THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 115/2020

In the matter between:

KURT ROBERT KNOOP NO	**FIRST APPELLANT**
JOHAN LOUIS KLOPPER NO	**SECOND APPELLANT**
and	
CHETALI GUPTA	**RESPONDENT**
MAHOMED MAHIER TAYOB	**INTERVENING PARTY**

Neutral citation: *Knoop and Another NNO v Gupta (No 1)* (115/2020) [2020] ZASCA 149 (19 November 2020)

Coram: WALLIS, MBHA and MOCUMIE JJA and EKSTEEN and MABINDLA-BOQWANA AJJA

Heard: 6 November 2020

Delivered: The order in this case was delivered orally to the parties on 6 November 2020 and furnished to them electronically that day. This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down of the judgment is deemed to be 09h45 on 19 November 2020.

Summary: Suspension of operation of order pending an appeal – section 18(1) of Superior Courts Act 10 of 2013 – leave to execute on

order in terms of s 18(3) of Act – requirements – urgent appeal in terms of s 18(4) of Act – suspension of order granting leave to execute in terms of s 18(4)(iv) of Act – whether court empowered to order that suspension would not operate – such an order a nullity.

ORDER

On appeal from: Gauteng Division of High Court, Pretoria (Ledwaba DJP, Janse van Nieuwenhuizen J and Senyatsi AJ concurring, sitting as court of first instance):

1 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

2 The order of the full court is set aside and replaced by the following order:

'The application is dismissed with costs, such costs to include those consequent upon the employment of two counsel.'

3 It is declared that pending the finalisation of this appeal:

(a) The operation and execution of the order of the full court granting leave to execute in terms of s 18(1), read with s 18(3), of the Superior Courts Act 10 of 2013 was suspended in terms of s 18(4)(iv) of the Superior Courts Act 10 of 2013.

(b) The appellants were not validly removed from office as business rescue practitioners in respect of Islandsite Investments One Hundred and Eighty (Pty) Ltd (Islandsite) and Confident Concept (Pty) Ltd (Confident Concept).

(c) The directors of Islandsite and Confident Concept were not entitled to act on the order for the removal of the appellants as business rescue practitioners in those two companies by nominating new business rescue practitioners and the appointments of Mr Tayob in respect of Islandsite and Mr Naidoo in respect of Confident Concept were invalid.

(d) The notices of termination of business rescue given by Mr Tayob in respect of Islandsite and Mr Naidoo in respect of Confident Concept in

terms of s 132(2)*(b)* of the Companies Act 71 of 2008 were invalid and of no force and effect.

(e) Nothing in this order validates or invalidates any other action taken by Islandsite and Confident Concept since 7 February 2020 with the authority of Mr Tayob and Mr Naidoo as the case may be.

4 It is further declared that pending the finalisation of the main appeal under Case No 116/2020 Islandsite and Confident Concept remain in business rescue under the supervision of the appellants in accordance with their original appointments as business rescue practitioners.

JUDGMENT

Wallis JA (Mbha and Mocumie JJA and Eksteen and Mabindla-Boqwana AJJA concurring)

[1] The immediate execution of a court order, when an appeal is pending and the outcome of the case may change as a result of the appeal, has the potential to cause enormous harm to the party that is ultimately successful. That was well-illustrated by the facts in *Philani-Ma-Afrika*,[1] where the judge granted leave to appeal against an eviction order and at the same time gave leave to execute. Only an urgent application to the Constitutional Court, made in the mistaken belief that the execution order was not appealable to this court, forestalled the inevitable and irreparable harm that would have resulted from giving effect to the execution order. In giving the judgment of this court, Farlam JA said:[2] 'The facts of this case provide a striking illustration of the need for orders of the nature of

[1] *Philani-Ma-Afrika and Others v Mailula and Others* [2009] ZASCA 115; 2010 (2) SA 573 (SCA); [2010] 1 All SA 459 (SCA).
[2] Ibid para 20.

the execution order to be regarded as appealable in the interests of justice.' There can be little doubt that what occurred in *Philani-Ma-Afrika* led to the statutory provisions that now govern the grant of leave to execute ('execution orders').

