IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

13/6/14

Case number: 17321/2014

In the matter between:

LIVIERO WILGE JOINT VENTURE	First Appellant
G. LIVIERO AND SON BUILDING (PTY) LTD	Second Appellant

and

ESKOM HOLDINGS SOC LTD	Respondent

SUMMARY: Section 18 of the Superior Courts Act 10 of 2013 – confirms common law and Rule 49(11) of Supreme Court Rules that where appeal has been noted or an application for leave to appeal against an order of court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application

Section 18 – statutorily regulates requirements for implementation of order notwithstanding appeal.

Section 18 – removes previous "wide discretion" exercised by courts in determining where balance of convenience lies.

Section 18 – demands applicant for implementation proves firstly, exceptional circumstances; secondly, irreparable harm; and thirdly, lack of irreparable harm to other party – requirements are cumulative.

On facts – monopoly energy supplier to nation not in and of itself an exceptional circumstance because parastatal is not a preferred litigant – mere inconvenience and delay which is capable of management does not constitute irreparable harm – applicant failed to address or respond to respondents' factual averments.

Peremption – conduct must indubitably and necessarily point to the conclusion that the losing party does not intend to attack the judgment - where applicant threatened contempt of court proceedings respondent communicated that it "has no intention of not complying 'as long as it is required to.'" – caveat indicates that there will be compliance with the order only insofar as and until respondent is required to comply – the proviso presages the possibility of an appeal – no peremption had taken place.

JUDGMENT

SATCHWELL J

URGENT APPEALS

1. This is an appeal against the second of two judgments, both of which were heard on an urgent basis.

2. On 29th April 2014, Rautenbach AJ made an order[1] in the urgent court that Liviero Wilge Joint Venture, G Liviero & Son Building (Pty) Ltd, Masibuyisane Services ('Liviero') were to "forthwith perform and continue to perform all of its obligations under the Contract" which had been concluded between Liviero and Eskom Holdings Soc Limited ('Eskom').

3. Liviero noted an application for leave to appeal which had the effect of suspending operation and execution of the order of specific performance of Rautenbach AJ.

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[1] Case number 12874/2014

4. Eskom then brought an urgent appeal in terms of the provisions of Section 18 of the Superior Courts Act 10 of 2013 ('the Act'). Makume J made two orders on 28th May 2014 the first of which provided that "notwithstanding any application for leave to appeal and/or appeal by [Liviero] against the order granted by this Court on 30th April 2014, and pending outcome of any such application or appeal, paragraph 1 of the Order granted on such a date is not suspended." In other words, Liviero was required to comply with the order of Rautenbach AJ and therefore to continue to perform in terms of the contract.

5. An appeal court was convened in accordance with the provisions of Section 18(4) (Satchwell, Van Oosten and Spilg JJ) and sat on the afternoon of Friday 30th May. Neither the parties nor the court had yet seen the reasons for the orders made by Makume J. Counsel for the parties proposed that times be arranged for filing of heads of argument as soon as the reasons were available. The reasons of Makume J became available in the course of the afternoon by which time the parties were in agreement that the court should deal only with the second order of Makume J, pertaining to performance bonds or guarantees in respect of which there was particular urgency because those bonds/guarantees were due the following day, Saturday 31st May 2014. That court made an order in respect of the guarantees which issue is no longer the subject matter of the appeal.

6. On Tuesday 10th June, Rautenbach AJ made an order dismissing the application for leave to appeal. On Wednesday 11th June, Liviero served and filed notice of an application for leave to appeal to the Supreme Court of Appeal against the judgment of Rautenbach AJ.

7. The question arose whether or not the 36 hours interregnum during which no application for leave to appeal was pending has had the effect of rending the order of Makume J moot precluding the hearing of an appeal against his judgment. The question I have considered and asked both counsel is whether or not Eskom should now launch a new application in terms of section 18 or affirm that its original application in terms of section 18 is before this full bench as a court of first instance.

8. Counsel for Eskom was adamant that this court was to hear the appeal against the judgment of Makume J which order had specifically stated that "notwithstanding any application for leave to appeal and/or appeal by [Liviero] against the order granted by this Court on 30th April 2014, and pending outcome of any such application or appeal, paragraph 1 of the Order granted on such a date is not suspended." Counsel for Liviero indicated that Liviero was prepared to engage in either the hearing of an application or an appeal and placed on record that Liviero would ask this court to treat this hearing as a continuation of the appeal.

9. Accordingly, this appeal court, convened in accordance with the provisions of Section 18(4), now hears only the appeal against the remaining first order of Makume J. Although, this court was convened, as required by section 18(4), "as a matter of extreme urgency," we have the benefit that we are not sitting, as were both Rautenbach AJ and Makume J, in an extremely busy urgent motion court and have had the opportunity to consider this appeal over a period of days rather than hours.

THE GENERAL APPROACH TO SECTION 18 OF THE SUPREME COURT ACT 10 OF 1913

The default position

10. Time honoured procedure has been that noting of an application for leave to appeal suspends the execution of a court order[2]. The purpose of the rule as to the suspension of a judgment on the noting of an appeal "is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from"[3].

11. This practice has been recognized in Rule 49(1) of the Supreme Court Rules which provides that "when an appeal has been noted or an application for leave to appeal against... an order has been made, the operation and execution of the order in question shall be suspended, pending the decision of such an appeal or application..."

12. Section 18 of the Act did not change the default position. In subsection (1) is restated that "the operation and execution of a decision which is the subject of an application for leave to appeal, is suspended pending the decision of the application".

A court may direct otherwise than suspension

13. Rule 49(1) recognised that suspension prevailed "unless the court which gave such an order, on the application of a party, otherwise directs."

