REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION PRETORIA)

CASE NO: 32968/2021

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

9 DECEMBER 2021

DATE SIGNATURE

In the matter between:

THE ROAD ACCIDENT FUND **Appellant**

and

EHLERS ATTORNEYS **First Respondent**

THE LEGAL PRACTICE COUNCIL **Second Respondent**

THE SHERIFF, PRETORIA EAST **Third Respondent**

ABSA BANK LIMITED **Fourth Respondent**

This judgment is issued by the Judges whose names are reflected herein and is submitted electronically to the parties/their legal

representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judges or their secretary. The date of this judgment is deemed to be 9 DECEMBER 2021.

JUDGMENT

Collis J: (Munzhelele J et Jordaan AJ concurring)

INTRODUCTION

[1] Before this Court, the appellant brings an automatic appeal in terms of section 18(4) of the Superior Courts Act, 10 of 2013 against an order of Mabuse J dated 1 September 2021.[1]

[2] On this date the order given by Mabuse J was as follows:

> '1. Prayers 1 and 2 of the notice of motion are hereby granted.
>
> 2. The requirement pertaining to the forms and service as set out in the Rules of this Court are hereby dispensed with in terms of Rule 6(12) and that this matter shall be heard in conjunction with the Respondent's application for leave to appeal.
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> 3. That the operation and execution of the order of Court under the above case number dated 28 July 2021 is not suspended pending:
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> 3.1 the final determination of the appeal; or

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[1] Court Order: Mabuse J Index 00-1

3.2 any further applications for leave to appeal that may be brought by the Road Accident Fund or the final determination of any future appeal (in the event of the Court dismissing the applicant's application for leave to appeal).

4. The Respondent is hereby ordered to pay the costs of the application including the costs of two counsel.'

[3] In terms of this automatic appeal, the appellant seeks the following orders:

3.1 That the appeal against the judgment and orders granted by His Lordship Mr Justice Mabuse on 1 September 2021 under the above case number be upheld with costs, including the costs of three counsel, one of whom is a senior counsel;

3.2 That the orders granted by the court *a quo* be set aside, and replaced with the following order:

> *"The application brought by Ehlers Attorneys in terms of section 18(3) of the Superior Courts Act 10 of 2013, is dismissed with costs to include the costs of two counsel."*

BACKGROUND

[4] By way of background, during April 2021 the Full Court,[2] Pretoria, granted the following relief:

'(b) All writs of execution and attachments against the applicant based on court orders already granted or settlements

[2] Full Court judgment, Case no: 58145/2020 Meyer, Adams and Van der Westhuizen JJ

already reached in terms of the Road Accident Fund Act, 56 of 1996 (the RAF Act) are suspended until 30 April 2021.

(c) The applicant is to pay all claims based on court orders already granted or settlements already reached in terms of the RAF Act, which are older than 180 days as from the date of the court order or date of the settlement reached, on or before 30 April 2021, provided that the applicant has been notified by any attorneys who represents claimants that have such claims that are older than 180 days of the existence of such claims in accordance with paragraph 3 of this court's order made on 16 March 2021.'

[5] Having regard to the above order, after 30 April 2021, the appellant would have no protection against execution in respect of orders older than 180 days. Moreover, the orders themselves state that the appellant must make payment to the first respondent's trust account.

[6] The first respondent before court represents the judgment creditors with court orders that are older than 180 days and it has given instructions to the third respondent urgently to attach, remove and sell the appellant's assets.

[7] At para [39] of the judgment by the Full Court the following statement was made by the Court:

'[39] I have referred to the objections raised by attorneys acting on behalf of clients who are successful claimants against the RAF. I do not believe that payments should be withheld from successful claimants because of a dispute between the RAF and the attorneys acting for them, or pending the repayment of double payments by attorneys. Such exceptions may cause undue hardship on and be unfair to successful claimants. In such instances,

> **the RAF, should approach the court, on a case-by-case basis, if it believes or is advised that it has valid grounds to obtain an order suspending writs of execution and warrants of attachments against it**. The order which we propose to make, therefore, does not provide for any exceptions. The RAF, as it undertook to do, must pay all claims based on court orders already granted or settlements already reached in terms of the RAF Act, which are older than 180 days as from the date of the court order or date of the settlements, already reached in terms of the RAF Act, which are older than 180 days as from the date of the court order or date of the settlement on before 30 April 2021, provided that it has been notified by any attorneys who represents claimants that have such claims that are older than 180 days of the existence of such claims in accordance with paragraph 3 of this court order made on 16 March 2021.'

