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| (1) | REPORTABLE: YES |
| (2) | OF INTEREST TO
OTHER JUDGES:
YES |
| (3) | REVISED: YES |

29 June 2026

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: 2026 – 048139

In the matter between:-

PATIENCE SHUMBA

Applicant

and

SIDMEDIA

First Respondent

SOUTHERN AFRICA INDIAN-OCEAN DIVISION OF

THE SEVENTH DAY CHURCH (SID)

Second Respondent

DR HARRINGTON AKOMBWA

Third Respondent

**MAVIS MWEEMBA
Respondent**

Fourth

Date of hearing: 11 June 2026

Summary: S 18(3) Superior Courts Act – by nature urgent application – however requirements of urgency must still be satisfied – principles relating to urgency considered – applicant satisfying requirements of urgency – application considered as one of urgency under Rule 38

S 18(3) Superior Courts Act – requirements for application of section considered – meaning of exceptional circumstances and irreparable harm

considered – constitutes holistic enquiry and not compartmentalized approach
 – involves weigh-off on prejudice – overall considered requirements for relief not satisfied by applicant

S 18(3) Superior Courts Act – prospects of success on appeal as part of exceptional circumstances – prospects of success ordinarily not material consideration – prospects of success however can establish exceptional circumstances – prospects of success of respondent overwhelming – exceptional circumstances justifying refusal of relief

Fair hearing – Court bound to only afford relief as prayed for in pleadings – applicant in matter before Court seeking interim relief pending final decision for declaratory / directory relief in main matter – respondent only required to answer such case – Court deciding to grant final relief on all issues including declaratory / directory relief – such approach not competent and violating right of respondent to fair hearing – respondent filing appeal on such ground – prospects of success on appeal overwhelming – enforcing order in such circumstances would be unjust

S 18(3) Superior Courts Act – irreparable harm to applicant – case of applicant primarily founded on financial considerations – such considerations do not establish irreparable harm for purposes of s 18(3) – applicant no different from all other litigants not receiving salary due to termination of employment – applicant able to obtain substantial redress in ordinary course if successful – no irreparable harm shown

S 18(3) Superior Courts Act – irreparable harm to respondents – harm to respondents also primarily based on financial considerations – however harm to respondents also founded on having to comply with unjust order – respondents cannot be expected to comply whilst pursuing only process to remedy such injustice – weigh off of prejudice favours respondents

Conclusion – applicant failing to make out case under s 18(3) – relief refused

JUDGMENT

SNYMAN, AJ

Introduction

- [1] The current matter for determination concerns an urgent application brought by the applicant in terms of section 18(3) of the Superior Courts Act¹, in terms of which the applicant seeks relief to the effect that orders granted by Prior AJ in a judgment handed down on 24 March 2026 not be stayed by the pending appeal and application for leave to appeal brought by the respondents against such orders, and that these respondents be ordered to immediately implement such orders. The application was opposed by the respondents.
- [2] The application was first brought on 30 April 2026 and set down for 19 May 2026. In this application, the applicant sought relief that the order of 24 March 2026 not be stayed and be implemented pending the determination of an application for leave to appeal brought by the respondents at the time. It came before Orr AJ on 19 May 2026. However, and on such date, the learned Judge granted an order removing the matter from the roll, due to intervening events.
- [3] On 26 May 2026, the applicant then filed a second application in terms of section 18(3), but on this occasion, as Prior AJ had granted partial leave to appeal, the applicant sought relief to the effect that the order of 24 March 2026 not be stayed and be implemented pending the appeal noted by the respondents. The respondents had also filed a petition for leave to appeal to the Labour Appeal Court (LAC) based on the grounds in the application for leave to appeal that had been refused by Prior AJ, and the applicant equally

¹ Act 10 of 2013.

sought an implementation order pending that petition. This application was set down on 11 June 2026, and this is how it came before me.

- [4] When the matter came before me on 11 June 2026, there had been a full exchange of pleadings, and both parties filed written heads of argument. The matter was heard virtually. After hearing both parties, and because of the provisions of section 18(4)(a)(i)², I reserved judgment. I now hand down written judgment. For ease of reference, I will refer to the respondents jointly as '*the Church*'.

Urgency

- [5] In opposing this matter, the Church has taken issue with the urgency of the application. It pointed out that it took the applicant about a month to bring the initial application in terms of section 18(3), considering the catalyst for that application was the Church's application for leave to appeal filed on 26 March 2026. The Church further complains that after the abortive process on 19 May 2026, it took a further two weeks to bring the current application. According to the Church, there is no explanation for this delay. In fact, considering the founding affidavit of the applicant, she has very little to say about the issue of urgency. She appears to approach the matter on the basis that considering the nature of the matter and the purpose of the relief sought, she is entitled to an urgent determination of the matter.
- [6] The approach adopted by the applicant towards urgency is not entirely accurate. Even the particular nature of section 18(3) proceedings does not render it automatically urgent. Whilst it is true that section 18(3) proceedings do enjoy an inherent quality of urgency,³ that is not automatic urgency and the

² The section reads: '*If a court orders otherwise, as contemplated in subsection (1) - (i) the court must immediately record its reasons for doing so ...*'.

³ See *Caterpillar Financial Services South Africa (Pty) Ltd v MNTK Projects Proprietary Limited (Leave to Appeal)* 2025 JDR 1717 (LP) at para 26; *Sable Place Properties 106 (Pty) Ltd and Others v Visa Security Group (Pty) Ltd and Another (Leave to Appeal)* 2025 JDR 3670 (GP) at para 5; *Volvo Financial Services Southern Africa (Pty) Ltd v Adamas Tkolose Trading CC* 2023 JDR 2806 (GJ) at para 6; *Board of Healthcare Funders NPC v Council for Medical Schemes and Others* 2023 JDR 3069 (GP) at para 8; *Merge IT Recruitment CC v Brits and Another* (2016) 37 ILJ 1145 (LC) at para 37.

requirements for urgency under Rule 38 must still be addressed and satisfied. A similar situation has been dealt with in the context of urgency in enforcement of restraint of trade applications, which also enjoy an inherent quality of urgency,⁴ and where it has been held that nonetheless, the requirements of urgency must still be satisfied.⁵ I believe the same considerations would apply here. Let me explain why. It surely cannot be considered to be appropriate that an applicant basically at any time during the course of the determination of an appeal or an application for leave to appeal can decide to ask for interim enforcement, despite procrastinating for months and doing nothing, just because it is inherently urgent. After all, one of the core purposes of section 18(3) proceedings is to prevent irreparable harm to the applicant, and it can hardly be said that this is a realistic prospect if the application is not brought at the first available opportunity.

- [7] In my view, the Church is correct where it comes to its complaints about the manner in which the applicant approached urgency. The applicant needed to provide an explanation why it took her so long to bring the application. She also needed to bring the application at the first available opportunity. However, the applicant did not deal with this in her application at all.
- [8] What the applicant needed to deal with in her application was the ordinary requirements necessary to establish urgency summarized in *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another*⁶ as follows: (a) the applicant has to set out explicitly the circumstances which renders the matter urgent with full and proper particularity; (b) the applicant must set out the reasons why the applicant cannot be afforded substantial redress at a hearing in due course; (c) where an applicant seeks final relief, the court must be even more circumspect when

⁴ See *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff and Another* (2009) 30 ILJ 1750 (C) at 761.

⁵ In *Vumatel (Pty) Ltd v Majra and Others* (2018) 39 ILJ 2771 (LC) at para 5 the Court said: ‘... An urgent restraint of trade application is still nothing else but an urgent application, just like any other urgent application where final relief is sought. The ordinary requirements applicable to such urgent applications must still find application. The fact that one is dealing with a restraint of trade is not some kind of license that in itself establishes urgency, to the exclusion of all other considerations ...’. See also *Ecolab (Pty) Ltd v Thoabala and Another* (2017) 38 ILJ 2741 (LC) at para 20.

⁶ (2016) 37 ILJ 2840 (LC) at paras 20 – 26, and all the authorities cited there.

deciding whether or not urgency has been established; (d) urgency must not be self-created by an applicant, as a consequence of the applicant not having brought the application at the first available opportunity; (e) the possible prejudice the respondent might suffer as a result of the abridgement of the prescribed time periods and an early hearing must be considered; and (f) the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency. The applicant did not do so.

- [9] Thus, I was tempted to non-suit the applicant based on a lack of urgency. However, I believe the applicant is saved in this regard by the fact that it can be said that the later developments, after the leave to appeal application was first brought, to be some sort of novation. This is because an actual subsequent finding by the original Court on leave to appeal may have an impact on the assessment of the matter, and may require supplementary addressing of the issues under section 18(3). *In casu*, Prior AJ did decide the leave to appeal application on 12 May 2026. This at least reduces the delay to some two weeks, which is how long it took after that to file the second section 18(3) application. By saying this I am not excusing the applicant from the earlier delay, and I remain of the firm view that she should have brought the first application far earlier. But these later events do impact on the assessment when deciding urgency, because it can be said that the filing of the notice of appeal and petition for leave to appeal by the Church would also be an appropriate point in time to have brought the section 18(3) application, which appeal proceedings happened two days after the leave to appeal judgment of Prior AJ. The following dictum in *Letsholonyane v Minister of Human Settlements and Another*⁷ is apposite in this respect:

‘The main judgment having been delivered on 15 May 2023, the respondents had as the timeline has demonstrated, lodged their application for leave to appeal within two days of that judgment. Thus, no purpose would have been

⁷ (2023) 44 ILJ 2757 (LC) at para 15.

achieved by the applicant filing this or any application in enforcing or executing the order pending a ruling on the leave to appeal.’

