Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

18211/2017

ERHARD SWANEPOEL	First Applicant
HENDRICK ARNOLDUS SWANEPOEL	Second Applicant
ENTERPRISES SWANEPOEL S.A.	Third Applicant
vs	
LUC SWANEPOEL	Respondent

JUDGMENT DELIVERED 13 DECEMBER 2017

KUSEVITSKY AJ

[1] This is an application in terms of section 18(1) and (3) of the Superior Courts Act 10 of 2013 ("the Act") that the order granted by me on the 17 October 2017 (the main application) not be suspended by the application for leave to appeal lodged by the Respondent and that the order granted will continue to be operational and enforceable and will operate and be executed until the final determination of all present and future leave to appeal applications and appeals in respect of that order.

Background

[2] The nub of this litigation involves two letters marked "HAS1" and "HAS6" to the main application sent to various authorities in the Democratic Republic of Congo

("DRC") concerning the Applicants. The Respondent admits to sending one of the letters. The Applicants and Respondent are related and are embroiled, I am told, in a myriad of litigation across provinces and borders.

[3] It is apposite to sketch a brief history of this matter. On 28 September 2017, letter HAS1 was sent by the attorney of the Respondent, one Mr Dieudonne Muhinza Lumoo, on his firm's letterhead which was addressed to 'The Public Prosecutor of the Lubumbashi Appeals Court, DRC' as well as to 'The Director of the National Intelligence Agency of the Province of Upper Katanga in Lubumbashi, DRC'. The introductory paragraph of the letter states of as follows:

> "Dear Sir,
>
> In my capacity as attorney for Mr Luc SWANEPOEL, a partner in the company ENTERPRISES SWANEPOEL SA, I am, in the name of my client, resorting to your court to request you to get involved in ensuring the protection of the workers in difficulty working for ENTERPRISES SWANEPOEL SA."

[4] This letter further *inter alia* accuses the Applicants of being in collusion with each other to the detriment of the Congolese workers and furthermore accuses them of taking sums of money across the border without declaring same. This was annexed as annexure "HAS1" to the main application, and Respondent in the main application denied authorizing his attorney to send the letter.

[5] The second letter, annexure "HAS6" dated 4 October 2017 was addressed to 'His Excellence the Governor of the Province of Upper Katanga Lubumbashi' and copies thereof sent to 'The Provincial Director DGM Lubumbashi Province of Upper

Katanga'. In this letter, which the Respondent admits to sending to the authorities, he *inter alia* accuses the Applicants of embezzlement, causing damage to the company's reputation and non or partial payment to employees and ended the letter by stating the following:

> "Mr Erhard Swanepoel now wishes to leave the country without paying the workers and without arranging an acceptable solution. I beg you to take the necessary measures to remedy the situation".

[6] On the 28 September 2017, the First Applicant was due to fly to South Africa from Luano Airport, Lubumbashi, DRC when, at the airport and waiting to board the airplane, he was summarily arrested by immigration officials and removed and detained at other facilities in Lubumbashi. The First Applicant was not told the reason for his arrest and his passport was confiscated. He could therefore not return to South African to see his family and attend to business. The First Applicant then instructed local attorneys there to ascertain from the officials the reason for his arrest. On the 29 October 2017, the attorneys informed him that unnamed officials had confirmed that it was as a result of the letter, "HAS1" and a copy of this letter was sent to the attorneys. The attorneys later informed the First Applicant that the officials had agreed to return his passport, which was duly done.

[7] On the 17 October 2017, I gave an *ex tempore* judgment and granted the order in favour of the Applicants. The Order reads as follows:

> IT IS ORDERED
>
> 1. That the Respondent is within 24 hours of the time that this order is made:

1.1 to give an instruction to Mr Dieudonné Muhinza Lumoo of the firm *Cabinet Mukonga et Muhinza Société* with address 26, *Avenue du Cuivre Q Makomeno, Commune et Ville De Lubumbashi*, the Democratic Republic of Congo ("the DRC"), to forthwith write and transmit to the addressees of annexure "HAS1" to the founding affidavit, being *le Directeur Provincial de La Direction Générale de Migration de et á Lubumbashi, le Procureur Générale prés la cour d' Appel de et á Lubumbashi,* and *le Directeteur de L' Agence Nationale des Renseignements de la province du Haut Katanga á Lubumbashi,* a letter on letterhead of his firm wherein the addressees are informed that annexure "HAS6" to the supplementary affidavit is unconditionally withdrawn by the Respondent, and

1.2 to forthwith write and transmit to the addressees of annexure "HAS6" to the supplementary founding affidavit, a letter wherein the addressees are informed that annexure "HAS1" to the founding affidavit is unconditionally withdrawn by the Respondent; and

1.3 to furnish the Court and Applicants' attorneys with proof under oath that he has complied with prayers 2.1 and 2.2 above."