14. Such court had "a wide general discretion to grant or refuse leave" which discretion was "part and parcel of the inherent jurisdiction which the Court has to control its own judgments."[4] In exercising this 'wide' discretion, the Supreme Court of Appeal has, in the past, held that the court should "determine what is just and equitable in all the circumstances" which would normally require the court to have regard to a number of factors including the potentiality of

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[2] As discussed in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 AD.
[3] *South Cape supra* at 544H.
[4] *South Cape supra* at 546A.

irreparable harm or prejudice being sustained by either party if leave to execute were to be granted or refused, the balance of hardship or convenience where such potentiality of irreparable harm or prejudice was found to exist for both parties and the prospects of success on appeal.

15. In addition to the discretion to grant leave to execute pending appeal, the court was empowered to determine "the conditions upon which the right to execute shall be exercised." It would appear that the courts have usually given directions for the provision of security to protect the party who is required to perform. That possibility has not been adverted to in the present case.

16. I cannot agree with the approach taken by counsel for Eskom that the lodging of an application for leave to appeal is a 'danger' against which the Legislature has sought to protect decision of our courts. I view the situation as exactly the opposite. The status quo has been affirmed that operation and execution of the order is suspended pending the outcome of an application for leave to appeal. It is the opportunity to pursue an appeal which has been further protected. Instead of leaving the removal of suspension to the 'wide' discretion of the court[5], the Legislature has now given very specific directions when such removal of suspension may be ordered.

The requirements of Section 18

17. Subsections 18 (1) and (3) provide that the court may order "otherwise" than suspension only when three requirements are met.

18. Firstly, the court may only order otherwise "under exceptional circumstances". That is the overarching requirement. It is repeated in subsections (1) and (2) and the other requirements set out in subsection (3) are "in addition" thereto. It was usefully and well described by Sutherland J in the recently reported *Incubeta Holdings (Pty) Ltd and another v Ellis and another* 2014 (3) SA 189 GJ as a "threshold factual test."

19. The survey of authorities and the meaning given to 'exceptional circumstances' in *MV Ais Mamas* 2002 (6) SA 150 C was helpfully referred to in *Incubeta supra* with the caution about importation from one statutory context to another. My brother Makume J in the court a quo also helpfully referred to certain authorities in this regard[6]. I am in agreement with the view expressed that "exceptionality must be fact-specific." Nevertheless, every court must have regard to the 'unusual' or uncommon' nature of the facts which must be found and that a strict rather

[5] *South Cape supra* at 545C.
[6] Paragraphs [19] to [22] of the judgment.

than a liberal meaning should be applied where a statute permits departure only under 'exceptional circumstances.'

20. Both Sutherland J in *Incubeta supra* and Makume J in the court *a quo* took the view that the notion of putting into operation an order in the face of appeal process is a matter which requires particular *ad hoc* sanction from a court. It is expressly recognized therefore, as a deviation from the norm, i.e. an outcome warranted only by 'exceptionally'[7].

21. Thereafter, the party who applies to the court for non-suspension must "prove on a balance of probabilities", firstly, that "he or she will suffer irreparable harm if the court does not so order" and secondly, that "the other party will not suffer irreparable harm if the court so orders". The conjunctive 'and' is placed between the two propositions to be proven.

22. It is this leg of the test which Sutherland J described as introducing "a novel dimension". Of this there can be no doubt. In the past, there was an attempt to determine what was just and equitable in all the circumstances and a court would have regard to the potentiality of harm to each party with a weighing of the balance . Now, as Sutherland J has succinctly elucidated "a hierarchy of entitlement has been created".

23. Two distinct findings of fact must indeed now be made. The applicant for an order of immediate execution must "prove on a balance of probabilities" both an affirmative proposition and a negative proposition. No longer does the court search for 'potentiality' but must be shown factual probabilities of each outcome.

24. Both propositions must be proven – not one or the other but both. As Sutherland J said "two distinct findings of fact must now be made". The test is cumulative.

25. The wording of subsection 18(3) is far more prescriptive than was the earlier approach. The onus and the burden is spelt out – a balance of probabilities must be proven by the applicant. What is now required is proof that "he or she <u>will</u> suffer irreparable harm" and that "the other party <u>will not</u> suffer irreparable harm" (my emphasis). In exercising their former 'wide' discretion, courts had regard to 'potentialities' whereas the Legislature has now introduced an element of connectedness or even causation between the court order and result. There must be proof that the applicant "will" suffer irreparable harm "if the court does not so order" <u>and</u> that the other party "will not" suffer irreparable harm "if the court so orders".

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[7] At paragraph [22] in *Incubeta* supra and from paragraph [10] in the judgment of the court a quo.

26. Of course, the courts have previously had regard to the potentiality of harm and the nature thereof. Of course, the test set out in subsection 18(3) still requires "a qualitative decision admitting of some scope for reasonable people to disagree about the presence of the so called 'fact' of 'irreparability'"[8]. But subsection 18(1) and 18(3) certainly circumscribe the limits within which the court may deviate from the default position and definitely prescribes the tests which must be surmounted by the applicant for such deviation.

27. For these reasons, I cannot agree with the approach taken by Eskom's counsel in his heads of argument that the "policy relating to the danger of allowing appeals to render nugatory the relief granted by the order of immediate execution remains as valid as ever". I am of the view that the Legislature has sought to emphasise and protect the default position by way of Statute rather than merely in the Rules of Court. The 'wide discretion' available to the courts in deviating therefrom has been removed. The applicant who seeks execution prior to the hearing of an application for leave to appeal or the hearing of an appeal has to meet three consecutive requirements – exceptionality, irreparable harm and the absence of irreparable harm.

28. With respect, I am not in agreement with the learned judge in the court *a quo* that the court hearing an application in terms of section 18 still "retains the wide discretion"[9] or that the court must "exercise its wide discretion on a balance of probabilities"[10]. For the reasons set out above, I am of the view that there is no longer such a wide discretion nor that an assessment of balance of probabilities is permitted.