- [10] The second consideration that saves the applicant is the inability to obtain substantial redress in the ordinary course. I accept that in some instances, a delay and procrastination may be so substantial or extreme, without any proper explanation for it, that this requirement of substantial redress is effectively rendered obsolete, and an applicant must fail on urgency on such basis alone. But this is not such a case. The delay is not extreme, and there are intervening events. So, the inability to obtain substantial redress in the ordinary course remains relevant. The proceedings under section 18(3) and (4) are bespoke and contemplate being expeditiously disposed of. There are no other means open to the applicant to obtain the kind of relief afforded by these provisions in the ordinary course.
- [11] I also consider that, overall, the Church had ample time to formulate a response to the application. Much of the work needed in opposing the application had been done in the course of prosecuting the appeal and in filing the petition for leave to appeal. The application by the applicant is not unduly lengthy, and can readily be answered. This mitigates prejudice to the Church resulting from truncated time periods.⁸
- [12] In the end, I consider it to be in the interests of justice that this application be urgently dealt with. Although there is an undue delay with little explanation for it, for which the applicant can legitimately be criticised, there are intervening events that must be taken into account. Considering that at the heart of deciding the current application is the issue of irremediable prejudice, as may be applicable to both parties, it must be in the interest of the parties to obtain finality on the issue, instead of striking it from the roll and kicking it down the track to be decided later. The issue of the inability to obtain substantial redress in the ordinary course is also an important factor. I am thus inclined to decide this matter as one of urgency.

⁸ See *Trendy Greenies (Pty) Ltd t/a Sorbet George v De Bruyn and Others* (2021) 42 ILJ 592 (LC) at para 12.

Background facts

- [13] The applicant is employed by the Church as chief financial officer (CFO), having commenced employment in March 2019. She is employed on a permanent basis in terms of a contract of employment signed on 19 May 2021. However, her employment was subject to the esoteric rules, beliefs and practices of the Church.
- [14] Further, the applicant is married to Good-Son Shumba (Good-Son), who is from Zimbabwe (the applicant is also from Zimbabwe), and who was also employed by the Church. In 2025, Good-Son was required to take up the position of Chief Financial Officer at the Mission of the Church in Mozambique. He declined to take up that position. That meant he had to relocate back to his original Mission in Zimbabwe, where a position for him would be found. It is common cause that Good-Son has now resigned from the Church, but this only happened after the hearing before Prior AJ.
- [15] According to the Church, because the Church had decided that Good-Son would be deployed elsewhere, with Church doctrine and policy being that married persons employed by the Church shall not be separated, the applicant was told at a meeting held in November 2025 that she would no longer occupy the position of CFO and she also had to relocate, because Good-Son needed to return to Zimbabwe. She was told that an alternative position would have to be found for her where Good-Son was deployed, being in Zimbabwe.
- [16] The applicant challenged this decision to higher authorities of the Church. She also pursued an unfair labour practice dispute to the CCMA, however this dispute was later withdrawn. The Church however remained of the view that Church policy dictated that the applicant's role as CFO would end effective 1 February 2026 when Good-Son was required to return to Zimbabwe. There was a dispute as to whether the Church actually terminated her employment,

but this issue need not concern this judgment. The applicant was paid until 31 January 2026, whereafter the payment of her salary stopped.

- [17] On 2 March 2026, the applicant launched an urgent application. It is important for the purposes of this application, for reasons dealt with later, to determine exactly what the applicant was asking for in such proceedings. The applicant's notice of motion was divided into two parts, being part A and part B. Part A was the urgent application. Part B related to relief sought in the ordinary course. In part A, the applicant sought relief to the effect that the Church continue to make the applicant's monthly salary payments to her, pending the final determination of her dispute under part B. In part B, the applicant asks for final declaratory and directory relief. The terms of the declaratory relief is that it be declared that she is employed by the Church on a permanent basis as CFO, and that it further be declared that her removal from that position was unfair, invalid and be set aside. The prayer for directory relief is in the form of her reinstatement into the position as CFO.
- [18] Turning to her founding affidavit, the applicant indicates that her case is based on her contract of employment and the application is brought under section 77 of the Basic Conditions of Employment Act (BCEA)⁹. She explains, where it comes to the nature of the application, that the relief she is seeking on an urgent basis is that the Church continues to pay her salary pending a determination under part B. She records that '*The nub of this application rests on the unlawful decision of the Respondents to stop my remuneration when in their stated position I am still regarded to be an employee*'. The bulk of the founding affidavit is devoted to making out a case for the granting of interim relief, including the harm and prejudice she would suffer if her salary is not paid. And then, under the ambit of establishing a prima facie right to the relief sought, she pleads reliance on her contractual right to her salary read with section 32 of the BCEA.

⁹ Act 75 of 1997 (as amended).

- [19] The Church opposed the application, and in its opposition highlighted what it described as several endemic deficiencies in the applicant's application. In particular, it took issue with the competence of the notice of motion, the basis for the relief sought by the applicant, which seemed to be couched both in the form of interim and final relief. In her replying affidavit, the applicant then explained the relief she sought, and indicated that she only sought interim relief for the restoration of her salary payments. She explains that under part B she sought to make out a case for a declaratory order, and the Court '*has an option*' to make such an order.
- [20] The application came before Prior AJ on 6 March 2026. According to the Church, as will be dealt with in more detail later, the case before Prior AJ only concerned the urgent interim relief regarding the continued payment of the applicant's salary, and the parties were directed by the learned Judge to focus on the question of urgency in presenting argument. Urgency was then argued and to a limited extent the merits of the matter. The Church contends that the learned Judge reserved judgment on the question of urgency, however then, in the judgment of 24 March 2026, proceeded to grant substantial and final relief against the Church on all the issues raised in the notice of motion. The Church complained that this violated its right to a fair hearing. The Church was particularly concerned about the fact that the learned Judge found that the Church policy related to employed married people and their staying together is inimical to public policy, whilst the Church in the hearing before Prior AJ had specifically stated that due to a lack of time afforded to oppose the application, it could not fully ventilate this issue.
- [21] The Church filed an application for leave to appeal on 26 March 2026, two days after the judgment. In the application for leave to appeal, it raised several issues, and in particular focussed on what it considered to be conduct of Prior AJ in making the findings that he did, contending that this violated its right to a fair hearing. A specific challenge also related to the fact that final relief was granted in matters concerning Church policy, when this should not have been dealt with in urgent proceedings on a final basis.

- [22] On 12 May 2026, Prior AJ handed down judgment in the application for leave to appeal.¹⁰ The learned Judge was convinced to grant leave to appeal on the issue of the Church policy relating to the termination of a position where spouses working for the Church would be required to be separated, which was referred to by the learned Judge as the ‘doctrine of entanglement’. Where it came to the issues of final relief being granted, the learned Judge refused leave to appeal, on the basis that he considered his views in the hearing to be that argument be focussed ‘*mainly*’ on the issue of urgency and that the merits were dealt with. The learned Judge in essence adopted the view that his decision was justified because he believed that a proper case had been made out for final relief on the facts as set out in the pleadings and he had an opportunity of a full and proper analysis of the matter before judgment was given.
- [23] On 29 May 2026, the Church then noted an appeal to the LAC on the issue of the doctrine of entanglement, for which it had received leave to appeal from Prior AJ. It however at the same time also filed a petition for leave to appeal to the LAC on all the other leave to appeal grounds that had been rejected by Prior AJ. Therefore, and as matters stood when the application came before me, there is a proper appeal and a petition for leave to appeal pending, both of which need to be decided by the LAC. As such, the order of Prior AJ of 24 March 2026 is suspended in terms of section 18(1) of the Superior Courts Act. This is then what led to the current application by the applicant in terms of section 18(3) of the Superior Courts Act.

Section 18(3)

- [24] Section 18(1) of the Superior Courts Act provides that: ‘*Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the*

¹⁰ The judgment was dated 9 May 2026 but was only delivered on 12 May 2026.

decision of the application or appeal.'. This matter does not concern section 18(2). Turning then to Section 18(3), it provides:

'A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.'

[25] In *University of the Free State v Afriforum and Another*¹¹, the SCA had occasion to consider how section 18(3) was to be applied, and had the following to say:

'It is further apparent that the requirements introduced by s 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.'

[26] It would appear from the judgment in *Afriforum* that the Court postulated that an enquiry under section 18(3) concerned satisfying three distinct and separate requirements. First, it must be proven by the applicant there exist exceptional circumstances. Second, it must be proven on a balance of probabilities that the applicant will suffer irreparable harm if the order is not granted. And third, it must be proven on a balance of probabilities that the respondent will not suffer irreparable harm if the order is granted. These

¹¹ 2018 (3) SA 428 (SCA) at para 10.

requirements are then considered and applied as distinct and separate requirements, each having to be individually established in its own right.¹² But more recently, the SCA in *Tyte Security Services CC v Western Cape Provincial Government and Others*¹³ specifically reconsidered that approach, where the Court said:

‘Whilst there are indeed statements in those judgments that would appear to support counsel's fundamental hypothesis, they seem to have been made in passing. They thus call for closer examination in this matter. An important point of departure, so it seems to me, is that consideration of each of the so-called three requirements is not a hermetically sealed enquiry and can hardly be approached in a compartmentalised fashion.’