[8] Pursuant to this decision of the Full Court, the first respondent sought urgent execution of the writs in respect of court orders or settlements which were older than 180 days and which, in terms of the Full Court decision, became payable after the expiry of 180 days.

[9] On or about 20 May 2021, the appellant received an email from the Sheriff containing a request of the first respondent seeking urgent execution of the writs. During June 2021, the Sheriff provided the appellant with a copy of a letter directed to the Sheriff by the first respondent, requesting the former to urgently effect attachment and sale of the appellant's assets. To this, the appellant responded and requested the first respondent to withdraw any writs of execution and instructions to the Sheriff to execute against the appellant's assets.

[10] As no undertaking was forthcoming, to either withdraw the writs or the instruction to the Sheriff to urgently sell the appellants' assets, the appellant took the step to institute an urgent application seeking a *rule nisi* and an interim order with immediate effect to *inter alia* suspend any warrants that compel the appellant to make payment to the first respondent's trust account. In terms of this urgent application, the appellant sought to interdict the first respondent from executing any writ and to suspend any attachment or removal of the appellant's assets, pending the finalization of the investigation by the South African Police Service. The appellant's application was premised on the provisions of section 173 of the Constitution, alternatively, Rule 45A of the Uniform Rules of Court.

[11] Paragraph 2 of the notice of motion in the urgent application brought by the appellant provided the following:

> '2. That a rule *nisi* be issued calling upon the first respondent and any interested party to show cause, if any, to this Honourable Court on 24 August 2021 at 10h00, why the following order should not be made final:
>
> 2.1 Any writ of execution based upon a court order that compels the Applicant to make payment to the First Respondent's trust account or any attachment and removal of the Applicants assets by the Third Respondent pursuant thereto, is immediately suspended and set aside in terms of section 173 of the Constitution, alternatively Rule 45A of the Uniform Rules of Court pending finalization of the South African Police Services investigation.
>
> 2.2 That the Applicant be authorized to pay the capital amounts directly to the First Respondent's claimants

> bank accounts, which banking details and contact details must be provided to the Applicant by the First within two days of the confirmation of this rule.'

[12] This main application was heard by Mabuse J on 20 July 2021. Judgment was handed down on 28 July 2021, wherein the appellant's application was dismissed with costs, which costs included the costs consequent upon the employment of two counsel.[3]

[13] Relying on this judgment, the first respondent on the next day instructed the Sheriff to attach and remove the assets of the appellant. On the same day, the appellant applied for leave to appeal, the order of Mabuse J dated 28 July 2021. The first respondent had applied for a direction in terms of section 18(3) of the Superior Courts Act[4] that the operation and execution of the court's decision is not suspended pending the decision of the application or appeal. The appellant's application for leave to appeal was refused and the first respondent's application was granted.

[14] It is this refusal of the application for leave to appeal and the subsequent granting of the first respondent's application in terms of section 18(3) that resulted in the present automatic appeal in terms of section 18(4) of the Superior Court's Act. The appellant thereafter

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[3] Judgment *RAF v Ehlers Attorneys and Others*, Case No: 32968/2021 Index 011-22.
[4] Act 10 of 2013.

petitioned the Supreme Court of Appeal for leave to appeal, which application was filed by the appellant on 1 October 2021 and is thus pending before the SCA.

ISSUES REQUIRING DETERMINATION

[15] As per the Joint Practice note[5] filed in the proceedings before us, the parties requested this court to determine the following issues: the first point raised by the appellant is that the Mabuse J's court order is a nullity due to lack of jurisdiction, secondly the issues is whether the court *a quo* erred in granting the first respondent's application in terms of sections 18(1) and (3) of the Superior Courts Act, thirdly whether exceptional circumstances exist as contemplated in section 18(1) of the Superior Courts Act, fourthly whether the appellant will suffer no irreparable harm if the execution order is granted and lastly whether the claimants represented by the first respondent and the first respondent will suffer irreparable harm if the execution order is not granted. It is on the aforesaid basis that the appellant submitted that there was no proper case in either fact or law for a section 18(3) order to have been made by the court *a quo*.

[16] The first respondent disputes all of the appellant's grounds of appeal, and it is their case that it made out a proper case in fact and

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[5] Joint Practice Note-Index 027

in law for the relief to be granted. Consequently, it moved for an order that the appellant's appeal in terms of section 18(4) should be dismissed with costs, including the costs of two counsel.