2. That the Respondent be interdicted and restrained:

2.1 from instructing Mr Dieudonné Lumoo or any other person in the DRC to make any representations, whether oral or in writing, on the Respondents behalf to the addressees of annexure "HAS1" to the founding affidavit and annexure "HAS6" to the supplementary founding affidavit, or to any other like government or state official in the DRC, pertaining to the First and Second Applicants and their conduct involving the Third Applicant, in like or in similar vein to annexure "HAS1" to the founding affidavit and annexure "HAS6" to the supplementary founding affidavit."

2.2 From making any representations as envisaged in prayer 3.1 himself;

2.3 From interfering in any manner with the First and Second Applicants' conduct, movements and business in the DRC; and

2.4 From interfering in any manner with the business of the Third Applicant in the DRC.

3. That the Respondent is to pay the costs of the application, on the scale as between attorney and client.'

[8] On the 18 October 2017, the Respondent filed an application for leave to appeal that order. On the 23 October 2017, the Applicants filed an application in terms of section 18(1) and (3) of the Superior Courts Act 10 of 2013 ("the first section 18 application) for the following relief:

> "That the operation and execution of the order by the Honourable Kusevitsky AJ under case number 18211/2017 on 17 October 2017 ("the Order") are not suspended by the application for leave to appeal lodged by the Respondent, nor by any appeal by the Respondent, and that the Order continues to be operational and enforceable and will operate and be executed in full until the final determination of all present and future leave to appeal applications and appeals in respect of the Order."

[9] That application was supported by an affidavit which sought to introduce new evidence in support of the application. It stated that on the 19 October 2017, the First Applicant was again due to fly to South Africa from the DRC when, at the airport, he presented his passport and ticket at the emigration desk but was denied permission to leave the DRC by the officials concerned. The First Applicant immediately contacted his attorneys and informed them of the situation. They confirmed that the reason why he was being prevented from leaving the DRC was because of one of the letters, i.e. "HAS1", that formed the subject matter in the main application.

[10] In opposition to the application, the Respondent averred that the facts presented were not markedly unusual or specially different from any other situation where leave to appeal has been sought against a final order. It was also contended that as a matter of fact, the First Applicant had been released from custody and that his passport had been returned to him and that he was later allowed to travel to the Republic of South Africa from the DRC after the intervention of his attorneys. It was furthermore contended that there was not a single primary fact to support the conclusion that the Second Applicant would similarly not be able to travel between South Africa and the DRC and that the First Applicant was not re-arrested despite attempting to leave the DRC which he was allowed to do after the intervention of his attorneys. He concluded by stating that if the application was successful, he would be put in a position where he would be ordered to withdraw a letter that he did not instruct his attorney to write and to withdraw a letter that he wrote and he had a well-grounded fear that the authorities in the DRC would consider that he was crying wolf if he were to renew his request for an investigation on the same or similar grounds after a successful appeal.

[11] Finally, it was stated that there is no irreparable harm in allowing the default position to endure and that no exceptional circumstances have been presented to suggest that the Applicants will suffer irreparable harm.

[12] On the 27 October 2017, I dismissed the application for leave to appeal with costs and postponed the section 18 application *sine die*, and granted the Applicants leave to supplement their papers if necessary. The issue of costs was reserved.

[13] On the 2 November 2017, the Applicants re-enrolled the section 18 application and delivered a supplementary affidavit. This re-enrolment was precipitated by the serving by the Respondent of a Petition to the Supreme Court of Appeal against the the 17th October 2017 Order.

[14] I agreed to hear the second section 18 application on the 15 November 2017. However, it was apparent that by the time of the hearing of the matter, the Respondent, despite serving the Petition on the Applicants, it had not been lodged with the Registrar in terms of section 18(5) of the Act. After hearing argument in respect of that point in *limine* which was taken by the Respondent on the grounds that the application was premature for want of compliance, I ordered that in the interest of justice and for the reasons which I will return to shortly, the matter could proceed. I accordingly heard the section 18 application.

