

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

Date: **19 May 2026** Signature: _____

Court *a quo* Case Number: **2025-006216**

Full Bench Appeal case number: **A2025-006216**

In the matter between:

BOMBELA CONCESSION COMPANY (PTY) LIMITED

APPELANNT

And

ZAHEER CASSIM N.O.

1ST RESPONDENT

STEPHEN SMYTH N.O.

2ND RESPONDENT

BUSMARK 2000 (PTY) LTD

3RD RESPONDENT

**INDUSTRIAL DEVELOPMENT CORPORATION OF
SOUTH AFRICA LIMITED**

4TH RESPONDENT

CORAM: TWALA J, CRUTCHFIELD *et* DLAMINI J

Heard: 6 May 2026

Delivered: 19 May 2026 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines*, and by release to SAFLII. The date and time for the hand-down is deemed to be 10:30 on 19 May 2026

JUDGMENT

DLAMINI J (TWALA J *et* CRUTCHFIELD J concurring)

INTRODUCTION

1. This is an application launched in terms of section 18(4)(a)(ii) of the Superior Courts Act,¹ (the Act), against an order granted by the court a quo on 16 May 2026. Manoim J granted the BRPs and Busmark orders sought in terms of section 18(1) and (3) of the Act for the immediate operation and execution of the order authorizing the cancellation of certain obligations of Busmark 2000 (Pty) Ltd ("*Busmark*") to Bombela Concession Company (Pty) Limited ("*Bombela*") in terms of section 136 (2)(b) of the Companies Act,² to the effect that the order is not suspended pending any appeal.

BACKGROUND

2. The facts surrounding this matter are largely common cause and have been clearly and succinctly captured in the main judgment, so they need no repetition. Only the parts relevant to this judgment will be restated herein.

¹ Act No. 10 of 2013

² Act 71 of 2008

3. Busmark is a bus manufacturing company. It had entered into an agreement with Bombela to supply Bombela with 125 buses of varying sizes. In August 2021, Busmark was placed under business rescue.
4. In the main application, the first and second applicants were appointed as joint business rescue practitioners (the BRPs) of the third applicant, Busmark. The BRPs had sought an order to cancel certain obligations under an agreement entered into between Busmark and Bombela.
5. The court a quo granted an order in favor of the BRPs cancelling certain obligations arising out of the agreement between Busmark and Bombela. Aggrieved by this order, Bombela filed an application for leave to appeal against the entire order and judgment of the court a quo.

IN THE COURT A QUO

6. It is trite that an application for leave to appeal stays the execution of the order pending the finalization of the appeal process. Having filed a notice to oppose leave to appeal, the BRPs and Busmark filed an application in terms of section 18(3) of the Act for an order that the operation and execution of the order dated 16 May 2025 not be suspended pending any appeal, leave to appeal, or petition.
7. The principles that the court had to consider before granting an order under section 18 (3) of the Act are now well established and have been distilled in a number of decisions. The applicant must show that exceptional circumstances exist that warrant that the operation and execution of the order not be suspended pending the appeal. The applicant must also prove, on a balance of probabilities, that he or she will suffer irreparable harm if the order is not executed. Simultaneously, the applicant must demonstrate that the other party will not suffer irreparable harm if the court so orders.³

³ See *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402. (SCA); *University of the Free State v Afriforum and Another* 2018 (3) SA 428 (SCA). *Tyte Security Services CC v Western Cape Provincial Government and Others* 2024 (6) SA 175 (SCA).

8. Our courts have now held that prospects of success in the appeal are relevant in deciding whether or not to grant the exceptional relief.⁴

FINDINGS OF THE COURT A QUO

9. After hearing the parties, the court a quo granted Bombela leave to appeal to the Supreme Court of Appeal on a narrow issue of whether the BRPs are entitled to engage the provisions of section 136 of the Companies Act once the business rescue plan has been adopted by the creditors. Simultaneously, the court a quo granted the BRPs an order to immediately execute the order pending appeal. Thus, the order allowed the BRPs to conclude an agreement with the Strategic Equity Partner (“SEP”) for the purchase of the shares or a major stake in Busmark since the SEP was reluctant to continue with the agreement to buy into the business with ongoing and potentially unlimited liability. The SEP wanted certainty on the liabilities of Busmark before committing to the agreement.