BACKGROUND TO THE LITIGATION UNDER CASE NO 12874/2014

29. It is necessary to outline the facts which have given rise to and which form the subject matter of the litigation.

30. This is not and cannot be done in order to assess the prospects of success of Liviero on appeal against the judgment of Rautenbach AJ. That is beyond the purview of the process provided for in section 18 of the Act. In this approach, I am in respectful disagreement with the view of Makume J who believed he was enjoined to comment on the prospects of success in the pending appeal.[11]

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[8] Paragraph [24] of *Incubeta supra.*
[9] Paragraphs [17] and [23] of the judgment.
[10] Paragraph [17] of the judgment.
[11] Paragraph [9] of the judgment.

31. Eskom and Liviero entered into a building contract on 3rd July 2012 for the construction of 336 flats on Erf 165 Wilge Township"[12] for a total price in excess of R258 million. The Contract is based on the NEC 3 form of contract (for Engineering and Constructing) incorporating those standard options identified in the Contract Data.

32. It is common cause that the former Project Manager, an agent of Eskom, informed Liviero, at the first site meeting on 9th July 2012, that the terms of the Project Labour Agreement (PLA) would be "introduced" as part of the Contract and Liviero would be required to "comply" with the PLA[13]. It is also common cause that no reference had previously been made to these PLA obligations in Eskom's invitations to tender, the tender submitted by Liviero or the Contract concluded between them[14]. It is further common cause that implementation of these PLA obligations has both time and cost implications for Liviero[15].

33. Liviero maintains that the introduction of PLA changed ' the contractor's risk profile drastically"[16] and that it was working towards achieving an amendment to the Contract to incorporate the PLA amendments. Eskom disputes that the introduction of the PLA requires any formal amendment to the Contract and, although 'strictly speaking it would have been preferable for a 'variation order' to be have signed", the PLA requirements were merely a Project Manager Instruction[17] . It is common cause that the Contract was never formally amended.

34. Pursuant to the introduction and implementation of the PLA, Liviero prepared and submitted drafts and final versions of calculations as to time and costs to the Project Manager. The approach of was that the cost and time of the PLA requirements would be dealt with separately until such time as the Contract had been modified to include the PLA and thereafter the main Contract and the PLA would run together[18]. This approach was never challenged or disputed and emerges from the Eskom Project Manager's own letter of 30th April 2013[19].

[1212] Part C1.1 'Form of Offer and Acceptance' at page 36 of the first application and see also the description of the Works at RM6 at page 67 of the first application "the works consist of the construction of 336 units and associated infrastructure and services in Erf 165 Wilge township".

[13] Annexure RM7 at page 68 to the first application.

[14] As set out in Liviero Answering Affidavit to the first application at para 30 at great length and not disputed in Eskom's Reply; as expressly stated in letter from Eskom dated 30 April 2013 at FB7 at page 246 of the first application; as set out in letter from Liviero dated 25th March 2013 at page 70 to the first application.

[15] As set out in the reference to the 170 pages of the PLA and the requirements thereof in Liviero's Answering Affidavit to the first application and not disputed in Eskom's Reply thereto. See also the letter from Eskom at FB 7 at page 246 of the first application and the letter from Eskom at RM10 at page 72 to the first application.

[16] Para 30.16.15 of the Answering Affidavit to the first application.

[17] As provided for in clause 14.3 of the Contract which empowers the Project Manager to "give an instruction to the Contractor which changes the Works Information or a Key Date" while the Works Information (annexure RM^ at page 67 of the first application) describes the Works and then sets out the background, the objective of the general description of the Works.

[18] See FB 6 of 24th January 2013 of the first application.

[19] At FB7 at page 246 of the first application.

35. The first draft of the PLA budget was presented by Liviero on 23 October 2012 and was followed by further calculations on 21st November that year. The eventual response of Eskom on 30th April 2013 was that "Liviero Wilge JV contract modification to include PLA will be presented to the Tender Committee on 8 May 2013 for approval."[20]

36. On 29th March 2013 Liviero advised that it had recalculated the calendar in accordance with PLA requirements which meant that additional time was required by Liviero to complete the contract. These calculations had already been made by the then Eskom Project Manager who had advised Liviero on 26th January 2013 of his own assessment of the "difference between the requirements of the PLA calendar and the calendar that the contract used on the accepted program of 28 June 2012" and had therefore agreed "to extend the time for the completion of the works" with resulting costs still to be calculated[21].

37. Advice from the Eskom Project Manager on 27 August 2013[22] was that "The PLA costs for the project from Nov 2012 was approximately R5 million. However, presently it is now approx. R5 million each month. Please note that the contract has been adjusted/modified to include PLA costs and time and therefore PLA is not a compensation event". However, it turned out to be incorrect that the Contract had been amended. No such amendment was ever finalized or concluded. Nevertheless, the parties continued on the basis that Liviero submitted claims for repayment of costs on the basis that that these were "PLA expense claims" and not "compensation events" as can be seen from payment certificate LVW-20 where an additional amount is "add" for "Project Labour Agreement (PLA) Expense Claims"[23].

38. The situation was neatly summarized in minutes of a meeting which were prepared by Eskom and which meeting was held on 13 January 2014[24]

> "It was noted that the PLA was not part of the contract. However at the project kick off meeting LWJV were informed that PLA was going to be implemented on the project. LWJV started implementation of the PLA in August 2012 and they subsequently submitted a budget for the PLA. The budget and hence a modification to the contract was approved by Eskom on 8 May 2013"[25]

39. Over the period July 2012 to March 2014 work was done, claims for payment submitted and were paid.

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[20] See FB 7 at page 246 of the first application.
[21] Annexure RM10 at page 72 to the first application.
[22] Annexure FB 8 at page 249 to the first application.
[23] Annexure FB 7A onwards at page 247 of the first application dated 25 February 2014.
[24] Annexure FB 9 at page 251 to first application.
[25] In addition it was noted that Liviero had highlighted budget and other problems.