Applicable legislation

[15] Section 18, the provisions of which bear the conditions necessary for a suspension of a decision pending an appeal, states as follows:

> "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 or of an 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 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) If a court orders otherwise, as contemplated in subsection (1)-

(i) the court must immediately record its 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.

[16] It is trite that in terms of 18(1) read with ss (5) of the Act, the lodging of an application for leave to appeal against a judgment of a high court has the effect of suspending the operation and execution of such judgment, pending the decision of the application.

[17] In terms of section 18(5), a decision becomes the subject of an appeal 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 applicable rules of court.

[18] In explaining his failure to lodge the Petition with the Registrar of the Supreme Court of Appeal, the Respondent argued that the delay was occasioned by the administrative department of this court in submitting to him the typed order and judgments in relation to the 17 October Order and the Order in respect of the leave to appeal application and as a result, he could not comply with Rule 6 of the Supreme Court of Appeal of Appeal Rules.

[19] In this particular matter, it seems as if the petition to the SCA has been served, but not yet lodged with the SCA.

[20] In the case of **Panayiotou v Shoprite (Pty) Ltd and Others 2016 (3) SA 110 (GJ**), a legal question arose when the court had to determine whether the service of an application to condone the late filing of a petition to the SCA in itself had the effect of suspending the judgment which leave was sought for purposes of s 18 (5).

[21] The court held in that instance that it was not. It found that in that instance, all that was before the Supreme Court of Appeal was an application for condonation, which fate was unknown. The failure to serve an application for leave to appeal within the prescribed time resulted in the lapsing of the right to apply for leave to appeal and only on the granting of condonation would it be revived. The court held that this was the correct position as the corollary would mean that a judgment many

months or years after it had been obtained could be suspended merely by the service of a condonation application, which position was untenable. This case however seems to be distinguishable from **Panayiotou**.

[22] In this particular case it seems the petition had been served and not lodged with the registrar of the Supreme Court of Appeal in terms of section 18 (5).

[23] The Respondent argued firstly that no appeal existed at present as they were awaiting the typed orders of 17 and 27 October 2017 and that this application was therefore premature for non-compliance with section 18(5). He, however, reiterated that he have every intention of filing his petition once he had complied with rule 6 of the Supreme Court of Appeal rules. Rule 6 of the Supreme Court of Appeal Rules makes it clear that whilst a judgment can be filed with the registrar of the SCA later, the Court's orders (including the order relating to the application for leave to appeal) have to be filed simultaneously with the petition. He reiterated that he had every intention to petition the SCA and that this "cannot be doubted". He furthermore argued that because of the non-compliance with s 18(5), the setting down of the second section 18 application was tantamount to an irregular step which could be cause for a rule 30 notice being filed, it being argued that the Respondent was still well within the time periods to file such a notice.

[24] The question which this court faced was whether, on a question of fairness and since the parties and counsel were from out of town, it could hear the application and decide on the merits of the application on the assumption that the petition would

be filed timeously with the registrar of the Supreme Court of Appeal as soon as this Court's Orders were received.

[25] Counsel for Respondent relied on the case of **Mogale City Municipality and Others v Fidelity Security Services 2017 (4) SA 516 (GJ).** In that case, the court had to determine firstly whether or not an application to execute (otherwise known as a section 18 application in this case) ought to have been heard at all owing to the fact that the application to execute was lodged on 9 June, when Mogale City had not yet lodged an application for leave to appeal, having done so only on the 20 June 2016. On the 21 June 2016, the section 18(1) application to execute was heard.

[26] The Respondent relied on the following passage as support for his argument. Paragraph 14 of the **Mogale** judgment states as follows:

> "[14] The critical argument levelled by Mogale City at the judgment of the court *a quo* is that, notwithstanding that at the time of the hearing in terms of s 18(1) an application for leave to appeal had been lodged, s 18 requires an actual application for leave to appeal to have been lodged before there can be an application lodged to uplift the suspension of the order. There is, in our view, considerable force in this argument. The architecture of s 18 provides for three realms. The first is that when an order of court is made, there is at once an obligation by the defeated party to comply. The second is that the obligation to comply is suspended, a circumstance created by the action of lodging an application for leave to appeal. The third realm is the reversal of the suspension on the grounds provided for in s 18. Therefore, inescapably, there can be no upliftment of a suspension before a state of suspension exists. On this view, the preferable interpretation of s 18 would be to recognise that an application to execute in terms of s 18(1) is a defence mechanism that a successful party may put up to resist

the harm wrought by a suspension of the obligation to comply. Accordingly, there is no occasion to raise a shield unless and until a sword is drawn."

