in the sense that is generally rule does not apply to it; something uncommon, rare or different, “besonder, seldsaam, uitsonderlike, or in hoe mate ongewoon” To be exceptional the circumstances must arise out of, or be incidental to, the particular case. 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 a Court must decide accordingly”.

¹⁰ Premier for the Province of Gauteng and Others v Democratic Alliance and Others [2020] 4 All SA 559 (SCA) at para 41.

¹¹ Ntlemeza v Helen Suzan Foundation and Another [2017] (5) SA 402 (SCA) at para 37.

[69]. In *Knoop NO v Gupta (Execution) 2021 (3) SA 88 (SCA)*¹² the Supreme Court of Appeal held that, in the context of section 18(3), the exceptional circumstances must be something that is sufficiently out of the ordinary and on an unusual nature to warrant a departure from the ordinary rule that the effect of an application for leave to appeal or an appeal is to suspend the operation of the judgment appealed from; must be a deviation from the norm; must arise from the facts and circumstances of a particular case:

[70]. In *University of the Free State v Afriforum and Another 2018 (3) SA 428 (SCA)*¹³, the Supreme Court of Appeal held:

“[9] . . . Section 18(1) thus states that an order implementing a pending judgment appeal shall only be granted 'under exceptional circumstances. The exceptionality of an order to this effect is underscored by s 18(4), which provides that a court granting the order must immediately record its reasons; that the aggrieved party has an automatic right of appeal; that the appeal must be dealt with as a matter of extreme urgency and that pending the outcome of the appeal the order is automatically suspended.

[10] It is further apparent that the requirements introduced by ss 18(1) and (3) are more onerous than those of the common law. Apart from the requirement of 'exceptional circumstances' in s 18(1), s 18(3) requires the applicant 'in addition' to prove on a balance of probabilities that he or she 'will' suffer irreparable harm if the order is not made, and that the other party 'will not' suffer irreparable harm if the order is made. The application of rule 49(11) required a weighing-up of the potentiality of irreparable harm or prejudice being sustained by the respective parties and where there was a potentiality of harm or prejudice to both of the parties, a weighing-up of the balance of hardship or convenience, as the case may be, was required. Section 18(3), however, has introduced a higher threshold, namely proof on a balance of probabilities that the applicant will suffer irreparable harm if the order is not granted and conversely that the respondent will not if the order is granted.”

¹² *Knoop NO v Gupta (Execution) 2021 (3) SA 88 (SCA)* para 46.

¹³ *University of the Free State v Afriforum and Another 2018 (3) SA 428 (SCA)* at para 9-10.

- [71]. In *KGA life Limited v Multisure Corporation (Pty) Ltd* [2021] ZAGPJHC 128; 2021 (6) SA 598 (GJ)¹⁴ a full court of this division, after a careful analysis of the decision of the Supreme Court of Appeal, concluded:

“...from the SCA judgment the following evident: (a) the suspension of court order pending an appeal is a norm. (b) An execution order pending an appeal is extraordinary relief which the applicant has to make out a case on the specific facts in the matter (c) This requires the applicant, a first hurdle. To demonstrate that exceptional circumstances exists which warrant departure from the norm, and to approve on a balance of probabilities, that he or she will suffer irreparable harm if the execution if the execution of the order is not granted and that the respondent will not suffer irreparable harm should the order be granted (d). Failure on the part of the applicant to prove any of these facts, is fatal to the application.(e) facts may be relevant to both requirements of exceptional circumstances and irreparable harm.(f) The position as to whether the court retains a discretion to grant the relief and the role of the prospects of success in the exercise of that discretion remains unclear. However, it would seem that the prospects of success do not take centre stage in the determination of the application for an execution order in terms of section 18(1) and (3) since these were not considered in the cases before the SCA.”

- [72]. In *Tyte Security Services CC v Western Cape Provincial Government and Others* [2021] ZASCA 168¹⁵, the Supreme Court of Appeal held that the enquiry into the three requirements is not hermetically sealed enquiry and can hardly be approached in a compartmentalised (“a tick-box”) fashion. Rather, the overarching enquiry has to be whether or not exceptional circumstances exist, and to that end, the presence or absence of irreparable harm in a given case may well be subsumed under the overarching circumstances enquiry.