The Court in *Tyte supra* proceeded to then consider how the requirements of section 18(3) should be considered and applied, where the Court pertinently held:¹⁴

‘... Even accepting that the legislature has employed the words 'in addition [to exceptional circumstances] proves on a balance of probabilities' in s 18(3), it would be passing strange that, if an applicant comes short in respect of either the *second* or *third* requirements, it would nonetheless still be able to successfully meet the exceptional circumstances threshold. The use of the words 'in addition proves' in s 18(3) ought not to be construed as necessarily enjoining a court to undertake a further or additional enquiry. The overarching enquiry is whether or not exceptional circumstances subsist. To that end, the presence or absence of irreparable harm, as the case may be, may well be subsumed under the overarching exceptional circumstances enquiry. As long as a court is alive to the duty cast upon it by the legislature to enquire into, and satisfy itself in respect of, exceptional circumstances, as also irreparable harm, it does not have to do so in a formulaic or hierarchical fashion.

¹² See *Ntlemenza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) at para 35; *Knoop NO and Another v Gupta (Execution)* 2021 (3) SA 135 (SCA) at para 48.

¹³ 2024 (6) SA 175 (SCA) at para 10.

¹⁴ *Id* at paras 14 – 15.

Although it has been postulated that the *second* and *third* are distinct and discrete enquiries, they are perhaps more accurately to be understood as being two sides of the same coin. The same facts and circumstances, which by that stage ought largely to be either common cause or undisputed, will inform both enquiries. The logical corollary of an applicant suffering irreparable harm will invariably — but not always — be that the other party has not. The enquiry into each can thus hardly be mutually exclusive, particularly because, as far as the *third* is concerned, unlike the *second*, the onus cast upon an applicant would be to prove a negative, in accordance with the usual civil standard. This suggests that, as with the exceptional circumstances enquiry, a court considering both the *second* and *third* must have regard to all of the facts and circumstances in any particular case. Insofar as the *third* goes, although s 18(3) casts the onus (which does not shift) upon an applicant, a respondent may well attract something in the nature of an evidentiary burden. This would be especially so where the facts relevant to the *third* are peculiarly within the knowledge of the respondent. In that event it will perhaps fall to the respondent to raise those facts in an answering affidavit to the s 18 application, which may invite a response from the applicant by way of a replying affidavit.’ (emphasis added)

[27] So, what then constitutes ‘*exceptional circumstances*’? This was dealt with in *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another*¹⁵ as follows:

‘What constitutes ‘exceptional circumstances’ has been addressed by Thring J in *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and Another* 2002 (6) SA 150 (C), where a summation of the meaning of the phrase is given as follows at 156I – 157C:

‘What does emerge from an examination of the authorities, however, seems to me to be the following:

1. What is ordinarily contemplated by the words “exceptional circumstances” is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something

¹⁵ 2014 (3) SA 189 (GJ) at para 17. See also *Ntlemeza (supra)* at para 37; *Knoop (supra)* at para 46; *Tyte (supra)* at para 12; *Sibanye Gold Limited and Others v Valuation Appeal Board for Rand West City Local Municipality and Others (Leave to Appeal)* 2025 JDR 1291 (GJ) at para 19; *Road Accident Fund v Newnet Properties (Pty) Ltd t/a Sunshine Hospital and Another* 2023 (5) SA 289 (GP) at para 11, where this exact reasoning was applied.

uncommon, rare or different; "besonder", "seldsaam", "uitsonderlik", or "in hoë mate ongewoon.

2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.

3. 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 the Court must decide accordingly.

4. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.

5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.'

[28] In summary, as held in *Ntlemeza v Helen Suzman Foundation and Another*¹⁶: '*In UFS v Afriforum this court agreed that whether exceptional circumstances were present depended on the facts of each case. The circumstances must be such as to justify the deviation from the norm. ...*'. And in *Jai Hind Emcc CC t/a Emmarentia Convenience Centre v Engen Petroleum Ltd South Africa*¹⁷ it was said: '*... The question posed brings sharply into focus the anterior question of exactly what it is that one is in search of in order to conclude that a given fact-specific set of circumstances clears the threshold of exceptionality. It must be recognised that 'exceptionality' is a value judgment ...*'. Lastly in this respect, the Court in *Moqhaka Local Municipality and Another v Tshabalala*¹⁸ said:

'Whether exceptional circumstances exist is a factual question that does not involve the exercise of a discretion or, as the court in *Incubeta* put it, '[n]ecessarily, in my view, exceptionality must be fact-specific. The

¹⁶ 2017 (5) SA 402 (SCA) at para 39.

¹⁷ 2023 (2) SA 252 (GJ) at para 13.

¹⁸ (2025) 46 ILJ 2439 (LAC) at para 34. See also *National Education Health and Allied Workers Union v Minister of the Public Service and Administration and Others* (2023) 44 ILJ 1207 (LAC) at paras 31 – 32.

circumstances which are or may be exceptional must be derived from the actual predicaments in which the given litigants find themselves'. In determining whether exceptional circumstances exist that warrant the order, a court must also consider whether there are prospects of success in the appeal ...'

- [29] In this case, the bulk of the Church's opposition to the applicant's application was based on the issue that its appeal and petition for leave to appeal to the LAC enjoyed substantial prospects of success, and as such, exceptional circumstances justifying interim enforcement do not exist. Or in other words, they argued that interim enforcement should be refused because they have an extremely good case on appeal. Conversely, the applicant contended that the Church's appeal is basically hopeless and will likely fail. This brings a crisp question into focus, namely what role would prospects of success on appeal play in deciding whether or not to grant relief under section 18(3)?
- [30] The issue of prospects of success on appeal decided in the context of an application under section 18(3) is an unruly horse to saddle. A conspectus of the wealth of authorities in this regard reveal that there are differing views. Some authorities say prospects of success are an entirely irrelevant consideration.¹⁹ Others say it must always be considered.²⁰ A third approach is that it may be a factor, but it is not an important or decisive factor.²¹ No matter what the approach is, it at least does appear to be competent to grant or refuse relief under section 18(3) without needing to specifically consider

¹⁹ See for example *Incubeta (supra)* at para 26; *Liviero Wilge Joint Venture and Another v Eskom Holdings Soc Ltd* 2014 JDR 1611 (GJ) at para 30.

²⁰ See *Afriforum (supra)* at para 15; *Minister of Social Development Western Cape and Others v Justice Alliance of South Africa and Another* 2016 JDR 0606 (WCC) at para 27; *Bliss Brands (Pty) Ltd v Colgate-Palmolive (Pty) Ltd and Others* 2025 JDR 2888 (GJ).²² – 23; *Zero Azania (Pty) Ltd v Caterpillar Financial Services SA (Pty) Ltd and a Similar Appeal* 2024 (2) SA 574 (GJ) at para 41; *Meintjes and Meintjes Rekenmeesters CC v Annandale and Another* 2025 JDR 0079 (GP) at para 30; *Langeni and another v South African Women in Mining Association and others (Leave to Appeal and Section 18(3))* 2024 JDR 1113 (GJ) at para 16; *Bitline SA 951 CC v Sasol Oil (Pty) Ltd and Another* 2024 JDR 1652 (GJ) at para 19

²¹ See *Tuhf Urban Finance (RF) Ltd v The House of Tandoor and Others* 2022 JDR 0640 (GJ).at para 7. In *Nene v District Municipality of Zululand and Others* 2024 JDR 2706 (KZP) at para 28, the Court said: '... the strength of the proposed appeal may only be a small factor to consider ...'.

prospects of success. As said in *Tuhf Urban Finance (RF) Ltd v The House of Tandoor and Others*²²:

‘In *AfriForum* where the court did not have before the necessary material to consider prospects of success, it candidly acknowledged that the prospects of success played no role in the decision. Plainly, it must follow that although a *relevant* factor to consider, prospects of success is not a *necessary* factor ...’

[31] Further in this respect, the Full Court in *Road Accident Fund v Newnet Properties (Pty) Ltd t/a Sunshine Hospital and Another*²³ said: ‘... The debate that raged amongst the members of the judiciary with regard to the role of prospects of success in the analysis of a s 18 situation, seems to have been settled by the SCA in *AfriForum*. We say ‘seem’ because there is no clear and direct authority on this point, in our view, given what the SCA said at a later stage ...’. The Court in *Newnet Properties* then concluded:²⁴

‘Nevertheless, of importance, in *AfriForum*, there was no record available and, as such, prospects of success did not feature in the consideration of the matter. This in our view is a demonstration that, even in the absence of prospects of success, a court may successfully consider a s 18(3) application and/or s 18(4) appeal. ...’

[32] I do not intend to enter into this debate and decide whether prospects of success are relevant or not. What I do believe is that after *AfriForum*, and through the authorities that followed it, a middle way, so to speak, has emerged, namely that prospects of success are relevant where such prospects of success in itself indicates that that it is something exceptional in the particular case. Or in other words, the prospects of success or lack of prospects of success is so extreme and patently obvious and apparent, that it necessitates being considered as part of the exceptional circumstances

²² 2022 JDR 0640 (GJ).at para 7.

²³ 2023 (5) SA 289 (GP) at para 23.

²⁴ *Id* at para 24.

enquiry.²⁵ As held in *Minister of Social Development, Western Cape and Others v Justice Alliance of SA and Another*²⁶:

‘It follows that the less sanguine a court seized of an application in terms of s 18(3) is about the prospects of the judgment at first instance being upheld on appeal, the less inclined it will be to grant the exceptional remedy of execution of that judgment pending the appeal. The same quite obviously applies in respect of a court dealing with an appeal against an order granted in terms of s 18(3). The position is very much akin to that which pertains when interim interdictory relief pending a judicial review is being considered.’