[27] In my view, however, Sutherland J, (with Windell J and Modiba J concurring), went further and explained the very nature of section 18 proceedings. The court stated that section 18 was wholly procedural in character and its purpose was to facilitate rapid relief to parties in the given circumstances. If I had to refuse to hear the section 18 application for want of an administrative function which was imminently forthcoming, that would have resulted in the parties having incurred an extra expense having to fly back to Cape Town, to argue on the same papers. In this regard Sutherland J stated the following:

"[19] A mechanical application of the section, genuflecting to a rigidity of the order of precedence of the jurisdictional preconditions could serve only a dilatory objective, an outcome wholly inconsistent with the purpose of the section to afford urgent relief. In our view, independently of the regulation provided by rule 30, the dismissal of the application to execute would have been so obviously wasteful and the delay in Fidelity coming again later on fresh identical papers so inimical to the aims of s 18, that a court exercising its inherent power to regulate its process effectively, ought to have allowed the matter to proceed and mero motu condoned the irregularity.

[20] It may also bear mention that the courts' patience with dilatory litigious behaviour, and unconstructive tactical manoeuvrings, is exhausted and, increasingly, it shall be expected of legal practitioners to manage and conduct litigation with at least a semblance of awareness that it is irresponsible to engage in Fabian skirmishes which consume the resources of opponents and of the legal system. If counsel are to be thought of as officers of the court it is

incumbent on them to see that there are clear manifestations that they are deserving of such an identity by promoting the resolution of disputes through the process, not indulging in the manipulation of the process to arrest progress."

[28] I was also referred to the matter of **Ntlemeza v Helen Suzman Foundation and Another [2017] 3 All SA 589 (SCA)** which also dealt with the effect of an application in terms of section 18 for an execution order pending the finalization of an appeal process**.** In this case, General Ntlemeza was appointed National Head of the Directorate for priority Crime Investigations on 10 September 2015 by the Minister of Police. His appointment was purportedly effected in terms of section 17CA(1) of the South African Police Service Act 68 of 1995, which imposed as one of the requirements for his appointment, that he be a fit and proper person, with due regard to his experience, conscientiousness and integrity. In March 2016, Ntlemeza's appointment was challenged in the High Court by the first and second respondents, Helen Suzman Foundation ("HSF") and Freedom under law ("FUL").

[29] The High Court found in favour of the Respondents. Subsequently Ntlemeza applied to the High Court for leave to appeal the principal order. HSF and FUL, in turn filed a counter-application, in terms of which they sought, *inter alia* ,as a matter of urgency, a declaratory that the operation and execution or the principal order not be suspended by virtue of any application for leave to appeal or any appeal. The court dismissed the application for leave to appeal but upheld the counter – application.

[30] In argument, counsel for Respondent in the present matter relied on the same argument which counsel for Ntlemeza relied on which was a jurisdictional point which in Ntlemeza's case they submitted would be dispositive of the appeal. In Ntlemeza, they contended that in terms of section 18(1), a pending decision on an application for leave to appeal or an appeal was a jurisdictional requirement before a court considering an application to enforce an order was empowered to make an execution order of the kind set out. It was contended that sequentially, the application for leave to appeal by Ntlemeza had been refused before FUL'S counter-application was upheld and thus the High Court was precluded from considering the counter application, because the jurisdictional fact of a pending decision in relation to an appeal or an application for leave to appeal was absent.[1]

[31] For present purposes, it is apposite to quote all of these succeeding paragraphs where the court considered whether that contention raised was well grounded. The court held as follows:

> "[25] In order to embark on a determination of whether the preliminary jurisdictional point raised on behalf of General Ntlemeza, set out in para 17 above, has substance, it is necessary to consider the provisions of **s 18(1)** and (2). These sections provide for two situations. First, a judgment (the principal order) that is final in effect, as contemplated in **s 18(1):** In such a case the default position is that the operation and execution of the principal order is suspended pending 'the decision of the application for leave to appeal or appeal'. Second, in terms of **s 18(2)**, an interlocutory order that does not have the effect of a final judgment: The default position (a diametrically opposite one to that contemplated in **s 18(1))** is that the principal order is not suspended pending the decision of the application for leave to appeal or appeal. This might at first blush appear to be a somewhat peculiar

[1] Para 17

provision as, ordinarily, such a decision is not appealable. However, this subsection appears to have been inserted to deal with the line of cases in which the ordinary rule was relaxed referred to in para 20 above.