40. In December 2013[26]:

a. It was made expressly clear to Liviero that the Project Manager was working subject to the decisions of two Eskom tender committees – one dealing with time and the other with time and money. This had been heralded by a number of references in correspondence to Eskom's internal procedures and particularly by the request from Eskom that it be given an extended notification period to allow for the internal Eskom processes which apparently supervised and controlled the Project Manager.[27] In March 2014, the new Project Manager clarified an earlier PM approval in January by stating that it had to be "approved" by Eskom's "delegated authority"[28]

b. It was suggested that there was "limited funds remaining" and that both the Project Manager and Liviero would have "to move fast" on the modifications "to ensure we do not run out of money".

41. The erstwhile Project Manager was replaced by Eskom and then a further new Project Manager was appointed in 2014.

42. It is the assessment by the Project Manager and the reversal of all previous payments made by Eskom to Liviero as set out in certificate no 21 which has given rise to a dispute between the parties. It is the absence of any amendment to the Contract (as is claimed to have been promised) to incorporate the PLA requirements and costings as well as the 'usurpation' of the PM functions by Eskom itself which have occasioned the claim by Liviero that Eskom has repudiated the Contract which repudiation Liviero has accepted and thereupon exercise it's common law rights to terminate the Contract.

43. Certificate LVW 21 is dated 25th March 2014[29]. The document includes the claim by Liviero for "Project Labour Agreement (PLA) Expenses" in an amount of R 36, 8 million plus Partnership Agreement Expenses in an amount of R 2,06 million. An amount of R5.7 million is deducted as either 'default interest' or 'advance payment recoupment'. There is then a deduction in respect of previous payments to Liviero identified as 'less previous recovery' of R 43.6 million. The result is that it is calculated that Liviero owes Eskom R4.7million.

44. Liviero responded on 2nd April, referred to earlier correspondence which had alerted the PM to "incorrect and invalid assessments in the draft certificate" and recorded that the PM has "now incorrectly assessed and reversed items which ought to have formed part of the assessment".

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[26] Annexure FB 11 at page 257 of the first application.
[27] See Eskom letter at annexure FB 13 dated 13 November 2013 at page 262 of the first application and confirmed in a follow up letter from Eskom dated 19th December 2013 at annexure FB14 at page 265 of the first application.
[28] Letter dated 4th March 2014 at annexure RM11 at page 73 to the first application.
[29] Annexure RMB at p[age 69 to the first application.

Notice was given that this dispute will be submitted to adjudication in terms of Section W1 of the Contract.

45. On the same day, Liviero recorded its view that Eskom had "demonstrated that it has no intention of abiding by material terms of the Contract and its obligations in terms thereof"[30] by reason of its conduct in failing to incorporate the PLA requirements into the Contract, insisting that Liviero abide by the PLA requirements notwithstanding that they do not form part of the Contract and the failure of the Project Manager to act independently in a fair and unbiased manner instead acting in accordance with the instructions of Eskom which has usurped the decision making duties and obligations of the Project Manager.

46. The litigation between the parties concerns whether or not Eskom repudiated the Contract thereby entitling Liviero to cancel the Contract. There is a litigation issue whether Liviero can cancel the Contract in terms of its common law rights when it has invoked the dispute adjudication provisions of the Contract to resolve a compensation dispute.

47. In the urgent motion court on 29th April 2014, Rautenbach AJ found that Eskom did not repudiate the Contract and that Liviero had not shown why it would be impossible for it to perform its obligations in terms of the Contract. Accordingly, the learned acting judge made an order that Liviero was to "forthwith perform, and continue to perform, all of its obligations under the Contract ".

THIS APPLICATION FOR NON SUSPENSION UNDER CASE NO 17321/2014

The exigencies of Urgency

48. It is appreciated that this application was prepared as a matter of great urgency and there was little opportunity to present and refine the facts in support of required propositions as Eskom might have wished to do. Accordingly, one finds no reference in the application to the threshold test of "exceptional circumstances" whilst the averments as to "irreparable harm" are reduced to "the balance of convenience".

49. It is regretted that the application has 107 pages of annexures which are no more than photocopies of the founding affidavit and annexures which comprised the original application before Rautenbach AJ under case no 1284/2014. The absence of any costs order in this regard is, to my mind, regrettable.

Summary of the Application before Makume J

[30] See the letter of 2nd April being annexure RM1 at page 27 of the first application.

50. Eskom's founding affidavit relies upon the indications given that Eskom would implement the order of Rautenbach AJ[31], absence of the prospect of success on appeal[32], the alleged purported cancellation of bonds[33], labour unrest amongst Liviero's workforce[34], delay in the Works schedule[35], shortage of accommodation within 50km of Kusile for artisans arriving in December 2014[36], further delays if another contractor is to be obtained[37] and unspecified financial loss to Eskom to found it's averments of irreparable harm to itself. Eskom's founding affidavit claims that Liviero will suffer no harm because it will continue to be paid for the work it performs in accordance with the provisions of the Contract to found its averment of the absence of irreparable harm to Liviero.[38]

51. Liviero's answering affidavit stresses the absence of incorporation of the PLA requirements which cost Liviero some R6 million per month into the Contract as undertaken[39], the refusal by Eskom to make repayments timeously or at all of PLA expenses paid out by Liviero[40], the reversal by Eskom of funds already reimbursed to Liviero, the labour unrest which has been occasioned by the inability of Liviero to meet PLA financial requirements in the absence of a Contract obliging Eskom to reimburse Liviero and the fear and intimidation which has resulted[41]. Liviero disputes the harm alleged by Eskom and specifically any cancellation of the bonds as alleged by Eskom and points to an agreement to substitute replacement bonds on return on the original bonds[42], avers that there is accommodation available[43], states that it is notorious that the Kusile and Medupi Power Stations are years behind schedule for reasons totally unconnected with the Liviero project[44].