And as pertinently explained in *Mdletshe and another v Youtube Channel and Another*²⁷:

‘... this Court, whilst accepting that it is obliged to consider the Respondent’s prospects of success on appeal at this stage of the proceedings, is also alive to the fact that same should not be over-emphasised to the detriment of other pertinent and important factors. It is, as already stated, only one of the relevant factors to be added into the “melting pot” of the various factors to be taken into consideration in each particular case when arriving at a decision as to whether an applicant has discharged the somewhat onerous burden of proof in an application of this nature and proven, on a balance of probabilities, both exceptional circumstances, together with irreparable harm and, at the same time, no such harm to a respondent.’

[33] I must confess that I have been a proponent of the notion that, generally speaking, prospects of success should not play a role in deciding an application under section 18(3). There are two reasons why this may be problematic, which I believe still remain relevant. First, and in the context of an application for leave to appeal, this Court would in essence be called upon to reconsider its own orders outside the ambit of the actual application for leave to appeal, as it is not required that the section 18(3) application be

²⁵ See *Minister of the Public Service (supra)* at para 33; *CCI SA (Umhlanga) (Pty) Ltd and Others v Mobile Telephone Networks (Pty) Ltd and Others* (2023) 44 ILJ 1055 (LC) at para 35.

²⁶ [2016] JOL 35612 (WCC) at para 27.

²⁷ 2023 JDR 3164 (GJ) at para 32.

decided by the same Judge that considered the main matter. This is undesirable. Second, and where an appeal may be noted or there is a petition for leave to appeal, the prospects of the appeal succeeding rests with a decision by the Judges of the appeal Court, and it may be said, for all practical purposes, that to decide the issue of prospects of success in such circumstances would usurp the powers of the appeal Court in respect of an appeal yet to be decided.²⁸ This was succinctly explained in *Minister for Local Government, Environmental Affairs and Development Planning, Western Cape v Bitou Municipality and Others*²⁹, with specific reference to the *dicta* in *Afriforum supra*, as follows:

‘I do not take the above paragraphs in a matter concerning a s 18(4)(ii) appeal as authority for the proposition that the court of first instance (which this court is) should take into consideration the prospects of success on appeal. This would mean a second guessing of its own judgment and order granting leave to appeal. In any event as the above paragraphs reflect the SCA did not make its decision in that matter based on a consideration of the prospects of success on appeal, given the absence of the appeal record. I do not therefore take submissions made by the parties on this question into account ...’

- [34] And further, it is difficult to decide whether there are prospects of success on appeal without a proper consideration of the appeal record. In a section 18(3) application, a Court would ordinarily not have the benefit of an appeal record, unless of course it is motion proceedings, where the Court may have access to the pleadings bundle (the affidavits) that formed the basis of the original decision, and such pleadings constituting the evidence in the matter. But an appeal record may compromise more than this. The point is that it is undesirable to pronounce on the possible success on appeal without an appeal record. For example, the Court in *Afriforum supra*, despite deciding that prospects of success are a relevant consideration, nonetheless did not consider prospects of success, because it was not called on to decide the

²⁸ *Incubeta (supra)* at para 26. See also *Newnet Properties (supra)* at para 28, where it was said: ‘... I interpose and state that this court is not hearing the appeal at this stage. It is inappropriate for us at this stage to second-guess the stance to be taken by the Constitutional Court when hearing the application for leave to appeal ...’.

²⁹ (2020) 41 ILJ 1154 (LC) at para 8.

appeal on the merits and was not seized with the appeal record.³⁰ And the following comments in *Knoop NO and Another v Gupta (Execution)*³¹ are apposite:

‘There may be difficulties if the High Court takes the prospects of success into account in granting an execution order, because it is not clear that the court hearing an urgent appeal under s 18(4) will always be in a position to assess the weight of this factor. As I have noted, in both *UFS v Afriforum* and *Ntlemeza* the court disposed of the appeal by disregarding the prospects of success on appeal. The urgency of the appeal almost inevitably dictates that in this court, and possibly in a full court, the appeal court will not have the record before it and will be confined to assessing the prospects of success in the main appeal from the judgment alone. The usual principle that an appeal court decides the appeal on the record before the High Court cannot apply in those circumstances. ...’

[35] In sum, it is my view that where it comes to prospects of success, and adopting a practical approach to everything that has been said in the various Courts, the following approach is appropriate. First, a section 18(3) application may be competently decided without reference to prospects of success, even if it considered to be factor, where the Court considers it in a particular case inappropriate to do so. Second, and even where the Court considers prospects of success, it is a factor of lesser importance in an overall assessment of exceptional circumstances. And third, where a consideration of the prospects of success show that such prospects are patently obvious and overwhelming, it could serve to establish exceptional circumstances, to either to grant or refuse relief. As I have said above, this would include the case that the likelihood that an appeal would succeed on the grounds raised is so

³⁰ Id at para 15.

³¹ 2021 (3) SA 135 (SCA) at para 50. The Court in *Ntlemeza (supra)* at para 44, actually said: ‘... in *UFS*, in deciding the matter before it, this court recorded that the review record was not before it and thus had no regard to the prospects of success. We are in the same position in the present appeal. As in *UFS*, but more so, because of the application for leave to appeal the principal order, pending in this case, before us the question of prospects of success recedes into the background. As stated at the commencement of this judgment, s 18 has now had as a consequence the curious and ostensibly undesirable position that there are two appeal processes in one appeal court in relation to the same case’ (emphasis added).

compelling and patently obvious, that it would be a grave injustice to order interim enforcement. On the other side of the coin, if the likelihood of success on appeal is so extremely poor that it can comfortably be said the appeal is nothing more than a stratagem to avoid compliance and it is thus highly unlikely that an appeal will succeed, it can be said that it will lead to a grave injustice if interim enforcement is not granted. It is clear that all of this would be a fact specific enquiry in each and very individual case. In any view, and properly considered, this is the approach adopted in *Justice Alliance supra*,³² where the Court assessed prospects of success in order to determine whether a particular case on appeal was so poor and completely lacking in merit, that it was unlikely that it will ever be upheld on appeal, and as such, it would establish the necessary exceptional circumstances justifying interim enforcement.

- [36] The next consideration is irreparable harm (prejudice), which of course remains a critical factor, overall, in assessing exceptional circumstances. As discussed above, although it can be said that there are distinct requirements under section 18(3) to show that the applicant will suffer irreparable harm, whilst the respondent will not suffer irreparable harm, it simply does not mean a compartmentalised consideration of these requirements must be conducted. This is because, as said in *Tyte supra*, both these requirements serve to establish exceptional circumstances. In fact, the Court in *Tyte* made this clear, as follows:³³

‘What constitutes irreparable harm is always dependent upon the factual situation in which the dispute arises, and upon the legal principles that govern the rights and obligations of the parties in the context of that dispute. It was accepted in *Knoop* that ‘(t)he need to establish exceptional circumstances is likely to be closely linked to the applicant establishing that they will suffer irreparable harm if the . . . order is not implemented immediately’. The same, I dare say, can be said of its counterpart, the absence of irreparable harm to the respondent. In that sense, the presence or absence of irreparable harm,

³² See paras 27, 29, and 35 of the judgment.

³³ *Id* at para 13.

as the case may be, can hardly be entirely divorced from the exceptional circumstances enquiry. It would perhaps be logically incoherent for a court to conclude, on the one hand, in favour of an applicant that exceptional circumstances subsist, but, on the other, against an applicant on either leg of the irreparable harm enquiry.'

Applying what the court said in *Tyte*, the Full Bench in *Alexkor SOC Ltd v Vast Mineral Sands (Pty) Ltd and Others*³⁴ added:

'In *Tyte*'s case, as can be seen from the passages quoted above, the SCA recognises the fact that in most cases the irreparable harm would be subsumed into the 'exceptional circumstances'. In those circumstances one would have to rely on the same facts and circumstances to establish both requirements.'

[37] In sum, and in my view, what would be appropriate is a weighing off of harm that would be suffered by the respective parties, if an interim enforcement order is granted on the one hand, as opposed to it being refused on the other. The direction the scale would tip in, when conducting this weight off, would then determine whether irreparable harm exists or not, as one holistic enquiry. The Court surely always have a residual discretion where to comes to this harm (prejudice) weigh off, as specifically recognized in *Tyte supra*³⁵.

Analysis

[38] *In casu*, the first consideration must be whether exceptional circumstances are found in the nature of the right the applicant seeks to enforce, and the circumstances under which she seeks to enforce it. In this context, and considering the applicant pursued her rights by way of urgent motion proceedings, she is bound by her case as pleaded in the notice of motion and

³⁴ 2024 JDR 3901 (NCK) at para 40.

³⁵ Id at para 18. See also *Sable Place Properties (supra)* at para 17; *Neumann v Western Cape Education Department* (2026) 47 ILJ 1363 (LC) at para 14.

founding affidavit. In *Betlane v Shelly Court CC*³⁶ the Court said: '*It is trite that one ought to stand or fall by one's notice of motion and the averments made in one's founding affidavit ...*'. In *Van Der Merwe and Another v Taylor NO and Others*³⁷ it was similarly held that: '*... The applicants must stand or fall by the factual averments in their affidavits which are intended to support the cause of action on which the relief sought is based ...*'. And as to the introduction of what may be described as a 'new' case, the Court in *Brayton Carlswald (Pty) Ltd and Another v Brews*³⁸ made the following clear:

'In my view, there are two insurmountable hurdles in the 'new' version being accepted. First, the general rule in motion proceedings is that an applicant must stand or fall by the averments made out in its founding affidavit ...'