SECTION 18 OF THE SUPERIOR COURTS ACT

[17] In terms of the common law, the noting of an appeal suspends the operation and execution of a judgment pending the outcome of an appeal.[6] Section 18(1) of the Superior Courts Act, whilst restating the common law position,[7] provides that a party, in whose favour judgment was given, may apply to the High Court in terms of section 18(3) for an order that the execution and operation of the decision not be suspended pending the decision of the application or appeal, but that the order be executed. A court may grant an order to execute under exceptional circumstances and, in addition, where the applicant 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 (section 18(3)).

[18] Section 18 of the Superior Courts Act reads as follows:

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[6] Ntlemeza v Helen Suzman Foundation and Another 2017 (5) SA 402 (SCA) at para 19 with reference to the decision in South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A).

[7] Ibid ad para 28.

"18 Suspension of decision pending appeal

(1) 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, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to 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) If a court orders otherwise, as contemplated in subsection (1) –

(i) the court must immediately record reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal.

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

WHETHER MABUSE J's ORDER WAS A NULLITY

Arguments advanced by the Appellant

[19] In this regard, the argument advanced by the appellant is that section 18 (1) is only applicable to *"the operation and execution of a decision which is the subject of an application for leave to appeal"*.

[20] In the present matter, the appellant argued that there is no application for leave to appeal against the orders that were granted in favour of the first respondent's clients before the court *a quo*. In fact, so counsel contended, nowhere in the appellant's papers was it stated that the appellant applied for leave to appeal against any of those orders.

[21] Instead, the appellant's application for leave to appeal was brought against the court *a quo's* order dismissing the appellant's urgent application with costs.[8] There was no positive order granted by the court *a quo* which was suspended by the appellant's application for

[8] Index 022 Appeal record, p 716 See: Judgment on Appellant's application for leave to appeal.

leave to appeal except for the court *a quo's* order that the appellant is ordered to pay the first respondent's costs.[9]

[22] It was on this basis that counsel submitted that the judgment and orders granted were not competent and were granted without the necessary jurisdiction, to grant an order in terms of that section.

[23] In support of this line of argument, counsel for the appellant had placed reliance on the decision of *Uitsig Secondary School Governing Body and Another v MEC for Education, Western Cape* 2020 (4) SA 618 (WCC). In this matter, the first and second applicants, a school governing body and the school concerned, had earlier applied to the Supreme Court of Appeal for leave to appeal against a High Court decision dismissing their application to have an administrative decision, made by the MEC for Education, Western Cape (the respondent), set aside on review. At issue in this case was whether, pending the SCA's decision in their application for leave to appeal, the MEC 's administrative decision was suspended in terms of s 18(1) of the Superior Court's Act 10 of 2013. The MEC relied on SCA precedent, that in cases where a claim or application was dismissed, such order was not suspended pending an appeal.

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[9] Index 022 Appeal record, p 706 "I therefore make the following order: The Applicant's application is hereby dismissed, with costs which costs shall include costs consequent upon the employment of two counsel."

[24] In paragraph [4] and [5], the court remarked as follows:

> '[4] If the first respondent wished to prevent the consequences of s18(1) when the applicants lodged their application for leave to appeal the judgment and order dismissing their application to review and set aside the administrative decision to close down the second applicant, she would be obliged to make a substantive application in terms of s18(3).
>
> [5] The position in s18(1) may therefore only be altered by an order granted in an application brought in terms of s18(3).'

[25] In further support of its argument, the appellant also relied on the matter of *MV Snow Delta: Serva Ship Ltd v Discount Tonnage Ltd*,[10] where the SCA dealt with the implication of an appeal against the dismissal of an application. Harms JA held '*that an order of absolution from the instance or dismissal of a claim or application is not suspended pending an appeal, simply because there is nothing that can operate or upon which execution can be levied.*'[11]

Arguments advanced on behalf of the First Respondent

[26] On the court *a quo*'s lack of jurisdiction, the first respondent had advanced the following arguments:

26.1 During June 2021, the first respondent instructed the sheriff to proceed with execution steps in respect of the writs

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[10] 2002 (4) SA 746 (SCA)
[11] Confirmed by the SCA in National Director of Public Prosecution v Rautenbach and Others 2005 (4) SA 603 (SCA) para 12.

pertaining to the matters listed in paragraph 4 of the first respondent's answering affidavit.

26.2 These instructions to the sheriff were in respect of 33 awards for compensation to claimants in the total amount of R89,844,054.00 plus a further 43 awards for taxed party and party bills of cost payable to claimants in the total amount of R15,400,854.00.

26.3 As at the time of this instruction directed to the sheriff, all claimants, represented by the first respondent, had received no payments from the appellant for a period of approximately 6 months and a total amount of more than R105 million was due and payable by the appellant to claimants.