52. Liviero also attached unnecessary papers to its answering affidavit – some 65 pages from the previous application.

53. In its reply, Eskom has really only tacked Liviero's complaint of non-payment of PLA expenses and the reversal of earlier payments in March 2014 by stating that an amount of R38 million was paid as evidence by certificate 21[45]. This does not address the reversal. Eskom repeats that "although the irreparable harm the Applicant would suffer is incalculable and not finite, and

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[31] Paragraph 28.4
[32] Paragraph 15
[33] Paragraph 28
[34] Paragraph 31
[35] Paragraph 32
[36] Paragraph 32
[37] Paragraph 34
[38] Paragraph 20 and 37
[39] Paragraphs 8, 12 to 20
[40] Paragraph 20
[41] Paragraph 67
[42] Paragraph 67
[43] Paragraph 70
[44] Paragraph 70
[45] Paragraph 14.14

made worse by the unlawful attempt to cancel the bonds, the Respondents alleged losses that they would suffer if the Order is granted is finite and is mitigated by a referral to adjudication".[46]

54. It is against this background, on these papers and in the hurly-burly of the urgent motion court that my brother, Makume J, had to make a decision on a urgent basis in accordance with the provisions of the newly introduced section 18 of the Act. His decision was handed down on 28th May 2014 and the reasons given on 30th May 2014.

55. It is against that judgment that this appeal is now brought.

THE JUDGMENT OF THE HONOURABLE MAKUME J

Exceptional Circumstances

56. The learned judge in the court a quo was, in my opinion, correct in commencing with an examination of 'exceptional circumstances'. The learned judge found the following facts indicating 'exceptional circumstances'.

Energy Supplier to the Nation – exceptional circumtances

57. The court found that what is under consideration is a 'national project that affects the economy of the country as well as employment contracts of numerous labourers on site"[47].

58. It is well known that Eskom is the supplier of energy to the country and beyond, that it is a monopoly and that the supply of power for both industrial and domestic use is totally reliant upon Eskom.

59. Whether this can constitute 'exceptional circumstances' on its own is debatable. If that were the case, each and every parastatal (Telkom, Transnet, Sanral, Portnet, SAA) would be entitled to rely upon its status when a court order is granted in its favour and automatically invoke the provisions of section 18 of the Ac without further ado.

60. Accordingly, this court has an obligation to interrogate whether or not the status of Eskom as a public enterprise or utility meets or contributes to the threshold factual test as provided for in section 18.

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[46] Paragraph 27.4
[47] Paragraph [25] of the judgment.

61. There can be no doubt that parastatals occupy an especial position within the economy and the wellbeing of the country. Without the majority of them (SAA excepted), South Africa would not enjoy the necessities of a modern economy. They must be accepted as existing and operating for the benefit of the country as a whole. It is this national benefit rather than shareholder and customer benefit which sets them apart from other enterprises.

62. Questions must be crisply put. Does this especial status mean that Eskom (and other parastatals) are exempt from compliance with their contractual obligations? The answer is obviously no. Does this especial status mean that Eskom (and other parastatals) are subject to the same jurisdictional and evidential requirements of our law? The answer is obviously yes. Does this especial status mean that Eskom (and other parastatals) need not attempt to show facts and persuade a court that it has shown 'exceptional circumstances'? The answer should again be no. Eskom is not a preferred litigant.

63. These questions could be put in the obverse. Is any party litigating with Eskom precluded from invoking the provisions of section 18 of this Act because they can never show that there are exceptional circumstances in their favour? Differently worded, is any party litigating with Eskom automatically denied access to section 18 of the Act because 'exceptional circumstances' can only ever exist in favour of Eskom? The answer, I suggest, must be no.

64. One then examines all other factors, other than the mere parastatal status of Eskom, for the existence of 'exceptional circumstances'.

Peremption – exceptional circumtances

65. Eskom submits that Liviero has perempted its right to proceed with an application for leave to appeal and that such peremption constitutes 'exceptional circumstances.' The learned judge in the court a quo found that "the sudden turnabout in the launching of an application for leave to appeal is a special circumstance in favour of the applicant."[48]

66. It is well established that 'if the conduct of an unsuccessful litigant is such as to point "indubitably and necessarily" to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal.'[49]

67. Application of what Innes CJ called, in *Standard Bank v Estate van Rhyn 1925 AD 266,* 'the doctrine' that '[i]f a man has clearly and unconditionally acquiesced in and decided to abide by

[48] Paragraph [24] of the judgment.
[49] *Dabner v South African Railways and Harbours* 1920 AD 583 at 594

the judgment he cannot thereafter challenge it,'[50] suggests that such 'unequivocal' conduct or intention has not always been easy for our courts to find.

68. In *Hlatswayo v Mare & Deas* 1912 AD - a judgment debtor made two payments after judgment and after receipt of a writ of execution but the court held that he had not lost his right to reopen the case (which was held to be subject to the same principles as to appeal). In *Union Government (Minister of Railways and Harbours) v Clay* 1913 AD, a judgment debtor had made part payment of the judgment debt and the court held that such part payment was not an unequivocal act inconsistent with an intention to assail the judgment. In *Resident Magistrate Taungs v James 1914 CPD,* Kotze J commented that compliance with the court order was probably occasioned by appellant thinking it was 'respectful to obey the court's order' and the full court held that such compliance had not resulted in pre-emption. In *Middelburg Coal Agency v Solomon & Co.* 1914 AD the aggrieved party had complied with the court order to set the matter down for hearing and pay costs but the appeal court held that he had not, by so doing, pre-empted the appeal. In *Standard Bank v Rhyn supra,* an order was made against a bank which then noted an appeal and ten days later sought to prove its claim for the amount of the judgment debt against a third party insolvent estate, which the appeal court held resulted in no peremption.