- [73]. In *Knoop NO v Gupta (Execution)*¹⁶ the court confirmed that while prospects of success are determined, they are a factor to be considered in the overall assessment.

¹⁴ *KGA life Limited v Multisure Corporation (Pty) Ltd* [2021] ZAGPJHC 128; 2021 (6) SA 598 (GJ) at para 42.

¹⁵ *Tyte Security Services CC v Western Cape Provincial Government and Others* [2021] ZASCA 168 para 14-17.

¹⁶ *Supra* note 12 at para 23.

The Position Where Children are Involved:

- [74]. Ms. Mitchell correctly submitted that where the matter concerns minor children, the court must consider whether, if the order is put into operation, the minor children will be irreparably prejudiced. In *WCJ and Another v PSJ and Others* [2021] ZAGPJHC 25 ¹⁷, the court held:

“The best interest of the child are paramount, but this does not absolve an applicant of the onus imposed by section 18. However, in applying the section to matters involving minor children, the court must consider the nature of the harm-emotional and psychological harm may be as irreparable as financial harm, and sometimes more so.”

- [75]. In *Lubbe v Volkswagon SA* [2023] 4 All SA 289 (C) ¹⁸, the court recognised that harm to a child’s emotional and psychological well – being can constitute irreparable harm, and that “*the loss of the year of child’s life, in educational and development terms, cannot be compensated by a monetary award*”,

- [76]. In *H v Fetal Assessment Centre 2015 (2) SA 193 (CC)* ¹⁹, the Constitutional Court stated:

“The High Court sits as upper guardian in matters involving the best interests of the child (be it custody matters or otherwise), and it has extremely wide powers in establishing what such best interest are. It is not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced or not advanced by respective parties. It may in fact gave recourse to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes”.

The Significance of the Children Current Enrolment:

¹⁷ *WCJ and Another v PSJ and Others* [2021] ZAGPJHC 25 at para 28.

¹⁸ *Lubbe v Volkswagon SA* [2023] 4 All SA 289 (C) at para 45.

¹⁹ *H v Fetal Assessment Centre 2015 (2) SA 193 (CC)* at para 64.

[77]. During the hearing, counsel on behalf of the respondent, Ms. Mitchell informed the court that both minor children have been enrolled at R[...] School for the 2026 academic year and are currently attending school. This information was confirmed by counsel on behalf for the applicant, Ms. Bezuidenhout. The minor children attendance at R[...] School pending the determination of these applications is matter of considerable significance for the following reasons:

[78.1]. Firstly, it demonstrates that, notwithstanding the applicant's application for leave to appeal and the consequent legal uncertainty, the practical reality is that the minor children are now settled at R[...] School. They have commenced their academic year, re-established contact with their teachers and friends, and resumed the educational and social routines that are so vital to their development. To disrupt this now would cause precisely the kind of irreparable harm that the respondent seeks to prevent.

[78.2] Secondly, the fact that the minor children are attending schools underscores that the only remaining the only remaining legal obstacle to the enforcement of the Court order dated 04 December 2025 is the technical suspension caused by the applicant's appeal. The school itself has facilitated the enrolment, recognising the best interest of the minor children. The applicant has not taken any steps to prevent their attendance. In these circumstances, to allow the suspension to continue would be to elevate procedural form over substantive justice, to the detriment of the minor children.

[78.3] Thirdly, the minor children current attendance at R[...] School reinforces the exceptional nature of the circumstances. The applicant's appeal, and his failure to prosecute it urgently, has created a situation where the minor children are attending school under a cloud of uncertainty. This uncertainty itself is harmful to their sense of stability and security. The section 18(3) application seeks to

remove that cloud by confirming that the court order dated 04 December 2025 shall remain operative pending the appeal.