26.4 In an attempt to avoid payments to the claimants, the appellant then launched an urgent application in terms of section 173 of the Constitution, alternatively Rule 45A of the Uniform Rules of Court.

26.5 The appellant brought an urgent application in terms of section 173 of the Constitution, alternatively Rule 45A of the Uniform Rules of Court, to suspend and set aside any Writ of Execution based upon any Court Order that compels the

appellant to make payment to the trust account of the first respondent pending finalization of an SAPS investigation.

26.6 The court *a quo* dismissed the appellant's urgent application (hereinafter referred to as "the main application") on 28 July 2021.

26.7 It subsequently dismissed the appellant's application for leave to appeal the main application on 1 September 2021.

26.8 The appellant applied for leave to appeal the main application to the Supreme Court of Appeal. The application to the SCA is currently pending.

26.9 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 decision of the application or appeal in terms of section 18(1) of the Act.

26.10 The effect of a suspension of the order in the main application in terms of section 18(1) of the Act is that the execution of any Writ based on a court order that compels the appellant to make payment to the first respondent's trust account is suspended pending the finalization of the application for leave to appeal (which is currently pending in the SCA) and,

if leave is granted, pending the finalization of the appeal. This means that the claimants represented by the first respondent cannot take execution steps against the appellant.

26.11 On 1 September 2021, the court *a quo* granted the first respondent's application in terms of section 18(1) and (3) of the Superior Courts Act (hereinafter referred to as "the Act") and ordered that the operation and execution of the order dated 28 July 2021 is not suspended pending any further applications for leave to appeal that may be brought by the appellant (hereinafter referred to as "the execution order"). If this order stands, the claimants represented by the first respondent may take execution steps against the appellant and receive payment of their claims.

26.12 This execution order is, however, subject to an automatic appeal to the next higher court in terms of section 18(4)(ii) of the Act.

26.13 The appellant persists in its refusal to pay any amounts to the trust account of the first respondent, notwithstanding the dismissal of the urgent application on 28 July 2021.

26.14 The Sheriff refuses to execute writs based on orders that provide for payment of awards of the claimants represented

by the first respondent to the first respondent's trust account citing the appellant's pending application for leave to appeal (in the SCA) and the provisions of section 18(1) of the Act.

26.15 All of the claimants represented by the first respondent, who obtained and continue to obtain orders in finalization of their claims against the appellant, are the recipients of orders that provide for payment of the awards to the first respondent's trust account.

26.16 It is on this basis that the first respondent submitted that the court *a quo* identified and applied the legal principles applicable to applications in terms of section 18(1) and (3) of the Act correctly and was correct in making the order which is the subject of this automatic appeal in terms of section 18(4)(ii) of the Act.

26.17 Furthermore, that the court *a quo* was able to make the order in terms of sections 18(1) and (3) because section 18(1) of the Act applies to all decisions, i.e. those granting as well as those dismissing applications. See in this regard the decision *Uitzig Secondary School Governing Body v. MEC for Education* 2020 (4) SA 618 (WCC).

26.18 It is on this basis that counsel contended that the court *a quo* did not lack the necessary jurisdiction to consider the section 18(1) and section 18(3) of the Superior Courts Act.

[27] On the question of the court's apparent lack of jurisdiction, the arguments advanced by the appellant cannot find favour with this court. This we say for the following reasons:

27.1 As a point of departure, the history of the litigation between the parties did not commence with the Mabuse J judgment of 28 July 2021. It commenced as far back when the first respondent first obtained various judgments and or settlement orders in favour of their clients which ultimately culminated in the order of the Full Court.

27.2 The Full Court gave clear '*guidance*' that in circumstances where the appellant was still of the opinion not to pay out specific claims of claimants after the due date of 30 April 2021, the only avenue available to the appellant was to mount a challenge on individual matters in terms of which either an interdict is sought or the stay of execution in terms of Rule 45A of the Uniform Rules of Court.

27.3 This 'guidance' offered by the Full Court, the appellant clearly elected to follow, when it launched its urgent application

before Mabuse J to either stay the execution of the judgments or orders granted in favour of the first respondent or to interdict the first respondent.

27.4 Mabuse J did not come to the assistance of the appellant; did not find favour with their case made out under oath and went ahead and dismissed the appellant's application. The effect of this decision, is that the first respondent would be entitled to proceed to execute on validly obtained settlements or court orders, which settlement or court orders have not been taken on appeal.

27.5 It is important to note that this decision by Mabuse J is a judgment like any other and as such it follows that the provisions of section 18 of the Superior Courts Act will apply.

