




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

CASE NO: 3445/2019

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
<u>17/11/2021</u> DATE	 SIGNATURE

In the matter between:

**SOUTH AFRICAN WOMEN IN MINING INVESTMENT HOLDINGS
(PTY) LTD**

Applicant

and

NOMSA MOLOBYE

First Respondent

BELINDA MOLEKO

Second Respondent

DOROTHY SEFANYETSO

Third Respondent

DELENE JACOBS

Fourth Respondent

RUTH MAGWAGWA

Fifth Respondent

BRENDA JANSEN

Sixth Respondent

SAWIMA: GAUTENG

Seventh Respondent

SAWIMA: NORTHERN CAPE

Eighth Respondent

SAWIMIH – GAUTENG

Ninth Respondent

BELL DEWAR INCORPORATED

Tenth Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by

JUDGMENT

YACOOB J:

1. The first to ninth respondents unsuccessfully sought leave to appeal my judgment in this matter. The applicant (“SAWIMIH”) simultaneously sought an order that my order be nonetheless enforceable should I grant leave to appeal. Since I refused leave to appeal the application for enforcement was not ripe. The first to ninth respondents (I will refer to them as the respondents in this judgment as they are the only respondents participating in these proceedings) have now lodged an application for special leave to appeal with the Supreme Court of Appeal, and I must now determine the enforcement application.
2. Section 18 of the Superior Courts Act, 10 of 2013 (“the Act”) now governs the operation of a decision which is subject to an application for leave to appeal, or an appeal. The basis on which a court may order that a decision operates and may be executed on (if it is not an interim order) is provided for in subsections (1) and (3).
3. Subsection 18(1) permits the court to make such an order “in exceptional circumstances”. In terms of section 18(3), a court may order the execution of a decision subject to an application for leave “if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders”

4. Section (3) does not ask the court to consider the balance of convenience between the parties. SAWIMIH in this instance must prove on a balance of probabilities (a) irreparable harm to itself if the order is not granted *and* (b) that there will be no irreparable harm to the respondents if the order is granted. It is not for the respondents to prove they will suffer irreparable harm if the order is granted, but for SAWIMIH to prove the respondents will not suffer irreparable harm if the order is granted.¹ This is in addition to satisfying the court that there are exceptional circumstances.
5. Should SAWIMIH satisfy these statutory requirements, the court then has a discretion to grant or refuse the application to execute. In exercising that discretion the court must consider prospects of success of the appeal.² If the statutory requirements are not satisfied, then the court's does not have a discretion to exercise and the application must be dismissed.³

The existence of exceptional circumstances

6. As can be expected, the question of the existence of exceptional circumstances is a factual one and will differ in the context of each case.⁴
7. SAWIMIH contends that the exceptional circumstances in this case are that the beneficiaries who would benefit from the dividend being released to SAWIMIH in terms of my order are rural women who have been waiting a long time to benefit from a Broad-Based Black Economic Empowerment opportunity which was

¹ *University of the Free State v Afriforum and Another* 2018 (3) SA 428 (SCA) at [10]

² *Knoop NO and Another v Gupta (Execution)* 2021 (3) SA 135 (SCA) at [49]

³ *Knoop NO* (above) at [50]

⁴ *UFS v Afriforum* (above) at [14]

established to empower them. Some of them have died in the interim. They need the money so that their lives can be improved and some of them are living on the edge of starvation. They would not be afforded substantial redress if they have to wait until the appeal is decided. The attempt to appeal is a frivolous attempt to delay.

8. The respondents, on the other hand, contends that these are not exceptional circumstances. They are the natural consequences of the appeal in the circumstances and that prospects of success must be considered in determining whether there are exceptional circumstances. The respondents' prospects are good and therefore any prejudice to SAWIMIH is not unduly harsh and does not result in exceptional circumstances.
9. While I have the utmost sympathy for the poor rural women who have invested their hard-earned savings in SAWIMIH in the hope of bettering their lives on whom SAWIMIH pins its case of exceptional circumstances, I am not satisfied that these are in fact exceptional circumstances. The women have been waiting for a long time and if a final determination by a higher court adds a little to that time that is not exceptional. The question of the deaths of some of the women does not add to SAWIMIH's case because there is no evidence that these deaths, as sad and unfortunate as they may be, resulted from the delay in the distribution of the dividend. In any event, the respondents and the women they represent are as exceptional and have been waiting equally long. The women represented by SAWIMIH are not more exceptional and are not entitled to justice and a remedy more quickly than the women on the other side.

10. Be that as it may, for completeness, I consider also whether SAWIMIH has established the remaining statutory requirements.

Has SAWIMIH established that it will suffer irreparable harm?

11. SAWIMIH submits that the irreparable harm it will suffer should its application not be granted because it needs money to function and because there is harm to shareholders if they are not paid their dividend as soon as possible. It relies also on the fact of shareholders having passed away while waiting for the fruits of their investment.

12. Again, it is sad that shareholders have not seen the fruits of their investments. There is however no evidence that their passing was caused by them not being paid, or that shareholders will suffer specific harm if their payment is delayed.

13. Nevertheless I accept that there is a continuing insult to the dignity of poor shareholders if the payment is delayed, and that the insult to dignity is irreparable.

Has SAWIMIH established that the first respondents will suffer irreparable harm?

14. SAWIMIH contends that the respondents will not suffer irreparable harm because they as shareholders will also benefit from the distribution of dividends.

15. In my view this misses the point of the respondents' application for leave to appeal. If the dividends are distributed they may be distributed to the wrong

people, if the respondents are correct that verification was not done correctly. The dividends will not be recoverable if this happens. Similarly if the respondents are correct that there is a basis to find delinquency and that the directors cannot be trusted to distribute the dividends correctly, and are likely to dissipate the funds, then releasing the money would be allowing them to do exactly that.

16. It was submitted for SAWIMIH that the respondents would nevertheless have a remedy if they succeed, but in my view this remedy would be empty if the money has already gone. Taking into account that the people the respondents represent are in the same situation as those SAWIMIH represents, the harm to them is at least equal if the money is released as it would be to SAWIMIH if the money is not.

17. I am not satisfied that SAWIMIH has established that there would be no irreparable harm to the respondents if the application is successful.

18. For these reasons, I make the following order:

The application in terms of section 18 of the Superior Courts Act is dismissed with costs.



S. YACOOB
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the applicant:

D C Mpofu SC and Ms K Pillay

Instructed by:	Mabuza Attorneys
Counsel for the first to ninth respondent:	S J Bekker SC and Ms I E Tshoma
Instructed by:	Faber Goertz Ellis Austen Incorporated
Date of hearing:	06 August 2021
Date of application to SCA:	22 October 2021
Date of judgment:	17 November 2021