BEFORE THIS COURT

10. This brings us to the present application launched by Bombela in terms of section 18 (4) of the Act to set aside the court a quo’s section 18 (3) order. Bombela has also filed an application to lead further evidence on appeal in terms of section 19 (b) of the Act. The application to lead further evidence is opposed by the BRPs.
11. I shall first address the application to lead further evidence, then turn to the main application.

⁴ See Afriforum *supra*

APPLICATION TO ADDUCE NEW EVIDENCE ON APPEAL

12. The general principle of our law is that litigation must have finality. However, in certain special circumstances, an appellate court may allow the introduction of further evidence on appeal.
13. It is apposite to have regard to the relevant provisions of section 19 (b) of the Act.

“The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law ... receive further evidence.”

14. The requirements for admitting new evidence on appeal are now well established.⁵ The four requirements are that there must be a reasonable and sufficient explanation for why the evidence was not introduced at the original hearing⁶ the new evidence must be materially relevant to the core issues of the case, the evidence sought to be introduced must be credible, and finally, there should be no prejudice to the opposing party that cannot be cured by a postponement or a costs order.

BOMBELA'S SUBMISSIONS

Reasonable sufficient explanation

15. The applicant submits that the BRP's and Busmark have always contended, not only in the main application but also in their 18 (3) application, that Bombela would suffer no prejudice or harm if the relief applied for is granted, because Bombela has a statutory damages' claim that it can pursue against Busmark.
16. The applicant avers that since the granting of the section 18 (3) order in favor of the BRPs and Busmark, the BRPs have now altered their stance and assert

⁵ See *Pepkor Holdings Ltd and Others v AJVH Holdings (PTY) Ltd and Others*; 2021 (5) SA 115 (SCA). *Ibex RSA Holdco Ltd and Another v Tiso Blackstar Group (Pty) Ltd and Others*; 2025 (2) SA 408 (SCA)

that the applicant is deemed to have abandoned its claim against Busmark, and that, as a result, Bombela has no claim against Busmark. This is so because the applicant, so say the BRPs, has not lodged its claim or its claim is disputed by the BRPs and does not form part of the business rescue plan which has been adopted by the creditors.

17. The applicant insists that it has met the requirements for further evidence on appeal. This is because the correspondence by the BRPs attached to the applicant's founding affidavit and the February 2026 BRPs status report became available only after the section 18 (3) application was heard and judgment was granted.

Materiality and Weight

18. Bombela submits that the evidence is material and goes to the core of the issue in this appeal. It directly contradicts the main contention supporting the BRPs' section 18 (3) application, namely that they require the execution of the order to obtain certainty about the quantum of Bombela's claim against Busmark and that Bombela will not suffer any harm if the order is granted. The admission of further evidence undermines the central reason advanced by the BRPs for requiring an order in terms of section 18 (3).
19. According to the applicant, this demonstrates that the BRPs' allegations and submissions to the court in the main application, particularly in the section 18(3) application, were misleading. The applicant avers that had the BRPs' true intention, as now shown in this further evidence, been known to the court a quo, it would have had a material effect on the outcome of the court's decision. Therefore, the judgment of the court a cannot stand because it was based on a misrepresentation.

Absence of Prejudice

20. Bombela contends that the BRPs' conduct is prejudicial to it because the BRPs have already taken a position that Bombela no longer has a claim for

damages against Busmark. Therefore, even if Bombela were to institute legal proceedings regarding its damages claim, those proceedings would be opposed.

THE BRPs' and BUSMARK's SUBMISSIONS

Explanation of Delay

21. The BRPs and Busmark contend that there are no special circumstances justifying the introduction of further evidence. The BRPs and Busmark contend that Bombela offers no explanation for why this issue was not raised earlier. They argue that their opposition to this application hinges on the fact that the evidence sought to be introduced is irrelevant to the issues in the present appeal. Furthermore, the application was launched late, without any explanation for the delay. The motive for the application, according to the respondent, is simply to obfuscate the issues and besmirch the BRPs and or Mr. Dollie.