[26] Both sections empower a court, assuming the presence of certain jurisdictional facts, to depart from the default position. It is uncontested that the high court's judgment on the merits of General Ntlemeza's appointment is one final in effect and therefore **s 18(1)** applies. This section provides that the operation and execution of a decision that is the 'subject of an application for leave to appeal or appeal' is suspended pending the decision of either of those two processes. **Section 18(5)** defines what the words 'subject of an application for leave to appeal or appeal' mean: '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.'

[27] When the high court made its decision on the merits of General Ntlemeza's appointment on 17 March 2017, that order immediately came into operation and could be executed. When General Ntlemeza, on 23 March 2017, filed his application for leave to appeal, the order (the principal order) of that court was suspended pending a decision on that application. HSF and FUL's 'counter-application', seeking the execution order, was thus well within the parameters of **s 18(1).** Did the dismissal of General Ntlemeza's application for leave to appeal prior to a decision on the execution application remove the jurisdictional underpinning for an execution order? The short answer is no. The reasons for that conclusion are set out hereafter.

[28] The primary purpose of **s 18(1)** is to re-iterate the common law position in relation to the ordinary effect of appeal processes – the suspension of the order being appealed – not to nullify it. It was designed to protect the rights of litigants who find themselves in the position of General Ntlemeza, by ensuring, that in the ordinary course, the orders granted against them are suspended whilst they are in the process of attempting, by way of the appeal process, to have them overturned. The suspension contemplated in **s 18(1)** would thus continue to operate in the event of a further application for leave to appeal to this court and in the event of that being successful, in relation to the outcome of a decision by this court in respect of the

principal order. **Section 18(1)** also sets the basis for when the power to depart from the default position comes into play, namely, exceptional circumstances which must be read in conjunction with the further requirements set by **s18(3).** As already stated and as will become clear later, the Legislature has set the bar fairly high.

[29] The preliminary point on behalf of General Ntlemeza referred to in para 17 above does not accord with the plain meaning of section 18. As pointed out on behalf of HSF and FUL, and following on what is set out in the preceding paragraph, section 18 does not say that the court's power to reverse the automatic suspension of a decision is dependent on that decision being subject to an application for leave to appeal or an appeal. It says that, unless the court orders otherwise, such a decision is automatically suspended. ("My emphasis")

[30] Moreover, contextually, the power granted to courts by section 18 must be seen against the general inherent power of courts to regulate their own process. This inherent jurisdiction is now enshrined in s 173 of the Constitution which provides:

> 'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.' ('My emphasis")

[31] A further application for leave to appeal the principal order was filed in this court on 21 April 2017. This was always highly likely and always in prospect. The nature of the contestation in the high court, including the negative aspersions concerning the character of the head of a leading crime-fighting unit of the South African Police Service, leads to that compelling conclusion. So too, one would imagine, whatever this court decides it is unlikely to be the final word on the matter. The execution order by the high court reasonably anticipated further appeal processes. This was in any event what was sought by HSF and FUL in their counter application. In their notice of motion, they sought an order that the operation and execution of the principal order not be suspended 'by any application for leave to appeal or

any appeal, and the order continues to be operational and enforceable and operate … until the final determination of all present and future leave to appeal applications and appeals…' A court charged with the adjudication of an application for an execution order would be astute to avoid a multiplicity of applications. ("My emphasis")

[32] There can be no doubt that an application by HSF and FUL for leave to execute, had there not been one earlier, could have been brought and would have been competent after the application for leave to appeal was filed in this court. Courts must be the guardians of their own process and be slow to avoid a to-ing and fro-ing of litigants. The high court's order achieved that end. A proper case had been made out by HSF and FUL for anticipatory relief. The high court reasonably apprehended on the evidence before it that further appeals were in the offing and issued an order that sought not just to crystallize the position but also to anticipate further appeal processes. For all the reasons aforesaid there is no merit in the preliminary point." ("My emphasis")

[32] It is for these reasons as cited by the dicta in Ntlemeza, that given the intention of the Respondent to file a petition and being precluded from doing so, together with the court's inherent power to dictate its own process and avoid wasteful time and expenditure, that I found that it would be an unjust exercise not to allow the matter to be heard and accordingly I condoned the irregularity, and dismissed the point in *limine* and ordered that the section 18 application could proceed.