27.6 The operation of section 18 is not to be applied selectively to the decision made by Mabuse J, but it is to be applied in its entirety.

27.7 The appellant dissatisfied, with the dismissal of their urgent application before Mabuse J sought leave from him to appeal such decision, and in their application for leave to appeal such decision, the first respondent in turn elected to take what we consider an overly cautious approach, by the

launching of its counter-application in terms of section 18(3) requesting the court to pronounce on its right to carry out the execution, notwithstanding the default position of having had judgment and or settlements orders in their favour, which have not been taken on appeal.

27.8 If the first respondent had not launched a counter-application in terms of section 18(3) and merely opposed the application for leave to appeal, like most litigants would do, and had Mabuse J merely refused the appellant's application for leave to appeal, the default position would still have been the same in which the first respondent finds itself in today, i.e. that the first respondent obtained several judgments or settlement orders in its favour, in respect of which they would have been entitled to execute upon.

27.9 It is for the above reasons that we could find no merit in the argument that the court *a quo* lacked jurisdiction to entertain an application in terms of section 18(3) of the Superior Courts Act.

[28] Consequently, the preliminary point raised by the appellant is found to be without merit.

[29] What then remains is to determine whether Mabuse J erred by refusing the appellant leave to appeal and granting the first respondent's counter application, thus granting it permission to carry out the execution in terms of section 18(3).

[30] Mabuse J in making his determination was mindful of the weakness of the appellant's case and more importantly, its lack of prospects of success on appeal, if leave was granted.[12]

[31] In terms of the provisions of section 18(3) of the Superior Courts Act, the first respondent applying to 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 other party will not suffer irreparable harm. Section 18(3) thus states that an order implementing a judgment pending appeal shall only be granted "*under exceptional circumstances*". The exceptionality for an order to this effect is underscored by s 18(4), which provides that a court granting the order must immediately record its reasons that the aggrieved party has an automatic right of appeal; that the appeal must be dealt with as a matter of extreme urgency and that pending the outcome of the appeal, the order is automatically suspended.

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[12] *University of the Free State v Afriforum* 2018 (3) SA 428 (SCA), paras 14 to 15.

[32] It is further apparent that the requirements introduced by sections 18(1) and (3) are more onerous than those of the common law. Apart from the requirements of "*exceptional circumstances*" in section 18(1), section 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.

[33] Mabuse J, by refusing the appellant leave to appeal and permitting the first respondent to carry out its execution, concluded that the first respondent had proven exceptional circumstances on a balance of probabilities that the appellant will not suffer irreparable harm if the execution order is granted and the claimants represented by the first respondent will suffer irreparable harm if the execution order is not granted.

FIRST REQUIREMENT: EXCEPTIONAL CIRCUMSTANCES

[34] In regard to exceptional circumstances, paragraph 32 of the judgment of the court *a quo* is of relevance:

> "……
>
> *32.1 there is no alleged impropriety in the first respondent's trust account;*
>
> *32.2 there is no alleged impropriety in respect of any of the awards for compensation listed in paragraph 4 of the first respondent's answering affidavit;*

32.3 the Applicant, inexplicably, failed to comply with the court order in paragraph 45 (c) of the Full Court and pay the first respondent what is due to it;

32.4 the Applicant failed to make payment arrangements with some of the firms of attorneys referred to in paragraph 3 supra, including the first respondent;

32.5 there is no alleged impropriety in respect of any one of the amounts payable in respect of the settled or taxed party-and-party bills of cost listed in paragraph 4 of the first respondent's answering affidavit;

32.6 According to the first respondent, there is no risk that the Applicant will make unlawful payments if such payments will be made in respect of the matters set out in paragraph 4 of the first respondent's answering affidavit or for that matter any outstanding amounts; all the Court orders were obtained, and bills of costs were taxed subject to the oversight of the Court;

32.7 *The Courts ordered that payment of some amounts be made into the first respondent's trust accounts. In some instances, the first respondent is required to establish a trust and other cases curator bonis were appointed. This kind of an order will defeat the Applicant's desire to make some payments into the First Respondent's clients' bank account directly."*

[35] It is significant to note, that the court *a quo* had also found that the appellant tendered payment to the claimants listed in paragraph 4 of the Answering affidavit represented by the first respondent directly. Having made this tender, it follows, that even in the event of the appeal being successful, the appellant will still be liable to make payment to the claimants as tendered.

[36] On behalf of the appellant, the following arguments were advanced in respect of the first requirement:

36.1 As a starting point it was submitted by counsel that the first respondent did not prove any of the requirements for an order in terms of section 18(3) of the Act.