[2] At common law, unless the court in the exercise of a discretion ordered otherwise, an application for leave to appeal and an appeal pursuant to leave being granted suspended the operation of the order. It was not open to the successful party to execute on, or otherwise act pursuant to, that order.[3] This common law rule and the power to grant an execution order is now expressly embodied in s 18(1), read with s 18(3), of the Superior Courts Act 10 of 2013 (the SC Act). The grant of leave to execute is constrained by the requirement that it may only be granted if there are exceptional circumstances; if the applicant will suffer irreparable harm if it is not granted; and if the grant will not cause the respondent to suffer irreparable harm. A further safeguard against the risk of harm being caused by an execution order is the automatic right to an urgent appeal given by s 18(4). Pending such an appeal the statute expressly provides in s 18(4)(iv) that the operation of the suspension order is itself suspended. This case illustrates what can go awry when a court attempts to override that statutory provision. But first, the background.

Background

[3] The shareholders in equal shares of two companies, Islandsite Investments One Hundred and Eighty (Pty) Ltd (Islandsite) and Confident Concept (Pty) Ltd (Confident Concept), are the respondent,

[3] *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty)* 1977 (3) SA 534 (A) (*South Cape Corporation*) at 544H-545G.

Mrs Gupta, her husband, Mr Atul Gupta, and Mr Gupta's two brothers, Arti and Rajesh Gupta (hereafter 'the Guptas'). Their business affairs have come to public attention through media reports, the 'State of Capture' report by the Public Protector, Ms Thuli Madonsela, and the activities and daily public hearings of the Commission of Inquiry into Allegations of State Capture, known eponymously as the Zondo Commission after the commissioner, Deputy Chief Justice Raymond Zondo. The Commission was appointed in fulfilment of the remedial action determined by the Public Protector in her report.

[4] In consequence of allegations made about the Guptas a number of companies in the group through which the Guptas conducted their business activities became 'unbanked', because the major banks in South Africa were not prepared to afford them banking facilities. This precluded them from continuing with their business operations and very probably rendered them commercially insolvent.[4] In the result Islandsite and Confident Concept were placed under supervision and went into voluntary business rescue on 16 February 2018. Six other companies in the group were placed under business rescue at the same time. These did not include Oakbay Investments (Pty) Ltd (Oakbay), the company that controlled the operations of all the other companies in business rescue. It is convenient to refer to these companies generally as the Oakbay Group. Forty percent of the shares in Oakbay are owned by Islandsite and the balance by Mr and Mrs Gupta. Its acting Chief Executive Officer (CEO) is Ms Ronica Ragavan.

[4] *Murray NO and Others v African Global Holdings (Pty) Ltd and Others* [2019] ZASCA 152; 2020 (2) SA 93 (SCA); [2020] 1 All SA 64 (SCA).

[5] The present appellants, Mr Knoop and Mr Klopper, were appointed as the business rescue practitioners (BRPs) in respect of Islandsite and Confident Concept[5] and also held appointments as BRPs in respect of some of the other companies in the Oakbay Group. Although appointed at the instance of the directors (Ms Ragavan and Mr Ashu Chawla in the case of Islandsite, and Mr Chawla in the case of Confident Concept) on the recommendation of the attorneys advising the Guptas, within a short period disputes arose between the BRPs, Ms Ragavan and other employees in the Oakbay Group. These need not be described here, but they led to Mrs Gupta making an application on 28 November 2018, on the basis of an affidavit by Ms Ragavan, for the removal of the BRPs of these two companies in terms of s 139(2) of the Companies Act 71 of 2008 (the Act). That application came before a specially constituted full court of the Gauteng Division of the High Court, Pretoria (Ledwaba DJP, Janse van Niweuwenhuizen J and Senyatsi AJ) and succeeded. An order for the removal of the BRPs (the removal order) was granted.