- [39] In her notice of motion, the applicant clearly and undeniably asked for interim relief, which she confirmed in her replying affidavit. This interim relief prayed for is specifically only that the Church continues to pay her salary, until the issue of her declaratory and directly relief sought, which is articulated under a separate heading (part B) in the notice of motion, is finally decided. A detailed conspectus of the founding affidavit leaves me convinced that the applicant made out no case for final relief where it comes to the declaratory and directory orders she sought. It follows that the interim relief case is the only case that Prior AJ would be permitted to decide. In this respect, the Court in *Molusi and Others v Voges NO and Others*³⁹ had the following to say:

'It is trite law that in application proceedings the notice of motion and affidavits define the issues between the parties and the affidavits embody evidence. As correctly stated by the Supreme Court of Appeal in *Sunker*:

'If an issue is not cognisable or derivable from these sources, there is little or no scope for reliance on it. It is a fundamental rule of fair civil proceedings that

³⁶ 2011 (1) SA 388 (CC) para 29. See also *Van Der Merwe and Another v Taylor NO and Others* 2008 (1) SA 1 (CC) at para 122; *President of the Republic of SA and Others v SA Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para 150; *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at paras 29-30; *Passenger Rail Agency of SA v Hoyo* (2025) 46 ILJ 1123 (LAC) at para 18.

³⁷ 2008 (1) SA 1 (CC) at para 122.

³⁸ 2017 (5) SA 498 (SCA) at para 29.

³⁹ 2016 (3) SA 370 (CC) at para 27/

parties . . . should be apprised of the case which they are required to meet; one of the manifestations of the rule is that he who [asserts] . . . must . . . formulate his case sufficiently clearly so as to indicate what he is relying on.'

The purpose of pleadings is to define the issues for the other party and the court. And it is for the court to adjudicate upon the disputes and those disputes alone. Of course there are instances where the court may of its own accord (*mero motu*) raise a question of law that emerges fully from the evidence and is necessary for the decision of the case as long as its consideration on appeal involves no unfairness to the other party against whom it is directed. In *Slabbert* the Supreme Court of Appeal held:

'A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.'

- [40] In fact, it makes perfect legal sense that the applicant would not, in her urgent application, seek final declaratory relief to the effect that she is permanently employed and that her removal from her position of CFO is unfair and invalid and be set aside. The same applies to the relief of reinstatement she seeks under part B, as this is nothing but an order for specific performance.⁴⁰ Why the applicant would not ask for this in urgent motion proceedings on a final basis is because this kind of relief, especially on a final basis, is simply not competent in such proceedings. As stated in *Member of the Executive Council for Education, North West Provincial Government v Gradwell*⁴¹, in deciding an urgent application: '*... A final declaration of unlawfulness on the grounds of unfairness will rarely be easy or prudent in motion proceeding ...*'. And further, at the heart of the dispute is nothing else but a breach of contract claim, and there simply nothing special in such a claim that necessitates urgent

⁴⁰ See *Pilanesberg Platinum Mines (Pty) Ltd v Ramabulana* (2019) 40 ILJ 2723 (LAC) at para 31, where it was said: '*... The relief of reinstatement in terms of the LRA is the same as specific performance that arises in a contractual dispute ...*'.

⁴¹ (2012) 33 ILJ 2033 (LAC) at para 46.

intervention, especially on a final basis. In *Northam Platinum supra*⁴² the Court held:

Whilst it may be so that a dismissal could in particular circumstances, and where the LRA is not relied upon, be considered to be unlawful and consequently invalid because of a specific provision in a contract of employment which has been breached, this cannot per se serve to jump the queue of all other dismissed employees relying on the provisions of the LRA waiting for their turn in court. This kind of situation is merely another cause of action upon which the termination of a contract of employment can be challenged in the Labour Court. But other than that it holds no particular magic ...'

Similarly, in *Maphalle v National Heritage Council and Others*⁴³ the Court decided:

'... It is entirely inappropriate to drag the first respondent to court by way of motion proceedings on extreme short notice to answer a case of breach of contract and to address the issue of the remedies that may follow such breach of contract, including the possibility of specific performance (the applicant calls this reinstatement). The fact that there may be breach of contract does not mean that specific performance (reinstatement) as a remedy follows as a matter of course, and the court would need to be satisfied, on the basis of proper evidence, that such relief is appropriate. It is seldom appropriate to make these kinds of determinations, which are in the form of final declaratory relief, in motion proceedings on an urgent basis.'

[41] I believe the applicant crafted her case with the above in mind. That is why the notice of motion was split in two, with one part being dedicated to interim relief on an urgent basis, and the other to final relief in the ordinary course. The founding affidavit, overall considered, also specifically speaks to such separation and is principally aimed at making out a case for interim relief. To obtain this interim relief, the applicant would need to satisfy the following requirements as articulated in *National Council of Societies for the Prevention*

⁴² (2016) 37 ILJ 2840 (LC) at para 6.

⁴³ (2023) 44 ILJ 579 (LC) at para 27.

*of Cruelty to Animals v Openshaw*⁴⁴: ‘... (a) A *prima facie* right. What is required is proof of facts that establish the existence of a right in terms of substantive law; (b) A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; (c) The balance of convenience favours the granting of an interim interdict; (d) The applicant has no other satisfactory remedy.’ That is exactly what the applicant sought to do, with specific reference to these requirements under separate heading in her founding affidavit.

[42] So, it is clear that on the basis of the case that was pleaded, what came before Prior AJ was an urgent application to decide if the Church should continue to pay the applicant’s salary until the dispute concerning the breach of her contract was decided in the ordinary course. What happened the hearing on 6 March 2026 appears to be commensurate with this. The Church has discovered, as part of its grounds for seeking leave to appeal to the LAC, the transcript of the proceedings before Prior AJ and has made extensive reference to it. A conspectus of this transcript leaves me convinced that what was at stake before Prior AJ, and which the parties were required to address, was the issue of urgency in the context of the urgent interim relief asked for. Prior AJ was not addressed on granting final declaratory and directory relief, and the learned Judge never asked to be addressed on the same nor did he ever intimate that he was inclined to consider granting it.

[43] Whilst the Church referred me to many references in the transcript in this respect, I will suffice by only referring to a few that I believe pertinent. When presenting the Church’s argument to Prior AJ, its counsel, when referring to what can be called the merits of the main case of the applicant, said: ‘... we would respectfully ask your Lordship not to deal with whether that was lawful or not on an urgent basis and under these circumstances ...’ Prior AJ answers that: ‘I think your point is made, your point, your point is made in the sense that it is not the aspect that I must concentrate on ...’. In fact, the learned

⁴⁴ 2008 (5) SA 339 (SCA) at para 20. See also *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* 2023 (4) SA 325 (CC) at para 253.

Judge recognises that the point in this regard concerns that this issue would be a determination for another day.

- [44] In reply to the submissions of the Church, the applicant's counsel then argued that the Court was already seized with sufficient information and with what he termed concessions from the Church, to enable the Court to grant all the relief sought in the notice of motion, including relief under part B, on a final basis. This argument solicited an immediate objection from the Church's counsel. This objection led to the following exchange between the Church's counsel and Prior AJ:

'Court: Right. Let me..... let him repeat his objections. Sorry Mr Grobler, would you mind just repeating your objection

Mr Grobler: Yes. M'Lord, the, the, the argument in chief this morning relates to the payment of the salary in the interim, in the interim, as if it is an interim interdict and related only to that ...

Court: Yes.

Mr Grobler: I responded to that and I responded only to the question of urgency, which Your Lordship had asked us to deal with

Court: Yes.

Mr Grobler: My learned friend is now dealing with relief that is sought beyond Part A, let us forget about the urgency argument, and he is saying to the Court, the Court is seized with all the facts of the matter in order to make a determination on Part B, which is something that is on rudimentary level different to what was argued in chief

Court: Yes

Mr Grobler: and from there, the objection ...'

- [45] Prior AJ then explained to the applicant's counsel that his (the Court's) understanding was that only part A of the application was argued, and it was only about the payment of the applicant's salary. The applicant's counsel answered that he held a different view and that he considered the Court capable of making a final decision on both part A and part B. This then led to the following exchange between the applicant's counsel and Prior AJ:

‘Court: But, but to be, but to be honest with you, I do not recall you mentioning the ability of the Court to make declaratory orders to reinstate certain contractual relationship beyond the remedy that was being sought to restore her status quo ante from a remuneration point of view. I certainly do not recall there being any emphasis ... despite your geenrla argument on that basis, but so is th eapplciant seeking to have A and B dealt with this morning?’

The applicant’s counsel answers in the affirmative and states that the applicant made out that case. Prior AJ answers:

‘Court: Well, be but the problem is that it has not been argued on that basis because we moved from are we dealing simply with an interim interdict with urgency or are dealing with a final interdict with urgency?’

This answer was allowed by a further exchange between Prior AJ and the applicant’s counsel concerning what was argued and in what context it was argued. Following this debate, Prior AJ said:

‘Court: So, the, the understanding and it seems to accord with your opponent’s understanding, that what was being asked for this morning, although it was confusing, was that of an interim relief in respect of monies but that is the nub of where your..... the applicant is saying, listen, that is where I am suffering the prejudice ...

Court: My understanding of his [Grobler] dealing with the facts of the matter dealt with question of the allegations of unlawfulness of the contract being determinate unlawfully and he, his, his concentration was on the basis that the jurisprudence before this Court is that is not a standalone basis upon which an urgent relief can be granted and those judgments that he referred to.
Mr Mkhize: Yes.