[78.4] Fourthly, the minor children's enrolment and attendance demonstrates that no irreparable harm will be caused to the applicant if the order is enforced, the minor children are already at school. The order merely confirms the legal basis for their attendance and the applicant's corresponding obligation to the school fees. The applicant has not been prejudiced by their attendance to date, and there is no reason to believe that will be prejudiced by an order confirming that attendance.

The Respondent Submissions on Exceptional Circumstances:

[78]. Ms. Mitchell submitted in her heads of arguments, that the respondent has established exceptional circumstances for the following reasons, which she developed with reference to the facts and the authorities:

[79]. The applicant's orchestration of the crisis, as I found in my written reasons at paragraph 13, the applicant unilaterally stopped paying R[...] School fees from March 2025, knowingly allowed the contract of enrolment to be terminated on 09 October 2025, and withheld this information from the respondent. The applicant then launched an urgent application to enrol the minor children at different school, creating a scenario where the placement was in jeopardy. This was not a case of genuine, unforeseen inability to pay.

[80]. The timing of the leave to appeal, the applicant launched his application for leave to appeal on 09 December 2025 – the day he was required to sign the contract of enrolment. This timing, Ms. Mitchell submitted, cannot be coincidental. It was calculated to maximise disruption and to use the suspension as a tool to achieve what he could not achieve in the litigation, the removal of the minor children from R[...] School.

[81]. The applicant's failure to prosecute the appeal urgently, having suspended the court order, the applicant took no steps to have the leave to appeal

adjudicated urgently. The applicant did not seek the written reasons on an urgent basis, despite being aware that the minor children were due to commence school on 14 January 2026. This demonstrates that his purpose was not to pursue the appeal, but to allow the suspension to continue indefinitely.

- [82]. The applicant's failure to provide an undertaking, despite a formal request on 12 December 2025, the applicant failed to provide an undertaking that he would co-sign the contract of enrolment pending the appeal. Such undertaking would have cost him nothing and would have protected the minor children's interests. The applicant's failure to provide it speaks volumes.
- [83]. The applicant's objection to the conditional counter application, when the respondent sought to have the section 18(3) relief determined simultaneously with the leave to appeal – precisely what this court is now doing. The applicant objected by way of Rule 30 notice, necessitating a separate application, and incurring additional costs. Ms. Mitchell submitted that this was particularly egregious given that the applicant's own counsel subsequently argued that such applications should be heard together.
- [84]. The imminent commencement of the school year, the minor children were due to commence school on 14 January 2026. The urgency was real and pressing.
- [85]. R[...] School itself indicated that it would proceed with enrolment on the basis contemplated in the court order, in the best interests of the minor children, unless a court directed otherwise. This underscores that the only obstacle to the children's enrolment was the legal suspension caused by the applicant's appeal.
- [86]. The applicant's conduct post-order; the applicant's intimidatory Whatsapp message to the respondent on 12 December 2025, in which he threatened to complain about the respondent's attorney and accused the respondent of

delaying tactics, is consistent with a pattern of conduct designed to bully rather than to engage in good faith.

- [87]. Ms. Mitchell argued that these circumstances, considered cumulatively are “something out of the ordinary and of an unusual nature” and constitute a deviation from the norm warranting departure from the general rule of suspension.
- [88]. Ms. Mitchell further submitted, relying on *University of the Free State*²⁰ (*supra*), that the prospects of success in the appeal are relevant considerations. Given the dismissal of the leave to appeal, the prospects are at best, remote. This reinforces the exceptionality of granting execution pending an appeal that has no reasonable prospects of succeeding.