[6] Messrs Knoop and Klopper lodged an application for leave to appeal against the removal order and were met with an application for leave to execute, brought on behalf of Mrs Gupta on the strength of an affidavit deposed to by Ms Ragavan. On 7 February 2020 the application for leave to appeal to this court against the removal order succeeded. An execution order was also granted in terms of ss 18(1) and (3) of the SC Act. On 12 February 2020, as was their right and as was expected,[6] Messrs Knoop and Klopper lodged notice of an extremely urgent appeal to this court. This is the appeal dealt with in this judgment. The following day they lodged their notice of appeal against the removal order.

[5] They were jointly appointed in relation to Islandsite and Mr Knoop was the sole appointee in relation to Confident Concept.
[6] According to counsel for Mrs Gupta.

Subsequent events

[7] After the execution order was granted arrangements were made – presumably by the boards of directors of the two companies – to have Mr M M Tayob appointed as the business rescue practitioner in respect of Islandsite and Mr S M Naidoo appointed as the business rescue practitioner in respect of Confident Concept. According to an affidavit filed by Mr Tayob his appointment was made on 10 February 2020 and I will assume that Mr Naidoo was appointed on about the same date. We do not know whether notice of that appointment was filed with the Companies and Intellectual Property Commission (the CIPC) as required by s 129(4)*(a)* of the Act, or whether and when notice was given to affected parties in terms of s 129(4)*(b)*, but I will assume that there was proper and timeous compliance with these statutory requirements. What is relevant for present purposes is the steps taken, on the basis of these appointments, to bring these proceedings and the business rescue of the two companies, to an end.

[8] On 13 March 2020, Mr Tayob delivered a notice purporting to withdraw the main appeal insofar as it related to Islandsite. On 17 March 2020, Mr Naidoo purported to do the same insofar as Confident Concept was concerned. This precipitated a paper war between the attorneys acting for Messrs Knoop and Klopper and those representing Mrs Gupta. On 9 April 2020, Mr Krause of BDK Attorneys wrote to the registrar asserting that Messrs Klopper and Knoop had been 'stripped of their capacity' as BRPs; had no *locus standi* and no right of appeal; and asking that the urgent appeal should not be enrolled, but should be disposed of by the President under Rule 11(1)*(b)* of the Supreme Court of Appeal Rules. It is difficult to conceive of a more misconceived request by a legal practitioner. The rule empowers the

President to give such directions as she may consider just and expedient 'in matters of practice, procedure and the disposal of any appeal'. No sensible reading of the rule could lead anyone to think that it entitled the President of this court to dispose of an appeal without placing it before a bench properly constituted to consider the issues raised by the appeal, including the question of the entitlement of the appellants to pursue an appeal.

[9] It is noteworthy that Mrs Gupta's attorneys did not ask for the appeal to be enrolled as a matter of extreme urgency as provided in s 18(4)(iii) of the SC Act. Indeed, they asked that it not be enrolled at all. This is both odd and unexplained. If their client thought that she would suffer irreparable harm by Messrs Knoop and Klopper remaining in office, one would have expected them to ask the court to expedite the urgent appeal to remove any obstacle to their removal. Had that been done immediately the notice of appeal was lodged on 12 February 2020, the appeal could have been set down for an urgent hearing in the February term that was about to commence and disposed of by the end, or shortly after the end, of that term.

[10] The contention that Messrs Knoop and Klopper, who were cited in their capacity as business rescue practitioners *nomine officio*, no longer had any *locus standi* to pursue the main appeal, because they had not sought or obtained leave to appeal in their personal capacities was refuted by their attorneys. They asked for the urgent appeal to be enrolled. The outcome of this pointless spat was that the Deputy President quite properly refused to determine these legal issues on the correspondence and directed that the urgent appeal and the main appeal be set down for hearing together. They were both enrolled for hearing before us on

6 November 2020. On 5 October 2020 the attorneys delivered a notice that the parties wanted a web-based hearing.

[11] Heads of argument were delivered in accordance with the rules. Counsel for Messrs Knoop and Klopper submitted that the urgent appeal had been rendered moot by the Deputy President's order, as the outcome of the main appeal would render it unnecessary to determine the urgent appeal. However, in making that submission they had counted on there being no further actions by Mr Tayob in relation to Islandsite and Mr Naidoo in respect of Confident Concept. In this they fell into error as the following paragraphs demonstrate.