Court: It was in that context that he mentioned the factual dispute he said ...’

- [46] From the above, it is surely quite clear that it was the understanding of both Prior AJ and the Church’s counsel that what was being argued was only the

issue of urgency and the urgent relief under part A. Where it came to addressing the facts on the merits, that was only done in the context of this urgent relief sought. A final determination under part B was simply not on the cards.

[47] I must make it clear that what I am compelled to say next I do not say in the context of pronouncing on the merits of the Church's petition for leave to appeal as if I am deciding whether such petition has substance. That is simply not my place to do. In circumstances where a Court is called upon to decide prospects of success in section 18(3) proceedings, on the basis I have discussed earlier, such a decision is not the same as considering prospects of success in deciding whether or not to actually grant leave to appeal. Or in other words, the issue of prospects of success in the context of a section 18(3) application is unrelated to actually deciding prospects of success for the purposes of granting or refusing leave to appeal, or an appeal. Prospects of success in a section 18(3) application inform exceptional circumstances in that process, and not the merits of the matter on appeal which is a separate process.

[48] The Church complains that what it thought it was facing and had to answer was whether the matter was in the first place urgent, which it strenuously opposed, and second whether the applicant would be entitled to the interim relief she sought concerning the continued payment of her salary. It never believed nor considered that it would be facing final declaratory and directory relief, and certainly not final pronouncement on the Church's internal edicts and policies. I am unfortunately compelled to agree that what happened in the hearing on 6 March 2026, particularly considering what is quoted above, lends substance to the Church's complaints. In short, it was informed of the case it was required to meet, by way of the notice of motion and founding affidavit, as being interim relief on an urgent basis for the maintaining of the applicant's salary until the contract dispute was decided. That is the case that was argued before Prior AJ. But that is not what the Church got at the back end. Instead, it got a final pronouncement on all the issues raised in the applicant's

notice of motion, including part B, and more, in the form of pronouncement on its edicts and policies.

- [49] In *Fischer and Another v Ramahlele and Others*⁴⁵ the Court dealt with the appropriate manner of conducting litigation in our Courts, and decided the following:

‘Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for ‘(i)t is impermissible for a party to rely on a constitutional complaint that was not pleaded’. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.

It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be

⁴⁵ 2014 (4) SA 614 (SCA) at paras 13 – 15. See also *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at para 234; *Minister of Police v AmaBhungane Centre for Investigative Journalism NPC* 2021 (3) SA 246 (CC) at para 58.

determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.

This last point is of great importance because it calls for judicial restraint. As already mentioned Gamble J 'required' the parties to argue as a preliminary issue what he described as two issues of legality. Although he added that the parties were amenable to these proposals, counsel who appeared in this court and in the court below confirmed that the judge's own description, that he 'required' the points to be argued, was accurate. They were not asked for their submissions on whether this was an appropriate approach to the matter, or even (which was more pertinent) whether either question was in issue in the case. Nor were they asked whether their clients agreed to broaden the issues to encompass these points. The authority on which the judge relied in adopting this approach was not in point. That was a case where the court, *on the application of one of the parties*, held that it could dispense with the hearing of oral evidence, notwithstanding the case having been referred for the hearing of such evidence, because the questions raised on the papers could be determined without hearing such evidence and the evidence could not affect the resolution of those issues. It is a far cry from that for a court to raise issues that do not emerge from the papers and have not been canvassed in the affidavits and require that those be argued instead of hearing oral evidence and deciding the issues raised by the parties.'

[50] It is also apposite to refer to the following *dictum* in *Four Wheel Drive Accessory Distributors CC v Rattan NO*:⁴⁶

'In my view, a fundamental reason for maintaining the adversarial system in which the parties identify the dispute, is to ensure that judicial officers remain independent and impartial and are seen to be so. This is a cornerstone of any fair and just legal system. When a judge intervenes in a case and has recourse to issues falling outside the pleadings which are unnecessary for the

⁴⁶ 2019 (3) SA 451 (SCA) at para 23.

decision of the case and departs from the rule of party presentation, there is a risk that such intervention could create an apprehension of bias. The court could then be seen to be intervening on behalf of one of the parties, which would imperil its impartiality.’

[51] Applying the aforesaid *in casu*, the failures, with the utmost of respect, are apparent. It is not a case of Prior AJ deciding to consider pure questions of law. The granting of final declaratory relief in this case is not just a question of law, but actually involves crucial factual determinations. I believe that the Church was never informed that such factual determinations would be made in the context of the Court granting final relief under part B, and certainly was not asked to address it. In fact, a proper conspectus of the transcript of the proceedings on 6 March 2026 shows the opposite. In any event, the founding affidavit does not seek to make out such a case, and is clearly designed and populated to serve as basis for interim relief. In fact, to grant final relief where interim relief was asked for is unfair in itself, especially where the Church made it clear that it was only answering such interim relief sought. The Church was also at pains to indicate to Prior AJ that it was not appropriate to decide Church policy and declaratory relief at stake in this matter in the urgent application, and it was not able to properly present its case in this regard in such urgent motion proceedings. There can be little doubt that the Church would be materially prejudiced should the issue of final relief in this respect nonetheless be considered, and then then granted. Prior AJ decided the matter as he did, on the basis that he had the proper opportunity to consider the facts contained in all the pleadings, despite what he had said in the hearing on 6 March 2026. The learned Judge never decided the matter on the basis of the requirements for interim relief, which was the case before him and what he needed to decide. All of this is exactly what the Court in *Fischer supra* said should not happen, and the following *dictum* from such judgment is apposite:⁴⁷

⁴⁷ Id at para 16.

‘... The parties found themselves in a situation where they felt obliged to argue matters that formed no part of the case. That may easily arise because of the relative positions of judge and counsel or litigant. The latter may feel obliged to adopt the course indicated in order to avoid displeasing the judge and possibly without adequate reflection on the implications of what they are being told to do. For that reason judges must always exercise extreme caution before suggesting that parties depart from the course that they have chosen. That is particularly so in urgent matters where there is not always sufficient time to think through the implications of the issues raised by the judge. Gamble J obviously felt that counsel (and their clients) had acquiesced in the course he suggested, but acquiescence is not consent, and what was required was a clear and unequivocal change in the entire approach to the case by the counter-applicants, to which the City and Mrs Fischer needed to respond. That did not occur. ...’

- [52] In the judgment relating to leave to appeal, Prior AJ said that the parties did argue the merits of the case, albeit not as complete as they would like. But this, with respect, appears to fly in the face of the learned Judge’s own views expressed in the hearing on 6 March 2026, which indicate that the learned Judge understood that the merits were only addressed in the context of the urgent interim relief. The transcript of 6 March 2026 indeed shows that merits were argued, but it is indeed clear that this was only done in the context of satisfying the requirements for interim relief. As referred to earlier, in order for the applicant to obtain the interim relief of the continued payment of her salary, she must illustrate a *prima facie* right to the relief sought. Arguing a case on that basis simply cannot mean that the Court, simply because the issue of the right is addressed, could decide to grant final relief. It is one thing to establish a *prima facie* right even open to some doubt, where definitive and final proof of the right is not required.⁴⁸ It is an entirely something else to make out a case of a clear right for final relief, where the right must be finally proven.⁴⁹

⁴⁸ As explained in *Shimansky v Forman* 2014 JDR 2447 (GJ) at para 17, in the case of a *prima facie* right: ‘... this court must form a view on the relative strengths and weaknesses of the applicants’ case but without binding the court at the main trial in relation to the validity of the design’.

⁴⁹ In *Department of Economic Development and Environmental Affairs v Boyana and Another* 2024 JDR 1674 (ECM) at para 59, it was explained: ‘The meaning of ‘clear right’ in relation to an application for a final interdict relates to the degree of proof required to establish the right. This, in turn, entails the

This is exacerbated by the fact that it is simply not appropriate to finally decide declaratory relief in urgent application proceedings.

- [53] Further, it was simply not necessary for Prior AJ to make a final determination on whether the applicant would be entitled to final declaratory relief as asked for in part B, in order for the applicant to succeed in obtaining interim relief of the payment of her salary under part A. Making the unsolicited final order on the basis that the facts in the pleadings made out a case for it and the interests of justice demanded such an order, was thus irregular, *per se*. In *De Nysschen v Government Employees Pension Fund and others*⁵⁰ the Court said:

‘The court erred in granting the further, unsolicited order for payment against the appellant. Apart from the fact that no such order had been sought by the Department, the issue of the (re)payment of the pension benefit was not necessary for determination of the mandatory interdict. Both this court and the Constitutional Court have repeatedly expressed the principle that the dispute between parties is defined in the pleadings before court. Courts may, on their own accord raise issues of law that emerge fully from the record where consideration of those issues is necessary for the decision of the case. In this case, the foundation for the relief sought by the appellant was the Department’s refusal to submit her exit documents to the GEPPF. The Department’s defence was that, its refusal to submit the documents was justified given the appellant’s obligation to pay to it the pension benefit paid to her. The issue fell to be determined solely on the pleadings and evidence rather than on the interests of justice basis advanced by the high court.’

- [54] An apposite example can be found *Nederduitsch Hervormde Kerk v Die Wilge Hervormde Gemeente and Others*⁵¹ which ironically also concerned declaratory relief relating to a church’s policy. The Court identified the dispute as being declaratory relief relating to whether new congregations had the

existence of a right as a matter of substantive law, which means that the right must be one that is recognized by law. The right asserted must, furthermore, be clearly established by the evidence ...’. See also *Port St Johns Taxi Owners Association v MEC for Transport, Safety and Liaison Eastern Cape and Others* 2025 JDR 2243 (ECM) at para 11.