Respondent’s Submissions on Irreparable harm:

- [89]. Ms. Mitchell submitted that the respondent and the minor children will suffer irreparable harm if the order is not enforced and relied on the following evidence and authorities:
- [90]. The evidence establishes that the minor children, have attended R[...] School since they were three and four years old respectively. It is the only school they have known. The minor children have expressed strong opposition to moving schools. D[...] pointed out that he would have to move twice- once to a new school for Grade 7 and again to high school. O[...] became emotionally upset when the issue was discussed and expressed that her best friend is at R[...] School.
- [91]. The applicant’s proposed alternative, B[...] P[...] M[...] School, would require the minor children to be taught in Afrikaans – a language in which they have never been instructed. D[...]’s concern about this was not addressed.
- [92]. The emotional impact of relocating schools, particularly at such a pivotal stage in their development, would be significant and potentially long

²⁰ Supra note 13.

standing. Ms. Mitchell submitted, relying on *Lubbe v Volkswagen SA*²¹, that harm to a child's emotional and psychological well-being can constitute irreparable harm. She argued that the loss of a year of a child's education, the disruption of friendship, and the emotional distress caused by forced relocation cannot be compensated by a later court order.

- [93]. The applicant's suggestion that the minor children could receive private tutoring ignores the social, emotional, development benefits of school attendance, particularly at this critical stage. It is not a viable alternative. There is no evidence as to the availability, costs, or appropriateness of such tutoring, nor any consideration of the impact on the children of isolation from their peers. The harm is irreparable because it cannot be undone. Time lost in a child's education, emotional distress suffered, and relationships disrupted cannot be restored by a later court order. As the court in *Lubbe* recognised that:

"the loss of year of a child's life, in educational and development terms, cannot be compensated by a monetary award."

The Respondent's Submissions on Absence of Irreparable Harm:

- [94]. Ms. Mitchell submitted, that the applicant will not suffer irreparable harm if the order is enforced and she relied on the following reasoning:

[95.1] Firstly, the order does not create new obligations. It enforces obligations the applicant already has under the 2019 divorce order and his own acknowledgment of debt. If the applicant complies with those obligations, there will be no arrears and no contempt. If the applicant does not comply, he faces the consequences of his own non – compliance- consequences that would exist regardless of this judgment.

[95.2] Secondly, the suggestion that the applicant may default is not a basis for refusing execution. The law presumes that parties will

²¹ Supra note 18 at para 45.

comply with court orders. If the applicant genuinely believes he cannot afford the fees, his remedy is to pursue a variation application in the maintenance court, not to suspend the court order and create uncertainty for the minor children in the meantime.

[95.3] Thirdly, the applicant's financial position, as I found in the written reasons at paragraph 16, is irreconcilable with plea of inability to pay. The applicant's lifestyle – international travel, luxury holidays, high value properties – demonstrates capacity. The new financial evidence the applicant seeks to introduce does not alter this conclusion.

[95.4] Fourthly, Ms. Mitchell reliance on *Incubeta Holdings (Pty) Ltd v Eliis* [2014] ZAGPJHC 87²², where the court observed that the mere fact that a party may have to comply with an order pending appeal does not constitute irreparable harm. That is the ordinary consequence of litigation. The applicant will suffer no harm beyond the obligation to comply with the order – an obligation that applies to all litigants. This is not the kind of harm that section 18(3) contemplates.

The Respondent's Submissions on the Balance of Harm:

[95]. Ms. Mitchell submitted that even if the court were to approach the matter on the balance of harm, the scales tip decisively in favour of the respondent and the minor children. The harm to the minor children of disrupting their education and emotional stability is profound and irreparable. The harm to the applicant of complying with his existing obligations is, at most financial inconvenience – and even that is not established on the evidence. The minor children interest is paramount, and they strongly favour maintaining the *status quo*.

The Respondent's Submissions on the Applicant's Alternative Proposals:

²² *Incubeta Holdings (Pty) Ltd v Eliis* [2014] ZAGPJHC 87 at para 20.

- [96]. The applicant's proposals do not assist him. The proposal that the respondent contributes 50% of the fees seeks a *de facto* variation of the 2019 order without a proper hearing. It ignores that the 2019 order places the obligation to pay private school fees squarely on the applicant. The maintenance court may vary that obligation, but it has not done so yet. The respondent is entitled to rely on the existing court order.
- [97]. The proposal that the minor children be tutored is speculative and unsupported. There is no evidence as to the availability, costs, or appropriateness of such tutoring, nor any consideration of the impact on the minor children of isolation from their peers. It is not a serious proposal; it is a litigation tactic.
- [98]. Moreover, the applicant's conduct in making these proposals through "*without prejudice*" correspondence and then placing them on record demonstrates a lack of genuine commitment to settlement. If the applicant were genuine, he would have provided the undertaking requested. He did not.