36.2 In order to be successful in was incumbent on the first respondent to prove that there are truly exceptional circumstances that warrant an order in terms of section 18(3) and as counsel had argued, the first respondent had failed to do.

36.3 As regards to the exceptional circumstances present, what the first respondent had pleaded were the following:

36.3.1 that if the section 18(3) orders are not granted then the first respondent, including all of its employees, run the risk of losing their source of income;

36.3.2 that the appellant failed to make out a case that money paid for the benefit of claimants represented by the first respondent will not or may not reach the claimants if payment is made into the trust account of the first respondent;

36.3.3 that the appellant's purpose in the main application was found to frustrate valid court orders and

unsatisfyingly accuse the first respondent of conducting a trust account that was inflicted with impropriety to avoid its obligations;

36.3.4 that a suspension of execution of writs where payment is to be made to the first respondent will cause unwarranted delay in the making of payments due to claimants and will destroy the first respondent's practice and livelihood of its employees;

36.3.5 the first respondent further stated that it would have to close down its business and that its employees would lose their only source of income if the court *a quo* did not grant it the section 18 (3) application.

[37] These grounds counsel had argued, were premised on a bad proposition that, if the court *a quo's* decision dismissing the appellant's application is not put into operation, then the first respondent's business will close down and its employees will lose their income. The first respondent however had failed to state why it could not obtain its disbursements and fees directly from its clients as the appellant specifically sought to make payment directly to the judgment creditors. If this was agreed upon then the first

respondent would have been able to received direct payments from their clients.

[38] The court *a quo* in its judgment extensively had found that in executing the valid writs of execution, the first respondent is not conducting an illegitimate activity as it possesses rights which will be curtailed if the appellant's relief, which sought to suspend the valid writs of execution, was to have been granted.

[39] In its judgment, the court *a quo* specifically had found that the appellant's main application was found to be to frustrate a valid court order and unjustifiably accuse the first respondent of conducting a trust account that was inflicted with impropriety to avoid its own constitutional and statutory obligations.

[40] Counsel for the first respondent had further argued on *"exceptional circumstances,"* that the court *a quo* had found, that the request made by the appellant to make payment directly to its clients and the refusal by them to inform its clients of the appellant's request will result in them not receiving payment and ultimately closing down.

[41] As the first respondent was challenged to produce affidavits of their clients stating that they have informed them that the appellant

wishes to make payment directly to them but that the first respondent refused to produce any affidavits by their clients.

[42] It is on this basis that counsel contended that the court *a quo* as such could not have found on a balance of probability that exceptional circumstances exist to have ordered the payment of the capital awards and settled or taxed party and party costs.

[43] Furthermore, in the event of the first respondent acceding to a request to make direct payments to their clients, then there would be no *"unwarranted delay in the making of payments"*. The appellant's tender to make direct payment to the judgment creditors dispelled the notion that the claimants, represented by the First Respondent, will not receive payment of their claims pending a further application for leave to appeal or pending the final determination of an appeal.

[44] In addition, the first respondent is a firm of attorneys that can take on any form of work which can generate an income. As such, there can be no merit in the argument that it would have to close down without proving what its actual financial position is. The First Respondent failed, or refused, to attach any financial statements, failed to state what the total amount was that it had earned from RAF work since it began trading.

[45] It is on this basis that counsel concluded that the First Respondent failed in proving that there were any exceptional circumstances.

[46] On behalf of the first respondent the following arguments were advanced by counsel on the first requirement:

46.1 Firstly, the findings made by the court *a quo* are unassailable and there is no basis to conclude that an appeal would have a reasonable prospect of success as is required in section 17(1)(a) of the Act;

46.2 Secondly, that even if leave to appeal were to be granted to the appellant, and even if the appellant were to be successful in the appeal, the appellant would still be liable for payment of the capital awards and the appellant would have to make payment of the amounts payable in terms of the court orders listed in paragraph 4 of the answering affidavit in the main application.

46.3 In this regard counsel had argued, that the appellant, had failed to show improper conduct or impropriety on the part of the first respondent in respect of any of the outstanding payments due in respect of settled or taxed party-and-party bills of cost.

46.4 Even if leave to appeal is ultimately granted to the appellant, and even if the appellant is successful in the appeal, the appellant will still be liable for payment and the appellant will have to make payment of the settled or taxed party-and-party bills of cost to the claimants represented by the first respondent.