⁵⁰ 2023 JDR 4267 (SCA) at para 17.

⁵¹ 2024 JDR 4175 (SCA).

authority under the governing documents of that church to alienate certain properties to new owners. This was an issue distinct and separate from a determination concerning whether contracts of donation were valid, which was also at stake in this case in another part of the proceedings in the ordinary course. However, the Court *a quo* had proceeded to decide the matter on the issue of the validity of the contracts of donation. The Court *a quo* held that it was entitled to raise and consider that issue, based on what was before it. The SCA concluded:⁵²

‘I conclude that, contrary to the high court’s view that it had acted within the bounds of *Fischer*, it clearly acted outside of them. It did not simply raise a new ‘issue’ or ‘approach’. It raised an entirely new question of law not in issue in the pleadings. Counsel for the respondents had attempted to make this clear to the high court when the matter was heard. However, as I noted earlier, his submissions were rejected. In this respect, too, the high court failed to heed the caution for judicial restraint expressed in *Fischer*, and instead directed the parties to deal with an issue that was not pleaded. This was clearly to the prejudice of the NHKA, which was denied its right, as a cited defendant, to properly oppose the relief sought by the respondents ...’

[55] A further example is the judgment In *Makhado Local Municipality v Makhavhu and Another (Appeal)*⁵³, which concerned a case where the appellant in that matter complained that the Court *a quo* erred in granting orders that were neither sought in the notice of motion nor canvassed in the founding papers or at the hearing of the application. This is obviously the same as the complaint of the Church *in casu*. The Court decided as follows:⁵⁴

‘It is trite that an Applicant must stand or fall by his papers. Facts relevant to the relief sought must be set out simply, clearly and in chronological sequence in the affidavits which support the notice of motion.

⁵² Id at para 27. Also compare *A Penglides (Pty) Ltd and Another v Minister of Agriculture, Forestry and Fisheries and Another* 2022 (5) SA 401 (SCA) at para 18.

⁵³ 2026 JDR 0204 (LP).

⁵⁴ Id at paras 11 – 13.

In the present matter, the court *a quo* clearly deviated from the relief sought by the Respondents in their notice of motion. The court *a quo* further failed to invite the parties to comment or address the court or make submissions before making such orders that were completely outside the case the Respondents pleaded in their founding affidavit.

By making the orders, although the orders might have been practical under the circumstances and might have resulted in a more speedily finalization of the matter, impermissibly ventured and extended the relief beyond the Respondents case.'

[56] A last appropriate example to refer to is *Tau v Mashaba and Others*⁵⁵. In that case, an applicant sought relief to the effect that pending the institution of an action for defamation and damages, the respondents be interdicted from repeating such and/or similar remarks concerning the applicant in future. But despite this, and when the matter came before the Court *a quo*, the Judge granted a final order which declared that the statement made by the respondent was defamatory of the applicant, and finally interdicted the respondent from repeating the statement, or statements to the same effect. The SCA commented as follows in respect of this relief granted by the Court *a quo*:⁵⁶

'The founding affidavit makes it clear that the dispute between the parties was whether the respondent was entitled to a retraction and apology; and an interdict to prevent the appellant from repeating the initial statements 'between the granting of the interim order and the finalisation of the action'. That is also how the appellant understood the case he was called upon to meet. Both parties had approached the application on the basis that the trial court would decide whether the appellant was liable for damages for defamation. The papers show that the appellant's defences were fair comment, truth and public benefit and 'political commentary'. The order declaring that the initial statements were defamatory of the respondent effectively precludes the appellant from exercising his right to adduce

⁵⁵ 2020 (5) SA 135 (SCA).

⁵⁶ Id at paras 20 – 21.

evidence in defence of a claim for defamation. That, in turn, adversely impacts upon his fundamental right to have a dispute decided in a fair public hearing, enshrined in s 34 of the Constitution.

Had the High Court determined the dispute before it as defined by the parties, it ought to have decided whether the respondent had met the requirements for the grant of an interim interdict. These are: a prima facie right; a well-grounded apprehension of irreparable harm if the relief is not granted; that the balance of convenience favours the granting of an interim interdict; and the absence of another satisfactory remedy. An interim interdict pending an action is an extraordinary remedy within the discretion of the court. ...'

- [57] Based on all the aforesaid grounds, I believe this is a case where the prospects of success on appeal, considering the specific appeal grounds raised by the Church, establish exceptional circumstances that would actually justify not enforcing the order of 24 March 2026. I believe that the Church has not received a fair hearing. It came to Court to fight a case about whether the applicant should be paid whilst her breach of contract dispute is to be decided in the ordinary course. What it got at the back end was a final decision on the entire merits of the breach of contract dispute, together with adverse findings on church policy, which it did not have an opportunity to answer in an urgent Court. This is just not right, and certainly not fair. It infringes the Church's rights under section 34 of the Constitution. The LAC is likely to intervene. In *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association intervening)*⁵⁷ the Court had the following to say:

'This s 34 fair hearing right affirms the rule of law, which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are

⁵⁷ 2002 (1) SA 429 (CC) at para 11.

inconsistent with the Constitution courts must interpret legislation and Rules of Court, where it is reasonably possible to do so, in a way that would render the proceedings fair. It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case.'

[58] And on this same basis, the Court in *CCI SA (Umhlanga) (Pty) Ltd and Others v Mobile Telephone Networks (Pty) Ltd and Others*⁵⁸ decided as follows, in refusing relief under section 18(3):

'Prospects of success are to be considered as a factor in deciding whether or not to grant the exceptional remedy of execution of a judgment pending appeal. In my view, considering what I alluded to above, it is highly likely that leave to appeal will be granted in due course and that the LAC will reach a different finding on appeal.'

[59] In summary, it is my view that it would be manifestly unjust to require the Church to comply with the order of 24 March 2026 in the interim, pending its appeal, where the order was obtained under the circumstances it was obtained *in casu*. This Court must always guard against such injustices and should refrain from granting relief that will only further compound a failure of justice. Even if the irreparable harm considerations are decided in favour of the applicant (and they should not for the reasons set out below), this Court still retains jurisdiction to refuse to grant relief under section 18(3) for the reasons elaborated on above. As held in *Marima and Another v Makofane and Another*⁵⁹:

'The full bench in *Justice Alliance*, Binns-Ward J (Fortuin and Boqwana JJ concurring), viewed the provision differently. That court considered prospects of success on appeal to remain a relevant factor in granting relief. I understand Binns-Ward J, to say that prospects of success forms part of a residual discretion sourced in the common law meaning that, even if the requirements of irreparable harm and exceptionality are satisfied, a court

⁵⁸ (2023) 44 ILJ 1055 (LC) at para 45.

⁵⁹ 2025 JDR 4600 (GJ) at para 33.

retains a general wide discretion to grant or refuse leave to execute and to determine conditions upon which the right to execute should be exercised.’

[60] In fact, this situation is tied in with the issue of irreparable harm to the Church. It certainly cannot be gainsaid that the Church will suffer irreparable harm where it is expected to comply with an order that is, for the want of a better description, improperly obtained, and the only way to remedy this anomaly is by way of an appeal. This unduly undermines the right to appeal and the purpose of the appeal, in this case. The fact is that a final decision on whether the applicant is a permanent employee of the Church, whether she was unlawfully / invalidly removed from her position as CFO, and whether she should be reinstated in that position, is entirely inappropriate in urgent proceedings such as the one *in casu*. It is clear to me that the Church never ventilated these issues in detail, because it justifiably believed it did not need to. Making a final decision under these circumstances would deprive of a right to a fair hearing. It cannot be permitted that this unfairness be compounded by interim enforcement.

[61] Under the topic of prospects of success, final comments must be made. The applicant has devoted some attention to illustrating why the Church’s decision to remove (or dismiss) her from her position of CFO is fundamentally flawed and in breach of her contract of employment. She also points out that the conduct of the Church in relying on the disentanglement policy in conducting this termination is discriminatory, in violation of local law, and in any event, it has been inconsistently applied. She finally states that with her husband having resigned from the Church, there was no longer any need to apply this policy to her where it comes to her post as CFO. The Church has set out its own views in answer to this, which contradicts what the applicant has said. I do however not intend to set out the Church’s views, as it is not necessary. But in a nutshell, the case on the merits does not concern any egregious violation, because, with all peripherals stripped away, the Church says that its policies and the applicant’s terms of employment tied thereto, entitled it to remove the applicant from her position of CFO, whilst the applicant says that the Church’s conduct in doing so was unlawful, unfair and discriminatory for

the reasons given. The simple fact is that these are issues on the substantive merits, and an appeal Court should and would decide this when deciding the merits of the appeal. This being the case, and for the reasons as set out above, I do not consider any of this to be relevant in deciding the application under section 18(3). There is nothing egregious or patently obvious in any of these issues which may serve to convince me of an appeal outcome that is highly likely in order to establish exceptional circumstances. But the issue of prospects of success where it comes to the Church's right to fair hearing is different. For the reasons set out above, that case is obvious and egregious, and it does not require any decision on the substantive merits of the case. The following *dictum* in *Neumann v Western Cape Education Department*⁶⁰ illustrates the point:

'Regarding the prospects of success in the respondent's appeal, this court is not required to re-evaluate its earlier decision. It is enough to note that this case did not involve the kind of serious procedural irregularities or blatant legal breaches seen in *Letsholonyane v Minister of Human Settlements & another*, where the employer summarily dismissed the employee in direct violation of contractual and statutory requirements. In that matter, this court, per Tlholhlalema J, found that suspension during appeal would have prolonged an unlawful situation and effectively perpetuated an illegality. The employee in *Letsholonyane* had limited prospects of finding employment at her age — about two years before retirement — which meant she would be left with no income for the appeal period and that protracted appeals could extend beyond her retirement, rendering reinstatement meaningless. In contrast, the applicant was found guilty of a charge of insolence by this court, his dismissal was not in flagrant breach of contractual or statutory requirements, and there is no bad faith established on the part of the respondent. This case, therefore, does not present the type of circumstances that would justify treating the judgment as immediately enforceable pending appeal.'