The Respondent's Submissions on Urgency on the section 18(3) application:

- [99]. Ms. Mitchell submitted that the application is inherently urgent. The minor children were due to commence the 2026 academic year on 14 January 2026. If the application is not determined urgently, the minor children cannot be enrolled at R[...] School and will suffer the irreparable harm identified. The respondent cannot be afforded substantial redress in the ordinary course.
- [100]. It was submitted that the respondent exhausted all other remedies before launching the application, including seeking a formal undertaking from the father. The applicant's failure to respond necessitated this application.

Exceptional Circumstances:

- [101]. The concept of exceptional circumstances must be applied to the facts of this case. What makes this case exceptional is not merely that minor children

may have to change schools, but the manner in which the crisis has been created and the conduct of the parties.

[102]. The circumstances identified by Ms. Mitchell, considered cumulatively, establish exceptionality:

[103.1] The applicant's orchestration: of the crisis as I found in my main judgment, the father unilaterally stopped paying R[...] school fees from March 2025, knowingly allowed the contract of enrolment to be terminated on 09 October 2025, and withheld this information from the mother. The then launched an urgent application to enrol the minor children at a different school, creating a scenario where their placement was in jeopardy. This was not a case of genuine, unforeseen inability to pay.

[103.2] The timing of the leave to appeal: The applicant launched his application for leave to appeal on 09 December 2025 – the day before he was required to sign the contract of enrolment. This timing cannot be coincidental. It was calculated to maximise disruption and to use the suspension as a tool to achieve what he could not achieve in the litigation: the removal of the children from R[...] school.

[103.3] The applicant's failure to prosecute the appeal urgently: Having suspended the order, the applicant took no steps to have the leave to appeal adjudicated urgently. The did not seek the written reasons on an urgent basis, despite being aware that the minor children were due to commence school on 14 January 2026. This demonstrates that his purpose was not to pursue the appeal, but to allow the suspension to continue indefinitely.

[103.4] The applicant's objection to the conditional counter-application: When the respondent sought to have the section 18(3) relief determined simultaneously with the leave to appeal – precisely what

this court is now doing – the father objected by way of a Rule 30 notice, necessitating a separate application and incurring additional costs. This was wasteful and obstructive.

[103.5] The imminent commencement of the school year: The minor children were due to commence school on 14 January 2026. The urgency was real and pressing. The applicant's conduct brought us to the eve of the school year with no certainty as to the children's enrolment.

[103.6] R[...] school's position: R[...] school, a third party with no interest in the litigation, recognised that the minor children's best interests required enrolment on the basis contemplated in the order. This underscores that the only obstacle was the applicant's appeal.

[103.7] The applicant's conduct post-order: The applicant's intimidatory WhatsApp message to the mother on 12 December 2025, in which he threatened to complain about her attorney and accused her of delay tactics, is consistent with a pattern of conduct designed to bully rather than to engage in good faith.

[103]. The minor children's current enrolment and attendance at R[...] School further underscores the exceptional nature of the circumstances. The applicant's appeal, and his failure to prosecute it urgently, has created a situation where the minor children are attending school under a cloud of legal uncertainty. This uncertainty itself is harmful to their sense of stability and security. The fact that the minor children are now settled at school makes it all the more imperative that the legal basis for their attendance be confirmed and that the applicant's obligation to pay the fees be enforced.

[104]. These circumstances are, in my view, "something out of the ordinary and of an unusual nature". They are a deviation from the norm. They arise from the facts and circumstances of this particular case. The applicant has created a situation where his own appeal, and his failure to prosecute it urgently,

threatens to undermine the very stability the court order was designed to protect.

[105]. I also have regard to the prospects of success in the appeal. As I have already found in dismissing the leave to appeal, the applicant's grounds are without merit. The prospects of success are, at best, remote.