69. In *Gentiruco A.G. v Firestone S.A. (Pty) Ltd* 1972 (1) 589 AD, Firestone had not pursued its claim for remittal of an action to the Commissioner of Patents but the appeal court held that this was not express or by conduct abandonment of the review proceedings and that 'its conduct was not inconsistent with an intention on its part to appeal against any judgment or order that might thereafter be given against it.' In *Natal Rugby Union v Gould* 1999 (1) SA 432 AD, an election was challenged and the court ordered that new elections be held in accordance with constitutional procedures, an application for leave to appeal was noted but further meetings of the Union took place and elections were held, the appeal court found that the elections were probably held for administrative reasons and that there had been no peremption. In *Lekota NO v CCII Systems (Pty) Ltd* 2007 JDR 0024 (T), the court found there had been peremption in circumstances where a court order was handed down, there were many requests for extensions of time to comply with the order, the losing party wrote that they had sought the opinion of counsel 'there were no prospects of success on appeal and therefore they had decided to comply' but thereafter there was a letter indicating that the losing party had decided to appeal and apologizing for this *'volte face'*, an application for condonation of late filing of an application for leave to appeal was made some three months after the judgment had been handed down.

70. Most recently in the Minister of Defence v South Africa National Defence Union 9161/11) [2012] SAXCA 110 (30 August 2012) Nugent JA found that a "change of stance" on the part of appellant from the earlier "knee-jerk reaction" where appellant had issued a media release

[50] *Standard Bank v Estate van Rhyn* supra 268

announcing it had been decided to "withdraw the case from the SCA" and to pursue another process and had written to respondent's attorneys "we are drafting our notice of withdrawal of the appeal" did not preclude an appeal. The court found that acquiescence in a judgment will not be "lightly inferred and affirmed" [paragraph 22] and that it "would not serve the ends of justice" to hold the appellants to their earlier decision" [paragraph 25].

71. In the present case, the order of Rautenbach AJ is dated and was handed down on Wednesday 30th April 2014. On Saturday 2nd May Eskom wrote to Liviero demanding attendance at site on Monday 5th May. On 5th May Liviero responded that its Executive Committee was meeting on the following day, 6th May, to 'discuss giving effect to the Court Order.'

72. On Tuesday 6th May Eskom wrote to Liviero stating "you are in contempt", demanding attendance on site and confirmation that Liviero would resume works as ordered by the court "failing which steps would be taken to enforce the order" That same day, Liviero's attorneys responded, saying that it had been attempting to take steps to remobilise the site. It was also stated 'quite simply our client has commenced compliance with the Order…' and "Our client has commenced the necessary to give effect to the order and has no intention of not complying with the Order as long as it is required to." (my emphasis)

73. On Friday 9th May 2014, Liviero filed a Notice of Appeal.

74. In its founding affidavit Eskom alleged that the correspondence indicated that Liviero 'continued to evince every intention of complying with the Order' while, in its answering affidavit Liviero responded that 'it did indeed evidence an intention to comply with the Order, as it was obliged to and as it then had to, until its decision to pursue an application for leave to appeal had been taken and effected.'

75. Until Liviero had taken a decision to pursue an appeal it was obliged to comply with the order of Rautenbach AJ. When threatened that it was "in contempt" and that steps would be taken to 'enforce the order,' if it failed to give an undertaking that it would return to site, the response was that it would comply with the order and had no intention of not doing so 'as long as it is required to.' The latter proviso can only refer to pursuit of appeal procedures – there is little other basis (other than settlement) upon which Liviero would not be required to comply with a court order. Liviero undertook to comply with the court order until such time as it had invoked the appeal procedures. These it implemented timeously. The Notice of Appeal was dated and filed Friday 9th May which was well within the time periods for bringing an application for leave to appeal.

76. I can see no unequivocal statement or action necessarily inconsistent with any intention to pursue an appeal. The letter of 6th May contains the caveat which indicates that there will be

compliance with the order only insofar as and until Liviero is required to comply. That proviso presages the possibility of an appeal.

77. Accordingly, I take the view that the learned judge in the court *a quo* was in error in finding that there had been peremption on the part of Liviero which would constitute 'exceptional circumstances'. In any event, on the authorities referred to above, I do not take the view that such a 'change of heart' would constitute 'exceptional circumstances.'

Adjudication of the dispute in terms of the Contract – exceptional circumtances

78. As already indicated one of the disagreements between the parties which has led to the litigation is Liviero's stance that it is required to submit the dispute about certificate 21 to adjudication in terms of WI of the Contract and it is entitled to accept the repudiation of Eskom and cancel the Contract. With this stance, Eskom does not agree and takes the view that Liviero cannot approbate and reprobate.

79. That is the subject matter of the appeal.

80. I am accordingly not in agreement with the learned judge in the court a quo that, since the PLA dispute has been referred for adjudication, "there accordingly remains no dispute" and there should therefore be immediate and prompt implementation as ordered by Rautenbach AJ.

Urgency – exceptional circumstances

81. I cannot agree that Eskom's approach to the urgent court places this matter in the category of special circumstances[51]. If that were the case, then each and every successful applicant in the urgent court would feel entitled to proceed in terms of section 18.

Bonds – exceptional circumstances

82. At the time this application was heard before Makume J, the issue of the bonds was still alive. It has now been disposed of – per the hearing on Friday 30th May.

83. The founding affidavit specifically stated that "on 12th May 2014, the first respondent advised the applicant that it had cancelled the performance bonds which it had issued as part of its contractual obligations..."