[33] I am fortified by the fact that in the event that the Respondent does not lodge a petition for whatever reason, then he will still be visited by the order of the 17th October and be obliged to comply with the order. The effect of this application would therefore be the same albeit in a somewhat roundabout fashion.

The requirements of section 18(3) of the Act

[34] I now turn to consider whether the Applicants have discharged their onus in terms of section 18(3) of the Act.

[35] Under the common law rule of practice, the court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave is granted, to determine the conditions upon which the right to execute shall be exercised.[2]

[36] Now, with the repeal of Rule 49(1) of the Uniform Rules of Court, section 18 introduces a fresh test for leave to put into operation and execute an order pending the appeal process.

[37] The requirements for a successful section 18 application were considered in **Incubeta Holdings (Pty) Ltd and Another v Ellis and Another 2014 (3) SA 189 (GJ).** Sutherland J held that they are the following:

> 39.1 "Firstly, whether or not 'exceptional circumstances" exist; and
>
> 39.2 Secondly, proof on a balance of probabilities by the applicant of –
>
> 39.2.1 The presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order; and

[2] South Cape Corporation (Pty) Ltd v Engineering Services (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) at 545C

39.2.2 The absence of irreparable harm to the respondent/loser, who seeks leave to appeal.[3]"

Exceptional Circumstances

[38] With regard to the requirement of "exceptional circumstances", it was held in the matter of **University of the Free State v Afriforum and Another [2017] 1 All SA 79 (SCA)[4]** that whether "exceptional circumstances" for the purposes of section 18(1) of the Act existed would necessarily depend on the peculiar facts of each case, the Court citing Incubeta Holdings with approval where that Court held that:

> *"[n]eccessarily, in my view, exceptionality must be fact specific. The circumstances which are or may be 'exceptional' must be derived from the actual predicaments in which the given litigants find themselves."*.

[39] As to what would constitute "exceptional circumstances", the court, in **Incubeta,** looked for guidance to an earlier decision (on Admiralty law), namely, *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, & another* 2002 (6) SA 150 (C), where it was recognized that it was not possible to attempt to lay down precise rules as to what circumstances are to be regarded as exceptional and that each case has to be decided on its own facts. However, at 156H-157C, the court said the following:

> 'What does emerge from an examination of the authorities, however, seems to me to be the following:
>
> 1. What is ordinarily contemplated by the words "exceptional circumstances" is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; "besonder", "seldsaam", "uitsonderlik", or "in hoë mate ongewoon".
> 2. To be exceptional the circumstances concerned must arise out of, or be incidental to,

[3] at p194,para 16
[4] at para 13

the particular case.

3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.
4. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.
5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.'[5]

[40] The court in **Ntlemeza** also referred to **UFS v Afriforum** (supra) where the court stated that it was immediately discernable from sections 18(1) and (3) that the legislature proceeded from the well-established premise of the common law, that the granting of relief of this nature constituted an extraordinary deviation from the norm that, pending an appeal, a judgment and its attendant orders are suspended. It noted that the exceptionality is further underscored by the requirement of s 18(4)(i); that the court making such an order 'must immediately record its reasons for doing so'. The court stated that the reasons contemplated in s 18(4)(i) must relate to the court's entire reasoning for deciding 'otherwise' and must therefore also include its findings on irreparable harm as contemplated in s 18(3).

Irreparable Harm

[41] With regard to the second leg of the enquiry, i.e. the presence or absence of irreparable harm to either party, the full bench in **Mogale City Municipality and Others v Fidelity Security Services 2017 (4) SA 516 (GJ)** held as follows:[6]

[5] Ntlemeza V Helen Suzman Foundation and Another [2017] 3 All SA 589 (SCA) at para 37
6 at para 22

"The discernment of 'irreparable harm' by a court is a factual finding. It was stated in *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* 2014 (3) SA 189 (GJ) para 24:

'The second leg of the s 18 test [ie the presence or absence of irreparable harm to either party], in my view, does introduce a novel dimension. On the *South Cape* test, …. an even-handed balance is aimed for, best expressed as a balance of convenience or of hardship. In blunt terms, it is asked: who will be worse off if the order is put into operation or is stayed. But s 18(3) seems to require a different approach. The proper meaning of that subsection is that if the loser, who seeks leave to appeal, will suffer irreparable harm, the order must remain stayed, even if the stay will cause the victor irreparable harm too. In addition, if the loser will not suffer irreparable harm, the victor must nevertheless show irreparable harm to itself. A hierarchy of entitlement has been created, absent from the *South Cape* test. Two distinct findings of fact must now be made, rather than a weighing-up to discern a preponderance of equities. The discretion is indeed absent, in the sense articulated in *South Cape*. What remains intriguing, however, is the extent to which even a finding of fact as to irreparable harm is a qualitative decision admitting of some scope for reasonable people to disagree about the presence of the so-called fact of irreparability.'