[106]. Ms. Bezuidenhout's submission that changing schools is not exceptional, and that children change schools every day, misses the point entirely. The exceptionality lies not in the fact of a potential school change, but in the manner in which that potential has been created – through the applicant's deliberate conduct, his manipulation of the appeal process, and his failure to act in the minor children's best interests. The circumstances here are far from ordinary. I conclude that exceptional circumstances exist.

Irreparable Harm:

[107]. The respondent must prove on a balance of probabilities that she and the minor children will suffer irreparable harm if the order is not enforced. The harm must be "*irreparable*" – that is, harm that cannot be adequately remedied in due course by a successful appeal.

[108]. In the context of the minor children, the concept of irreparable harm must be understood broadly. It encompasses not only tangible harm but also emotional and psychological harm, and harm to educational stability and continuity. As recognised in *Lubbe v Volkswagon SA*²³, harm to a child's emotional and psychological well-being can constitute irreparable harm.

[109]. The evidence, as summarised by Ms. Mitchell, establishes:

[110.1] The minor children have attended R[...] school since they were three and four years old respectively. It is the only school they have known.

²³ Supra note 18.

- [110.2] The minor children have expressed strong opposition to moving schools. D[...] pointed out that he would have to move twice – once to a new school for Grade 7 and again to high school. O[...] became uncontrollably upset when the issue was discussed and expressed that her best friend is at R[...] school.
- [110.3] The applicant's proposed alternative, B[...] M[...] P[...] School, would require the children to be taught in Afrikaans – a language in which they have never been instructed. D[...]’s concern about this was not addressed.
- [110.4] The emotional impact of relocating schools, particularly at such a pivotal stage in their development, would be significant and potentially long-lasting.
- [110]. The minor children's current attendance at R[...] School adds a further dimension to the assessment of irreparable harm. They are now settled at school. They have re-established their routines and relationships. To disrupt this now – to require them to leave the school they have attended their entire lives, against their express wishes, after they have already commenced the academic year – would cause profound and lasting emotional harm. This harm cannot be compensated by any later court order. It is irreparable in the truest sense of the word.
- [111]. The applicant's suggestion that the minor children could receive private tutoring ignores the social, emotional, and developmental benefits of school attendance, particularly at this critical stage. It is not a viable alternative. There is no evidence as to the availability, cost, or appropriateness of such tutoring, nor any consideration of the impact on the minor children of isolation from their peers.
- [112]. The harm is irreparable because it cannot be undone. The time lost in a child's education, emotional distress suffered, and relationships disrupted

cannot be restored by a later court order, as the court in *Lubbe* recognised, "the loss of a year of a child's life, in educational and developmental terms, cannot be compensated by a monetary award".

[113]. Ms. Bezuidenhout's submission that the respondent has not proved irreparable harm because she has not demonstrated that the minor children could not be educated elsewhere misses the point. The question is not whether the minor children could be educated elsewhere, but what harm they would suffer if removed from the school they have attended their entire lives, against their express wishes, and placed in an environment for which they are unprepared and which they do not desire. The fact that they are now currently attending R[...] School makes the harm of removal even more palpable.

[114]. I am satisfied that the respondent has proved on a balance of probabilities that she and the minor children will suffer irreparable harm if the order is not enforced.

Absence of Irreparable Harm to the Applicant:

[115]. The respondent must also prove that the applicant will not suffer irreparable harm if the order is enforced.

[116]. The applicant's claimed harm is that he will fall into further arrears and risk incarceration for contempt, and that if he defaults, the contract may be terminated, causing further disruption.

[117]. These concerns are without substance for several reasons.

[118.1] Firstly, the order does not create new obligations. It enforces obligations the applicant already has under the 2019 divorce order and his own acknowledgment of debt. If he complies with those obligations, there will be no arrears and no contempt. If he does not comply, he faces the consequences of his own non-compliance – consequences that would exist regardless of this order.