Material Relevance

22. The BRPs and Busmark argue that the evidence regarding whether Bombela has a damages claim is irrelevant to whether the order of the court a quo should be executed.
23. The respondent submits that the only issue arising from the letter from Mr. Dollie, which is sought to be admitted, is whether Bombela has a claim for damages and, if so, whether it must quantify and file the claim now or at some later date. The BRPs contend that Bombela was required to file its claim by the due date set by Mr. Dollie in the letter at issue but failed to do so. Further, that Mr. Dollie was only expressing his opinion in the letter regarding the claim of the applicant.
24. The BRPs and Busmark deny making any misrepresentation to the court a quo. They concede that they have stated consistently that Bombela has a claim for

damages in terms of section 136(3) of the Companies Act. However, they argue that Mr. Dollie, acting on the conviction that Bombela's claim for damages had already arisen and was supposed to be submitted to the BRPs, duly invited Bombela to quantify and submit its claim. Bombela declined that invitation. Therefore, the BRPs insist that the evidence sought to be led is irrelevant, as whether Bombela may seek damages is a matter of law and is not dependent on Mr. Dollie's or the BRPs' opinions.

25. The BRPs contend that it is unclear whether Bombela contends that Dollie is correct and that it no longer has a claim for damages, or whether it has a claim for damages that it will institute later. Regardless, the BRPs insist that if Bombela believed it did not have a claim for damages, it should have raised this in the initial application or in its answer to the 18 (3) application. There is no explanation for why this was not done. Therefore, on any construction, Bombela's contentions are unsustainable.

ANALYSIS

26. In my view, the applicant has made its case for the need to lead further evidence. This is because the recent correspondence from Mr. Dollie and the BRPs was communicated and addressed to the applicant only after the court a quo granted the section 18 order. Therefore, there was no delay on the part of the applicants in adducing this evidence.
27. In my opinion, the evidence is material and relevant because it goes to the heart of the question whether Bombela has a claim for damages against Busmark or not. The BRPs presented evidence in the court a quo that execution of the order was sought to allow the sale of Busmark to the SEP. Therefore, the only outstanding issue was the quantification of Bombela's damages, which was necessary for the SEP to determine the purchase price.
28. In the correspondence from Mr. Dollie and the BRPs following the granting of the section 18 order, they now assert that Bombela has no claim for damages

against Busmark. On this point, the evidence is relevant and material to the determination of the issues in this appeal.

29. In my view, the evidence to be adduced is self-explanatory and credible, as it emanates from Mr. Dollie and the BRPs themselves. Its authenticity and veracity are uncontestable, and therefore, the evidence stands to be believed.
30. The BRPs' and Busmark's contention that Bombela has not offered any explanation for why this issue was not raised earlier is meritless. This is because the issue of Bombela having no claim for damages was raised for the first time by Mr. Dollie and the BRPs only after the court a quo granted the order in the section 18 (3) application.
31. The correspondence originates from Mr. Dollie and the BRPs themselves. As a result, I find that there is no prejudice that could be suffered by the BRPs and Busmark from the admission of the correspondence as evidence.
32. I therefore make an order that the application is successful and that the correspondence be admitted into evidence.

SECTION 18(4) APPEAL

33. I now turn to consider the application in terms of section 18 (4).
34. It is trite that in terms of section 18 (4) (a) (ii) of the Act, the appellant, as the aggrieved party, has an automatic right of appeal to the next highest court, which, in terms of section 18 (4) (b) (i) of the Act, is a full court of this division.
35. Our courts have held that the three requirements set out in section 18 (1) and (3) should not be interpreted as a formalistic box-ticking exercise. Rather, a holistic approach is required, with the main question being whether exceptional circumstances exist or not for the granting of the order.⁶

⁶ See Tyte, *supra*.