[42] The Applicants relied on the decision of the full bench in **The Minister of Social Development Western Cape v Justice Alliance of South Africa** where the court made it clear that notwithstanding the introduction of an absolute threshold in the sense just discussed, the provisions of s 18 do not result in the exercise of judicial discretion in the wide sense being excluded in the determination of applications for leave to execute or for *orders ad factum praestandum* to operate pending an appeal. It stated that even if the double-edged requirements on irreparable harm and that of exceptionality are satisfied, the court retains 'a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised'. Considerations of

what is just and equitable in the peculiar circumstances remain relevant in that context.[6] (My emphasis)

[43] That court also disagreed with an argument that *'the requirements of s 18(3) set a higher standard for what needs to be proved in respect of irreparable harm than the 'the potentiality of irreparable harm or prejudice'* referred to by Corbett JA in **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd**[7], holding that 'the provisions does not require proof that there is a certainty that irreparable harm will be suffered. Proof of a balance of probabilities that there is a likelihood that such harm will be suffered will suffice. That is indistinguishable from establishing 'the potentiality' of such harm'. (My emphasis)

[44] With regard to the first requirement of exceptional circumstances, the Applicants argued that they first sought and obtained an Order to remove the defamatory statements that were made about them in the two letters from continuous publication and, more importantly, to remove the direct threat that the letters posed to their very liberty in the DRC. They argued that on two occasions, the letters caused the liberty of the First applicant in the DRC to be impugned, and prevented the Second applicant from going to the DRC. They concluded that without the implementation of the Order, the Order amounts to a nullity and their reputations and most importantly their liberty continues to be imperiled by damage caused by the two letters.

[6] At para 26
[7] 1977 (3) SA 534 (A)

[45] As to irreparable harm that they might suffer, the Applicants argued that the peril caused by the publication of the two letters remains as fact – and is on-going and constant. The harm to their reputations, they say and liberty, are incapable of reparation. They also argued that the likelihood of further harm of the type already suffered is substantial and is likewise incapable of reparation. Insofar as the perceived harm that could potentially fall upon the Respondent, the Applicants aver that there is no conceivable harm that the Respondent can suffer as, so it was argued, on his own version the worst case scenario for him is that he might be accused of '*crying wolf*', which Applicants argue, is not a recognizable harm.

[46] The Respondent on the other hand raised as opposition to the section 18 application the fact that no appeal existed at the time of hearing of the application and that on that basis, the current application is flawed. I have already dealt with this issue above.

[47] The Respondent also argued that there are no facts present which indicate that exceptional circumstances are present which would justify an order being granted in favour of the Applicants.

[48] The Respondent in his heads of argument placed huge emphasis on the fact that the Applicants had filed a supplementary affidavit pursuant to the initial section 18 application claiming that the Applicants sought to rely on further grounds to seek compliance with section 18 without leave of this court. It is common cause that at the postponement of the initial section 18 application, I granted the Applicants leave to supplement their papers should they deem it necessary and unfortunately, given that

counsel for Respondent had changed in between these proceedings, this was not communicated to Respondent's current counsel, Mr Steyn. This therefore deals with the second ground of Respondent's objection.

[49] A further objection relates to the failure by the Applicants to file a replying affidavit, which, the Respondent argues, fails to deal with a list of challenges put up by them in their answering affidavit and which should, as a matter of course, be deemed to be admitted.

[50] In **Maes v Hancox**[8], Bozalek J considered the purpose of the replying affidavit. He stated as follows:

> '… affidavits in motion proceedings fulfil a dual purpose namely, to place the essential evidence in support of or in opposition to the granting of the relief claimed before the court and to define the issues between the parties (See: *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* **1999 (2) SA 279** (W) at 323G). It is trite that founding affidavits must contain the essential averments on which an applicant's cause of action is based, as in the absence thereof, a respondent would not know what the case is that has to be met (See: *Derby-Lewis and Another v Chairman Amnesty Committee of the TRC* **2001 (3) SA 1033** (C) at 1052C-E). A respondent's responses to the averments in a founding affidavit delineates the issues between the parties. On the other hand the purpose of a replying affidavit is to deal with the averments made by the respondent in an answering affidavit (See: *Bayat & Others v Hansa & Another***1955 (3) SA 547** (N) at 553C-E).'