46.5 It is on this basis that counsel contended that the appellant completely and dismally failed to make out a case that money paid for the benefit of the claimants represented by the first respondent will or may not reach the claimants if payment is made into the trust account of the first respondent.

46.6 Counsel further contended that the court *a quo* in permitting the execution of valid writs of execution, was satisfied that the first respondent is not conducting an illegitimate activity, however possesses rights which will be curtailed by the grant of the specific relief sought to suspend valid writs of execution.

46.7 Counsel had further argued, that a suspension of the execution of writs where payments are to be made by the appellant to the trust account of the first respondent will have no practical effect other than to:

46.7.1 cause an unwarranted delay in the making payments of payments due to the victims of road accidents; and

46.7.2 destroy the first respondent's practice and the livelihood of the first respondent's employees.

[47] It is on this basis that counsel therefore submitted that exceptional circumstances exist to order that the payment of the capital awards and settled or taxed party-and party bills of costs due to the claimants represented by the first respondent should not be delayed pending the appeal or any further application for leave to appeal.

[48] In its judgment,[13] the court *a quo* again made reference to its findings made in paragraph 32 of the main application. In his judgment, Mabuse J had found that the appellant's unilateral suspension of payments to the first respondent's trust account carried massive prejudice not only to the first respondent, but also to its employees who carry the risk of losing their employment which is their only source of income.

[49] Furthermore, the court *a quo* had found that the decision to act unilaterally was contrary to just administrative action and

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procedurally unfair in circumstances where a party was not given an opportunity to respond to the appellant's decision to withhold payments into the first respondent's trust account. The exceptional circumstances, the court concluded, was further found in the fact that it was not disputed by the appellants that the first respondent had not received any payments from the appellant since December 2020. Given the nature of the practice run by the first respondent, mainly RAF claims, non-payments on finalized claims will amount to the throttling of the main source of income of the first respondent.

[50] In addition, the court *a quo* had found that the claims made by the appellant that the trust account of the first respondent is inflicted by imperfection or impropriety was not proven, but mere allegations. No corroboration was also placed before the court *a quo*.

[51] Furthermore, that section 34 of our Constitution affords everyone the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court. The process of execution is a means of enforcing a judgment or order of court and it is incidental to the judicial process.

[52] Tellingly, the court *a quo* had further found that the appellant has not alleged that it is unable to fulfil its constitutional and statutory mandate to provide social security and health care services. It is not

the case of the appellant that it has no money to pay the claims of the first respondent's clients. The conduct of the appellant in ignoring the validly obtained orders, the court *a quo* concluded, amounts to nothing less than the appellant treating the court orders with disdain. It is on this basis that the court *a quo* concluded that the requirement of exceptional circumstances having been met.

[53] This court could find no misdirection in the reasoning employed by the court *a quo*, in concluding that the first respondent had met the requirement of exceptional circumstances.

SECOND REQUIREMENT: NO IRREPARABLE HARM TO THE APPELLANT IF THE EXECUTION ORDER IS GRANTED

[54] In this regard the following arguments were advanced on behalf both the appellant and first respondent.

54.1 Counsel for the appellant denied that the first respondent will suffer irreparable harm. On behalf of the first respondent it was alleged that the appellant is, in contempt of the court order of the Full Court which ordered the appellant to "... *pay all claims based on court orders already granted or settlements already reached in terms of the RAF Act, which are older than 180 days as from the date of the court order or date of the settlement reached, ...*"

54.2 In this regard counsel for the appellant had argued that albeit that the court *a quo* had found the appellant to have been in contempt of the Full Court's orders, at no stage did the first respondent bring an application against the appellant to declare them in contempt, nor were they afforded an opportunity to make submissions before the court *a quo*.

54.3 In substantiation that the appellant will not suffer irreparable harm, the first respondent alleged that the appellant is not currently facing a constitutional crisis and that it had a surplus of R 3.2 billion. In addition, that there is no threat of the provisions of section 21 of the Road Accident Fund Act being triggered if the appellant should make payment to the claimants represented by the first respondent. These payments counsel for the first respondent contended, will be made based on valid court orders obtained subject to judicial oversight of the court, and as such it will not amount to fruitless and wasteful expenditure.

54.4 This argument advanced by the first respondent the appellant submitted will indeed create a Constitutional crisis, if the appellant is not permitted to implement systems to safeguard the RAF fuel levy against future irregularity, maladministration and impropriety.

54.5 Furthermore, counsel for the appellant had argued that the appellant should not be made to make payments into a trust account which is administered by a firm of attorneys where there is *prima facie* evidence that the firm of attorneys potentially committed acts of impropriety.