84. There had been correspondence[52] about exchange of old and new guarantees. In reply, it emerges that Eskom had written to Liviero on 16th May 2014 confirming that the original bonds

[51] Paragraph [27] of the judgment.

were returned to Liviero "as it is standard practice" and demanding the "urgent submission of the original bonds and exchange of the old ones thereof". The replying affidavit, at paragraph 34.3 thereof, now simply states that the "first respondent has failed to provide them for the exchange".

85. The bonds were returned on 30th May 2014 pursuant to the court order of that date.

Irreparable Harm

86. The judgment of the court a quo assessed several factors as indicating "a well-grounded apprehension of irreparable harm" to Eskom.

A New Tender - irreparable harm

87. The learned judge in the court a quo thought it was "foolhardy" to expect a public company to issue a new tender because this "would not make economic sense" and "it would take too long"[53].

88. However, Eskom has not sought to indicate the source of or the nature of or the extent of any financial loss to itself if Liviero is not required to immediately perform. There is simply nothing other than speculation upon which this court, or the court *a quo,* could venture any factual finding.

89. Any employer in construction works faces the possibility of termination of a building contract and finding a replacement contractor. This is neither unusual nor insurmountable. These are only accommodation flats which are being constructed – they are not portions of a power station or a nuclear plant. There is nothing particularly complex or unknown about this construction. Liviero commented in its answering affidavit to the first application[54] that it should take no longer than two weeks to "estimate and price the completion of this reasonably simple Building Contract", which estimate Eskom did not dispute.

90. If Eskom is seen as a desirably contracting partner and employer on a construction works, then it should have no great difficulty in finding a new contractor. Eskom does have to follow various processes, including the PFMA, and these can be timeous. But this cannot be the first or last time that Eskom has to seek another or replacement contractor.

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[52] Emails exchanged 4th December 2013 to 3rd February 2014 pages 252 to 255 of second application.
[53] Paragraph [28] of the judgment.
[54] Paragraph 44 onwards.

91. Delay in construction of the flats to be built is unfortunate. Eskom has not disputed, in either of its replying affidavits, that the Kusile power station is already years overdue. In context, delay of the building of the flats cannot constitute irreparable harm.

92. As Liviero pointed out – not all accommodation within 50km has been booked. Eskom does not claim that none is available – it says "there is not much accommodation available any longer within the 50km radius"[55]. Liviero points out that numerous employees travel greater distances each day to which challenge Eskom has not responded[56].

93. I would assess the evidence as indicating no more than inconvenience to Eskom capable of management rather than 'irreparable harm'.

Legal Action by Artisans without Accommodation – irreparable harm

94. The lack of accommodation for artisans who are expected to arrive was viewed by the learned judge as possibly resulting in "serious losses, some will be forced to return to their homes and probably sue Eskom for loss of income and wasted expenditure"[57].

95. Fortunately, Liviero had dealt with this very issue in its answering affidavit to the first application[58] and in respect of which Eskom did not disagree in its replying affidavit.

96. Liviero points out that there is no indication from the Eskom as to the basis on which the deponent to the founding affidavit has averred that artisans will be arriving at the end of 2014 to commence work on the boiler installation. Liviero comments that it is both common cause and well publicised that the Kusile Power Station is years behind schedule. Liviero refers to media reports that such delays are due to a multiplicity of factors including works on boilers. Another media release by Hitachi confirms that Hitachi is the main contractor for construction and installation of the boilers construction of which commenced in 2011.

97. Absent any averment by Eskom that it is to employ these artisans, Liviero points out that the Kusile contract is being constructed by other major contractors. Eskom is neither the hirer nor provider nor employer of labour.

98. In these circumstances and absent any facts placed before the court by Eskom, it is impossible to agree that Eskom has proved, beyond reasonable doubt, any likelihood of litigating artisans causing grave financial loss to Eskom – who, after all, will have in place necessary insurances if it is the intended employer of artisans.

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[55] Paragraph 32 of the founding affidavit.
[56] Paragraph 41 onwards of the answering affidavit in the first application.
[57] Paragraph [29] of the judgment
[58] Paragraphs 38 onwards.

Labour Unrest – irreparable harm

99. Eskom averred that the approximately 650 persons comprising the workforce of Liviero and its subcontractors who are understandably anxious about their jobs[59]. Eskom says that this anxiety is "a reality that faces the Applicant on a daily basis" and that there is a "great risk of labour unrest similar to the one that occurred at the Medupi Power Station project during 2012 and 2013".

100. Liviero correctly points out[60] that Eskom has failed to give any indication of the nature of the reason for any unrest at Medupi Power Station and why there should be any connection with this project.

101. Insofar as the employees of Liviero and its subcontractors are concerned they have, according to Liviero, "long since left site"[61] which Eskom does not dispute.

102. I am unable to agree with Makume J that there will be "labour unrest of some sort"[62]. Even if there were unrest, it would appear that it is the unemployed and distressed who would engage in civil rather than labour unrest.[63]

Onus and burden of proving irreparable harm and lack of irreparable harm

103. Eskom asserts that "applicant will suffer harm while the respondents cannot legitimately make the same claim"[64]. That approach mistakes the onus and the burden. The onus is on Eskom to prove on a balance of probabilities that there will be no irreparable harm to Liviero. Liviero bears neither such burden nor onus.

104. The judgment of the court *a quo* did not interrogate the lack of irreparable harm and whether or not such lack had been proven by Eskom.

105. Where the learned judge stated "even though there is proof that a losing applicant who seeks leave to appeal will suffer harm that is not sufficient to stay execution such a party must still prove that the harm is irreparable"[65], it would appear the learned judge also mistook the nature of the test in section 18. The judgment suggests that it is permissible for Liviero ("who seeks leave to appeal") to suffer some level of harm. That is incorrect – section 18 requires that

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[59] Paragraph 31
[60] Paragraph 67 of the answering affidavit.
[6161] Paragraph 67.1 of the answering affidavit.
[62] Paragraph 30 of the judgment.
[63] See the reports on labour unrest by Liviero at paragraphs 27 onwards of the answering affidavit.
[64] Paragraph 12.1
[65] Paragraph [24] of the judgment

Eskom prove the lack or absence of such harm to Liviero. The judgment suggests that there is an onus upon Liviero ("such a party" i.e. the party who seeks leave to appeal) to prove that the harm is irreparable. That is incorrect – section 18 requires Liviero to prove nothing and Eskom to prove everything.