[51] **Bayat** (supra) states the following:

> 'An applicant for relief must (save in exceptional circumstances) make his case and produce all the evidence he desires to use in support of it in his affidavits filed with the notice of motion whether he is moving ex parte or on notice to the respondent and is not permitted to supplement in his replying affidavits (the purpose of which is to reply to averments made by the respondent in his answering affidavit) still less to make a new case in his replying affidavits.'[10] ((My emphasis)

10 See also *Betlane v Shelly Court* CC **2011 (1) SA 388** (CC) at para 29

[52] A cursory reading of both the Applicant's founding affidavit in the initial application and supplementary founding affidavit makes it abundantly clear what they claim would happen should the application not be granted. There can be little doubt that the Applicants have indeed made out a case in their respective founding affidavits.

[53] Furthermore most of the paragraphs that the Respondent refers to in his answering affidavit that he claims remains unchallenged, refers to argumentative material which, for the most part is prefaced by the statement, *"it will be argued that…".*

[54] In my view, the paragraphs alluded to does not contain any substantive allegations that would have called for, or necessitated a reply thereto, and in my view, is material best placed in Heads of Argument.

[55] Therefore Respondent's contention that the allegations remain unchallenged for want of a Reply thereto has no basis as the paragraphs alluded to lacks evidentiary value and therefore I do not find that the Applicants' failure to file a Replying affidavit is fatal to the Applicants case in this matter.

[56] When a Court ultimately has to assess the threshold that is incumbent upon the Applicants to overcome, it is noteworthy that the Respondent is aware of the situation that the Applicants finds themselves in and has not denied same. The Applicants in their founding affidavit related the events of what transpired when they were due to fly to South Africa from the DRC where they were denied permission to

leave the DRC by the officials. The officials confirmed that they were prevented from leaving because of the letters which formed the subject matter of the main application. This was not denied by the Respondent in his answering affidavit. The Respondent further admits that First Applicant was allowed to travel to South Africa from the DRC after the intervention of his attorneys. The Respondent furthermore confirmed in his answering affidavit that the Second Applicant was arrested as a result of the publishing of the letters but dismissed it as trivial by stating *"the First Applicant was not re-arrested despite attempting to leave the DRC which he was allowed to do after the intervention of his attorneys."*

[57] How any person, let alone a businessman can be expected to be subjected to the threat of arrest every time he travels to his business or home, wherever it might be situated, is unfathomable. This flippant attitude to the threat of having ones personal freedom threatened to my mind does not favour the Respondent. The threat to ones personal freedom, notwithstanding the fact that it is an enshrined right in our Bill of Rights, in my view constitute exceptional circumstances as envisaged in the Act and the Applicants have indeed shown that they will suffer irreparable harm should the order remain stayed. In contradistinction, the Respondent has not provided sufficient evidence to justify the conclusion that he will suffer irreparable harm by the implementation of the order.

[58] I am therefore of the view that the Applicants have proven on a balance of probabilities that they will suffer irreparable harm if this court does not so grant their order and that the Respondent will not.

In the result I make the following order.

1. That the operation and execution of the order granted by the Honourable Kusevitsky AJ under case number 18211/2017 on 17 October 2017 (“the Order”) is 0 not suspended by the Petition lodged by the Respondent, nor by any appeal to be lodged by the Respondent, and that the Order continues to be operational and enforceable and will operate and be executed in full until the final determination of all present and future leave to appeal applications and appeals in respect of the Order.

2. The question of costs will stand over for later determination.

_____

KUSEVITSKY AJ

Coram:	**D Kusevitsky AJ**
Judgment by:	**D Kusevitsky AJ**
Counsel for Applicant:	Adv C Wesley
Attorneys for Applicant :	DP Du Plessis Inc, 102 River Road, Lyttelton Manor, 0157 (H J Du Plessis)
Counsel for Respondent:	Adv I Theron
Attorneys for Respondent:	Rossouws Leslie Inc, 8 Sherborne Road, Parktown, Johannesburg
Dates of Hearing:	**27 October 2017**
Date of Judgment:	**13 December 2017**