[118.2] Secondly, the suggestion that he may default is not a basis for refusing execution. The law presumes that parties will comply with court orders. If the father genuinely believes he cannot afford the fees, his remedy is to pursue the variation application in the Maintenance Court, not to suspend the order and create uncertainty for the children in the meantime. The maintenance court will determine any variation, but until then, the order stands.

[118.3] Thirdly, the applicant's financial position, as I found in the main judgment at paragraph 16, is irreconcilable with a plea of inability to pay. His lifestyle – international travel, luxury holidays, high-value properties – demonstrates capacity. The new financial evidence he seeks to introduce does not alter this conclusion. The letter from his employer, the Business Rescue status report of Pruzofield, and the demand letter from TransAsia Private Capital Limited do not establish that he cannot pay school fees. They are, at best, evidence of complex financial arrangements, not of inability to meet his obligations to his minor children.

[118]. The applicant will suffer no harm beyond the obligation to comply with a court order – an obligation that applies to all litigants. This is not the kind of harm that section 18(3) contemplates. As the court in *Incubeta Holdings (Pty) Ltd v Ellis*²⁴ observed:

"the mere fact that a party may have to comply with an order pending appeal does not constitute irreparable harm. That is the ordinary consequence of litigation."

[119]. Ms. Bezuidenhout's reliance on *S.A.H. v S.B.H [2025] ZAGPJHC 538*²⁵ is misplaced. In that case, the court was concerned with a relocation order – an order that, if executed, would permanently alter the child's living arrangements and make it impossible to restore the status quo if the appeal

²⁴ Supra note 22 at para 20.

²⁵ *S.A.H. v S.B.H [2025] ZAGPJHC 538*.

succeeded. Here, the order is to maintain the *status quo*. If the appeal succeeds, the children can be moved. The harm is not irreversible in the same way.

- [120]. I am satisfied that the respondent has proved on a balance of probabilities that the applicant will not suffer irreparable harm if the order is enforced.

The Balance of Harm:

- [121]. Even if I were to approach the matter on a balance of harm, the scales tip decisively in favour of the respondent and the minor children. The harm to the minor children of disrupting their education and emotional stability is profound and irreparable. The harm to the applicant of complying with his existing obligations is, at most, financial inconvenience – and even that is not established on the evidence.

- [122]. The minor children's interests are paramount, and they strongly favour maintaining the *status quo*.

Conclusion:

- [123]. The respondent has established, on a balance of probabilities, the existence of exceptional circumstances, that she and the minor children will suffer irreparable harm if the order is not enforced, and that the applicant will not suffer irreparable harm if it is enforced. The application in terms of Section 18(3) of the Superior Act, No.10 of 2013, must accordingly succeed.

Costs:

- [124]. The respondent seeks costs on a punitive scale, as between attorney and client, alternatively on Scale C, inclusive of the costs of counsel.

[125]. The respondent has succeeded in both applications: the applicant's application for leave to appeal is dismissed. The respondent's Section 18(3) application of the Superior Courts Act No.10 of 2013 is granted. There is no reason to deviate from the normal principle that costs follow the result. I am persuaded that a punitive costs order is warranted, as sought by the applicant. Considering the issues and complexities which arise in both applications, costs of counsel on scale C is warranted on both applications.

Order:

[126]. In the circumstances, the following order is made:

1. The application for leave to appeal is dismissed with costs, inclusive of the costs of counsel on scale C.
2. The application in terms of 18(3) of the Superior Courts Act, No. 10 of 2013, is enrolled as urgent, and non-compliance with the Uniform Rules of Court relating to time periods, forms, and service is condoned in terms of Rule 6(12)(a).
3. The operation of the order granted on 04 December 2025 shall not be suspended and shall be immediately enforceable in accordance with section 18(3) and (4) of the Superior Courts Act, No. 10 of 2013.
4. The costs of the section 18(3) application, shall be paid by the respondent in the section 18(3) application, being Mr. F[...] J[...] L [...], inclusive of the costs of counsel on scale C.

KHABA AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

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Date of Hearing:

04 December 2025

Date of Order:

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