106. Eskom does not address itself by way of 'proof' to the absence of irreparable harm to Liviero. Instead there is indignation at the 'unlawful' departure from site and at the change of heart in proceeding with an application for leave to appeal.

Complaint about lack of PLA payments

107. Eskom calls the introduction of the PLA a 'red herring' and maintains that it has no bearing on the current 'dispute'. Eskom maintains that Liviero "accepted and implemented the PLA at all material times"[66]. That is presumably the subject matter of the application for leave to appeal.

108. What Eskom does fail to address is the financial implications of the PLA implementation as set out by Liviero in its answering affidavit to the first application and to this application. Liviero details that the PLA requirements involve it in expenditure of some R6 million per month[67] which is supported by the documentation annexed in the first application.

109. Liviero has set out in both sets of answering affidavits[68] how Eskom had previously certified and made payments of PLA entitlements and then reversed that certification and now seeks re-imbursement therefore. Liviero has detailed that it is currently out of pocket by reason of Eskom's perceived intransigence.

110. To all this, Eskom has done no more in its replying affidavit than "deny that the respondents will not be compensated for work they have performed on the project"[69]. Eskom does not dispute the lack of payment or the claim for reimbursement. Instead, Eskom states that there is a 'time dispute' which has led to rejection of the extension of time claim and hence to non-payment. In addition, there has been "no point" in issuing an assessment for the nine days outstanding.

111. Whatever the rights and wrongs of this disputed non-payment (which will be addressed at the appeal stage), the issue is that there has been a claimed reversal of payment to Liviero. The

[66] Paragraph 14 of the replying affidavit.
[67] Paragraph 8.4 of the answering affidavit.
[68] See paragraph 8.4 of the current answering affidavit
[69] Paragraph 12.3 of the reply.

issue is that Liviero is doubtful that there will be expeditious payment in the future and has set out reasons for that belief.

Labour Unrest

112. Liviero detailed how absence of reimbursement by Eskom has led to inability of Liviero to "pay its employees and subcontractors"[70]. Such inability has led in the past to, inter alia, labour unrest and intimidation. This is detailed in the answering affidavit by reference to the impact of 'worker unhappiness' upon named individuals and particular events[71].

113. Eskom replies that Liviero was responsible for management of these issues, that only two such incidents were ever reported which Liviero failed to resolve and that Eskom is prepared to claim for payment for additional security for Liviero on the site but that Liviero has made no such request.

CONCLUSION

114. For the reasons set out above I regret that I am of a different view to that expressed by my learned brother in the court *a quo.*

115. The court hearing an application in terms of section 18 no longer has a 'wide discretion' and must operate within the purview of the three requirements set out therein which requirements are subject to the preliminary and overarching threshold test of 'exceptional circumstances' plus proof of both the presence and the absence of irreparable harm. The onus is upon Eskom in respect of all three requirements.

116. I do not find that Eskom has succeeded in proving 'exceptional circumstances'. A parastatal energy supplier is not automatically the bearer of such 'exceptional circumstances' when it seeks to implement a court order. There has not been peremption by Liviero.

117. The irreparable harm for which Eskom tends has been covered. Labour unrest was envisaged amongst Liviero or its subcontractors and not within an Eskom workforce. None of them are on site. Any labour unrest is likely to be occasioned to Liviero, and not Eskom, if Liviero is unable to meet the PLA requirements introduced and required by Eskom. There is already delay in building these flats. These flats are intended to provide accommodation for artisans still to arrive at and be employed by others in installation of boilers at the Kusile Power Station. The problem in installation of boilers has already attracted much media attention from which it is apparent that it is not Eskom which is installing boilers nor its employees who will do so.

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[70]Paragraph 24.2 onwards.
[71] Paragraph 27.

Delays in finalisation of the Kusile Power Station have nothing to do with this Liviero project. Eskom gave neither details nor explanation nor causative connection with Liviero of the financial harm to which it referred.

118. Liviero does appear to face irreparable harm. It has entered into one Contract and found itself obliged to make payments in advance to subcontractors and employees in terms of the subsequently introduced PLA requirements. Reimbursement of those expenses has been partially made and then reclaimed/reversed. There is no guarantee that Eskom will make payment in full and on time.

ORDER

119. The order is as follows:

1. The appeal of Liviero Wilge Joint Venture, G Liviero & Son Building (Pty) Ltd, ('Liviero') against paragraph 1 of the Order of Makume J of 28th May 2014 is upheld.

2. Paragraph 1 of the order of Makume J of 28th May 2014 is set aside.

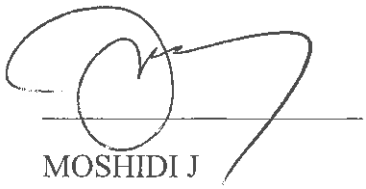
3. The order of Rautenbach AJ of 30th April 2014 remains suspended pending the outcome of the application for leave to appeal and any appeal consequent thereupon.

4. Eskom is to pay the costs of the hearings of the application before Makume J on 23rd and 24th May, the costs of the appeal hearing on 30th May and the costs of this appeal on 10th and 12th June 2014 such costs to include those occasioned by the employment of two counsel including senior counsel.

DATED AT JOHANNESBURG 12th JUNE 2014

SATCHWELL J

I agree



MOSHIDI J

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Dates of hearing of the Appeal: 30th May 2014, 10th and 12th June 2014

Date of judgment: 13th June 2014