BOMBELA'S SUBMISSION

Exceptional Circumstances

36. The applicant submits that the court erred in finding that exceptional circumstances exist on the ground that the BRPs sought to enter into an agreement of purchase and sale of the Busmark business with the SEP.
37. The applicant contends that the BRPs, in support of the assertion of exceptional circumstances and irreparable harm to Busmark, stated that non-execution of the order of the court a quo would result in the liquidation of Busmark. On the other hand, Bombela would not suffer any harm if the order is granted. This was premised on the need to finalize the sale of Busmark to the SEP. The BRPs further contended that, to do so, Busmark's contingent liabilities, in particular the liability owed to Bombela, must be quantified and finalized within 12 months post-transaction close with the SEP.
38. The applicant contends that, after the execution order was granted in terms of s 18(3), the BRPs now assert that Bombela has no claim for damages against Busmark because the claim is deemed to have been abandoned or lapsed. Therefore, the applicant submits that, if the evidence of the position now adopted by the BRPs is admitted, that evidence is dispositive of the BRPs' application for an execution order, and the appeal should be upheld.
39. The applicant avers that Busmark's contingent liability toward Bombela cannot be finally determined until the appeal to the SCA is resolved. Further, the execution order, on its own, does not permit any final determination of Busmark's liability toward Bombela.

Irreparable harm to Busmark

40. Bombela insists that the BRPs have failed to prove, on a balance of probabilities, exceptional circumstances showing that Busmark will suffer

irreparable harm. The BRPs allege that the original date for finalising the contingent liabilities was fixed at 27 February 2026, but that this has now been extended, with an expected finalisation date of November 2026. However, the SEP's term sheet expressly provides that the parties may agree to extend the date for fulfillment of these conditions. Bombela argues that the BRPs do not allege that the SEP is unwilling to agree to a further extension.

41. Further, Bombela argues that the BRPs do not assert that no other SEP will be interested in buying Busmark.

Prospects of Success

42. Bombela avers that the court a quo canceled the obligations under the supply agreement. According to the applicant, the agreement was not only renegotiated by the BRPs and amended over the years, but the final agreement was also incorporated into the business rescue plan adopted in 2023, rendering it binding on Bombela, Busmark, and the BRPs. Therefore, Bombela argues that the SCA has held that an adopted business plan cannot be amended unilaterally by the BRPs, which is exactly what the court a quo's cancellation of the obligations resulted in. On this ground, Bombela contends that its appeal to the SCA has a reasonable prospect of success.⁷

FIRST TO THIRD RESPONDENT'S SUBMISSION

Exceptional Circumstances

43. The BRPs and Busmark submit that the court a quo's finding that the BRPs were entitled to proceed with the sale of Busmark to the SEP is correct. They further submit that failure to do so would have resulted in the SEP withdrawing its offer. They also submit that such withdrawal would have resulted in the liquidation of Busmark, with all the consequences that follow, including negative consequences for employees. Therefore, the BRPs and Busmark

⁷ See *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty-Five (Pty) Ltd* 2017 ZASCA 131; *Vantage Goldfields SA (Pty) Ltd* 2023 (4) SA 568 (SCA).

argue that the court a quo's finding that exceptional circumstances exist, warranting the grant of this order in their favor, cannot be disturbed on appeal.

Irreparable Harm to Busmark

44. The BRPs contend that any delay in executing the order would prejudice all stakeholders because Busmark would be liquidated, despite having been successful at the court a quo.

Irreparable harm to Bombela

45. In contrast, the BRPs aver that Bombela will suffer no irreparable harm if the execution is granted, on the basis that its position will remain unchanged. This is because, argue the BRPs, Busmark cannot perform under the warranty and defect obligations and, as a result, will not perform regardless of whether the execution order is granted. The BRPs insist that Bombela's remedies were and remain a claim for damages.
46. I have addressed this issue above in the application to lead new evidence on appeal. Notably, after the court a quo granted the order in their favor, the BRPs and Busmark changed their position and now insist that Bombela has no claim for damages against Busmark. Furthermore, even if Bombela does have a claim for damages, that claim is meaningless because Busmark cannot meet the claim.