54.6 It is on this basis that it was argued by counsel for the appellant, that the appellant must take measures to ensure that the RAF fuel levy is safeguarded and that claimants' claims are protected against any potential misappropriation or exploitation.

54.7 It is not the appellant's case that it does not have funds available to pay the payments listed in paragraph 4 of the Answering affidavit in the main application. This much is conceded. What it is against is to make payment to the first respondent's trust account and by so doing counsel submitted that the court *a quo* could not have found that the appellant would suffer no irreparable harm if execution is ordered.

[55] The court *a quo* in its judgment concluded that the appellant having strongly expressed its preparedness to pay the first respondent's

clients claims, was indicative of an ability to pay and an acknowledgement of the various claims.

[56] Furthermore, the court *a quo* had found that the execution of writs is the only available avenue to give effect to court orders.

[57] In addition, that the appellant's refusal to pay the first respondent's clients' claims, is taking place in the face of validly obtained court orders or settlement orders.

[58] It was still open to the appellant to make acceptable arrangements with the first respondent's firm when it comes to the payment of claims, which is what the appellant never considered.

[59] It is on this basis that the court *a quo* concluded that the appellant will not suffer irreparable harm if the first respondent is allowed to take further steps to enforce its clients' claims.

[60] This court could find no misdirection in the reasoning employed by the court *a quo*, in concluding that the appellant will not suffer irreparable harm if the first respondent is permitted to take steps to enforce the valid judgments granted to its clients.

THIRD REQUIREMENT: IRREPARABLE HARM TO THE FIRST RESPONDENT IF THE EXECUTION ORDER IS NOT GRANTED

[61] On behalf of the first respondent the arguments advanced were *inter alia* the following:

61.1 That some of the claimants have been waiting as far back as 2015 for payments of their claims to be made and there is at present no indication when payments will be made;

61.2 If no payments are forthcoming, it will result in the practice of the first respondent having to close down as employees may have to resign due to non-payment of salaries.

61.3 It is on this basis that counsel for the first respondent concluded that on a balance of probabilities, the first respondent will suffer irreparable harm if the court does not order that execution may take place.

[62] In contrast the argument on behalf of the appellant was that it will suffer irreparable harm if it will be required to make payment into a trust account which is administered by a firm of attorneys where there is prima facie evidence of the firm of attorneys potentially having committed acts of impropriety.

[63] It its judgment, the court *a quo* had found that there was irreparable harm to the first respondent if the court does not order execution to take place. Consequently, the court had found that the third requirement had been met.

[64] The findings so made by the court *a quo*, in respect of these last two requirements, we also cannot criticise. The court *a quo* carefully motivated its findings and its conclusions reached and, in our minds, they are both sound.

[65] Before we conclude, we must take issue with what appears to be delaying tactics employed by the appellant. Not only, has its behaviour in the present matter displayed a total disregard for validly obtained court orders and settlements, but its conduct also points to a litigant who somehow believes that a different set of rules should apply to it.

[66] The actions displayed by the appellant in these proceedings to date are disconcerting and indicative of a litigant that is flagrantly in disregard of court orders resulting from proceedings wherein they freely participated and also wherein they in some of the proceedings reached settlements with the claimants.

[67] These claimants before court, represented by the first respondent's firm of attorneys, have waited for years before their claims in

respect of which judicial oversight had taken place, could be adjudicated by the court. They in many instances, make up the most vulnerable members of our society. Some of them have waited patiently for many years, and they continue to wait.

[68] Now it is so that the appellant before court is entitled like any other litigant to approach the courts to resolve a dispute, but then such dispute should be warranted and more importantly merited. In the present matter this cannot be said to have been the case.

[69] In the circumstances, the behaviour of the present appellant is frowned upon by this court.

ORDER

[70] For the reasons alluded to above, the following order is made:

70.1 The appellant's automatic appeal in terms of section 18(4)(iii) of the Act, is dismissed.

70.2 The appellant is to pay the costs, including the costs of two counsel where so employed.

COLLIS J
Judge of the High Court

pp.

MUNZHELELE J
Judge of the High Court

JORDAAN AJ
Judge of the High Court

APPEARANCES

Counsel for the Appellant	:	Adv. C. Purckin SC Adv. R. Schoeman Adv. P. Motsie
Attorney for the Appellant	:	Malatji & Co Attorneys
Counsel for the First Respondent	:	Adv. J.F. Grobler SC Adv. J. Bam
Attorney for the First Respondent	:	VZLR INC
Date of Hearing	:	09 November 2021
Date of Judgment	:	09 December 2021

Judgment transmitted electronically