⁶⁰ (2026) 47 ILJ 1363 (LC) at para 21.

[62] I now turn to the issue of irreparable harm *per se*, starting with the applicant. According to her, the irreparable harm that she will suffer if the order of 24 March 2026 is not enforced in the interim, pending the appeal, is based on several considerations. First, she states that her occupation is in the financial industry, and it is a convention in that industry that any person that is appointed or to be appointed in this industry must have their credit records in order, and failing to pay her the salary due to her '*will inevitably result in her obtaining an adverse credit record*', which would render her unemployable in the industry as her only career. She further contends that she also stands to lose her assets, her career and her dignity. She stated that she is unable to afford basic necessities such as food, clothing and medical costs, especially considering her medical aid has been terminated. She complains that the conduct of the Church infringes on her right to work. She points out that her husband had an accident recently which was quite serious and which needed surgery but they could not afford private health care as a result of her medical aid being terminated by the Church, and they were forced to seek medical help in the public hospitals with all its challenges. Finally, she states that her husband resigned and is now left without an income, leaving her as the only breadwinner.

[63] What is apparent from the aforesaid is that the basis for the applicant's contention of irreparable harm is founded squarely on nothing else but financial considerations. She does not tender her services. Even taking what she has said as it stands, this is not irreparable harm as contemplated by section 18(3). The applicant is no different from the thousands of employees that lost their jobs or salaries and are litigating to undo their predicament. Properly considered, and no matter what the cause of action may be and how the applicant classifies it, what she is asking for is the restoration of the *status quo ante* prior to the termination of her appointment as CFO. This is exactly the same as a dismissed employee asking for reinstatement. And there is nothing in this that establishes irreparable harm that justifies urgent intervention. Compared to the applicant's own version, all dismissed employees lose their salary and benefits (such as medical aid), cannot pay their bills, are accosted by their creditors and cannot afford basic amenities.

There is nothing unusual or exceptional about it. This was made clear by the Constitutional Court in *Road Traffic Management Corporation v Tasima (Pty) Ltd*⁶¹ as follows:

‘In any event, the non-payment of wages or salaries pending finalisation of an appeal cannot constitute exceptional circumstances for the purposes of s 18(3) without bringing almost every labour matter within the ambit of the section. It is impossible to find that Tasima’s employees’ position pending appeal must be protected, without finding that this must be the case in almost every labour dispute. Differently put, the exceptional circumstances that s 18(3) requires, ordinarily should not be located purely in the non-payment of wages or salaries pending appeal.’

[64] In *CCI SA supra*⁶² the Court applied the aforesaid *dictum* in *Tasima* as follows:

‘The Constitutional Court confirmed that the exceptional circumstances required by s 18(3) should not be located purely in the non-payment of wages or salaries pending an appeal process. More will be needed to demonstrate that ‘exceptional circumstances’ exist and the reality is that the applicants did not present any facts, other than financial suffering and distress, to support their case on the question of exceptional circumstances.

Secondly, as the Constitutional Court held, if the non-payment of wages or salaries pending finalisation of an appeal were to constitute exceptional circumstances for the purposes of s 18(3), it would bring almost every labour matter within the ambit of s 18(3).’

The Court in *Maphalle supra* similarly said:⁶³

⁶¹ (2020) 41 ILJ 2349 (CC) at para 131.

⁶² Id at paras 32 – 33.

⁶³ Id at para 31. Also compare *Jonker v Wireless Payment Systems CC* (2010) 31 ILJ 381 (LC) at para 16; *Democratic Nursing Organisation of SA and Another v Director-General, Department of Health and Others* (2009) 30 ILJ 1845 (LC) at para 19; *Northam Platinum (supra)* at para 37; *De Beer v Minister of Safety and Security and Another* (2013) 34 ILJ 3083 (LAC) at para 32.

'I am unconvinced that any explanation by the applicant concerning her financial prejudice is compelling or exceptional. None of what the applicant has set out in her founding affidavit makes the applicant's case different to the thousands of other cases where employees have been dismissed, and as a result, lost their salaries. As harsh as it may sound, the applicant is in exactly the same position as anyone else who has not received a salary, and there is no reason why she cannot wait in the queue to obtain an order to secure payment of that which may be contractually due to her, just like everyone else. ...'

[65] The applicant's reliance on her career prospects being compromised is speculative to say the least. But what I find quite ironic is that the applicant relies on a demand made for payment by the applicant of a medical account for her late mother at the Steve Biko Hospital, in the sum of R67 663.00, in which demand it is stated that if she does not pay, she would be blacklisted. But what is apparent from this demand, even as quoted by the applicant, is that this account is long outstanding, even whilst she was earning a salary. Even then, the possible backlisting did not spur her into making payment, and there was no cause for her not to, as she was earning her salary. I am convinced that the whole career prospects issue is contrived for the purposes of this substantiating this application.

[66] Lastly, and should the applicant ultimately be successful and the appeal is decided in her favour, she will not only get her position back, but she would have to be paid by the Church all the salary she did not earn in the interim. That would constitute proper financial redress.⁶⁴

[67] In sum, I am unconvinced that the applicant will suffer irreparable harm if the order of 24 March 2026 is not enforced pending the appeal and the petition for leave to appeal filed by the Church. What is nothing else but purely financial considerations raised by the applicant as basis to establish irreparable harm do not serve to substantiate such. The applicant can get proper financial redress in the event that the appeal is decided in her favour. The applicant

⁶⁴ Compare *CCI SA (supra)* at para 76.

has therefore failed to satisfy the requirement that she will suffer irreparable harm, as required under section 18(3).

- [68] With the applicant failing to satisfy the requirement of establishing irreparable harm on her part, there is really no need to consider whether the Church will not suffer irreparable harm. It is true that in the case of the Church, the harm it will suffer would be to pay the applicant her salary whilst the dispute is ongoing, which is in reality also just a financial consideration. The applicant has not tendered her services, as said above, so at this stage there is no issue with regard to the prejudice that may be caused by a possibly compromised trust relationship between the parties. So, and all said, things appear to equal in the balance where it comes to the notion of irreparable harm. But what puts this over the top in favour of the Church, is that the Church will be expected to comply with an obviously improperly obtained order, which is an injustice. But even considering the notion that both parties will suffer comparable harm, the end result is that the relief sought by the applicant must be refused. The Court in *Moghaka Local Municipality supra* held as follows:⁶⁵

‘This exercise is not akin to a balance of convenience examination where the respective harm to the parties is weighed up to determine the ‘preponderance of equities’. The applicant must, as a matter of fact, show that it will suffer irreparable harm if the suspension order is not granted and that the respondent will not suffer irreparable harm. Where both parties will suffer irreparable harm, the court should refuse the application.’

- [69] All considered, I am not satisfied that the applicant has made out a proper case for relief under section 18(3) of the Superior Courts Act. The consideration of exceptional circumstances in this case work in favour of the Church. As I have said, to enforce the order of 24 March 2026 at this stage, pending the appeal process, would just compound what is in my view an existing failure of justice and an infringement of the Church’s right to a fair hearing. The only way the Church can fix this wrong is by way of an appeal,

⁶⁵ Id at para 36.

and it should not be expected of it to endure the consequences of the order whilst taking this remedial action. Further, and on the issue of irreparable harm, the applicant's principal basis for alleging such harm is simply financial considerations flowing only from the fact that she would no longer receive a salary. It has been made clear that such a consideration does not establish irreparable harm nor is it anything exceptional. And finally, even if a global perspective is conducted of harm suffered by both parties, this consideration would favour the Church. The applicant is thus not entitled to the relief sought and the application must fail.

Costs

[70] This only leaves the issue of costs. Whilst the applicant ultimately did not succeed, I do not believe that the applicant acted unreasonably in bringing the application, and certainly at least had an arguable case. I also consider that there is obviously still plenty litigation between the parties to follow, and I do not believe it is fair to mulch any party with a costs order in such ongoing proceedings. Finally, I am guided by the judgment in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*⁶⁶ where it comes to the issue of costs in employment disputes in this Court, making a costs order in this case inappropriate. Exercising the wide discretion I have in terms of section 162(1) of the LRA, I believe that this is a case where no costs order would be appropriate and fair.

[71] In the premises, I make the following order:

Order

1. The application is heard as one of urgency in terms of Rule 38.

⁶⁶ (2018) 39 ILJ 523 (CC) at para 25. See also *Union for Police Security and Corrections Organisation v SA Custodial Management (Pty) Ltd and Others* (2021) 42 ILJ 2371 (CC) at para 35.

2. The applicant's application for relief in terms of section 18(3) of the Superior Courts Act is dismissed.
3. There is no order as to costs.

SNYMAN AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate B M Mkhize
Instructed by:	Sigama Attorneys
For the Respondents:	Advocate S Grobler SC
Instructed by:	Hendre Conradie Inc Attorneys