Prospects of Success

47. The main issue on appeal before the Supreme Court of Appeal is whether the BRPs were entitled to invoke section 136 of the Companies Act to cancel obligations under a contract after amending it. The BRPs contend that, in granting leave to appeal, the court a quo did not find that there was a probability that another court would reach a different conclusion. Instead, the argument goes, the court a quo granted leave on the basis that it was in the

interests of justice for the SCA to provide certainty on this issue, given the dearth of law on the point.

ANALYSIS

48. The onus rested on the BRPs and Busmark to establish facts supporting their allegations that exceptional circumstances existed for the granting of the order in the court a quo. That absent the granting of the order, they would suffer irreparable harm, and conversely, that Bombela would not suffer any irreparable harm if the order sought was granted.
49. In my view, the court erred in finding that the BRPs and Busmark had discharged their onus and established that exceptional circumstances existed, entitling them to execute the order pending appeal. The central issue in the court a quo was whether there was common cause between the parties under s18 (3), namely that Bombela had a claim for damages against Busmark. Soon after the order under s18 (3) was granted, the BRPs changed their stance and, in correspondence with the applicant, asserted that Bombela had no claim for damages against Busmark.
50. I am satisfied that, had the court a quo been aware of the BRP's and Busmark's new stance, the court a quo could not have granted the order it did. It follows, therefore, as it should, that there were no exceptional circumstances justifying the granting of the order in the court a quo. In my view, on this ground alone, the application must succeed.
51. Consequently, irreparable damage to Bombela will result if the order is granted and Bombela does not have a claim for damages against Busmark. Bombela will be left in no man's land, with nowhere to seek its damages once Busmark is sold to the SEP.
52. On the other hand, no irreparable harm will be suffered by Busmark if the order is not granted. The close of the sale of the business has been extended to November 2026. No evidence has been presented to this court suggesting

that the parties cannot further extend this date, or that the appeal could not have been finalised in the SCA by November 2026. Further, no submission has been proffered in these proceedings that the BRPs will not secure another SEP should the order not be granted.

53. Also, no facts have been presented to this court other than a bare allegation that if the execution is not granted, Busmark will be placed in liquidation. Busmark is still operating as a going concern. Although it is alleged that the Independent Development Trust has withdrawn its funding of Busmark which it has been continuously providing since Busmark was placed in business rescue, no evidence has been proffered before this court how Busmark has been operating all along without that funding.
54. Insofar as the prospect of success is concerned, it is my view that Bombela has established a firm basis for believing it has a prospect of success. This is because the order of the court a quo in favor of the BRPs had the effect of canceling obligations under the supply agreement. This agreement was incorporated into the business rescue plan and was thus binding on all the parties. Our courts have held that an adopted business plan cannot be amended substantively and only in respect of administrative issues. It is thus my view that Bombela has prospects of success on appeal.⁸

CONCLUSION

55. Having regard to all the circumstances set forth above, I hold that the court a quo erred in granting the execution order in favour of the first to third respondents. I find that the orders of the court a quo must be set aside. Therefore, the appeal is successful.

COSTS

56. Lastly, I turn to the issue of costs.

⁸ See *Kransfontein supra*

57. Bombela is successful in both its application to lead further evidence and the main section 18(4) application. I am satisfied, having regard to the complexity of the matter, that the applicant is entitled to costs on Scale C, including the costs of two Counsel where so utilized, one of whom is senior counsel.
58. I therefore make the following order.

ORDER

1. The appellant's affidavit in support of the application for admission of further evidence in terms of section 19 (b) of the Act is admitted into evidence on appeal.
2. The orders (paragraphs 1 and 2) of the court a quo dated 9 March 2026, in respect of the respondent's application in terms of section 18(3) of the Act, are set aside and replaced with an order in the following terms:

"The applicant's application in terms of section 18 (3) of the Superior Court Act 10 of 2013 is dismissed with costs including costs of counsel for the respondent to be taxed on Scale C".

3. The first to third respondents shall pay the costs of the application to adduce further evidence and of this appeal, including the costs of two counsel where two counsel were utilised one of whom is senior counsel, taxable at Scale C.



DLAMINI J

Judge of the High Court

Gauteng Division, Johannesburg

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