[12] On 12 October 2020, Mr Tayob lodged an application for leave to intervene in the main appeal for the sole purpose of placing further evidence before the court. While his notice of motion and affidavit did not express any view about the proper disposition of the main appeal – it will be recalled that he had purported to withdraw it – the terms of the affidavit were plainly directed at securing the dismissal of that appeal insofar as it related to Islandsite. On 22 October 2020, the court received a letter from the attorneys on behalf of the appellants saying that they would need time to respond to his affidavit and the four lever arch files of evidence to which it referred and that Mr Tayob might wish to reply to their answering affidavit. In the circumstances they said the appeals would need to be adjourned.

[13] All this came only two weeks before the appeals were due to be heard, when the preparation by the members of the court was well advanced. Bearing in mind that the appeal against the execution order was required by the provisions of s 18(4)(iii) to be heard as a matter of

extreme urgency and had already been delayed by nine months, we were not minded, without first hearing the parties, to agree either to Mr Tayob being allowed to intervene, or to the postponement of the appeals.

[14] We had started preparing a directive to the parties governing the further conduct of the proceedings, when our attention was drawn to a news report that Mr Tayob had purported to terminate the business rescue and restore Islandsite to its directors. On Monday, 26 October 2020, the respondent's attorneys confirmed this by delivering a letter to the registrar attaching a copy of a document from the CIPC reflecting that the business rescue of Islandsite had been terminated by Mr Tayob and recorded by CIPC on 16 October 2020. The letter indicated that in the circumstances Mr Tayob would not be pursuing his application to intervene in the main appeal and it would not be necessary for the appeals to be adjourned as suggested by the appellants' attorneys.

[15] The impression given by these actions on the part of Mr Tayob was that they might have been directed at stultifying the appellants' appeals both against the execution order and against the removal order. That was of concern, because our law is clear that if that is done with *dolus* it may amount to contempt of court. As long ago as 1906, Mason J in *Li Kui Yu*[7] said:

' … where a person knows or has reason to believe or ought to know that an application is being made to the Court for a certain purpose --- where he has that knowledge, or that suspicion, then, if he takes any action before the Court can be approached, the Court will regard that as an interference with the administration of justice, and will exercise its powers to prevent itself being defeated by anything of that kind.'

[7] *Li Kui Yu v Superintendent of Labour* 1906 TS 181 at 190.

Subsequent cases have stressed the need for there to be an intention to defeat the ends of justice amounting to *dolus*.[8] In *Yamamoto* De Villiers JP gave, as examples of such conduct, procuring the disappearance of a witness knowing that they had been subpoenaed to appear or removing goods with the object of defeating a possible order of court. The question is whether it is 'manifest that there was an ulterior object – namely to obstruct the due course of justice.[9] However, in oral argument counsel for the appellants said that a finding on this was not necessary for the determination of the appeal and we have not pursued the matter further. To do so would require further evidence.

[16] The following directive was issued to the parties and Mr Tayob concerning the conduct of the appeals:

'The judges have considered the application for an adjournment of the main appeal under Case No 116/2020 and Mr Tayob's application for leave to intervene in that appeal and to tender further evidence. Neither application is granted at this stage. They will be considered and disposed of together with the appeal in Case No 115/2020 in the scheduled appeal hearing on 6 November 2020. In addition, since receiving those applications the attention of the judges was drawn to a media report that Mr Tayob had purported to terminate the business rescue and restore the company to its directors. The respondent's attorneys sent a letter to the Registrar of this court on 26 October 2020 recording the termination of business rescue in relation to that company. As these intervening events may affect the conduct of the proceedings, the court gives the following directive for the hearing on 6 November:

1 Mr Tayob is to deliver an affidavit by no later than 30 October 2020 in which he is to inform the court:

(a) when he terminated the business rescue and provide particulars, including copies of all documents showing the steps taken in terms of s 141(2)*(a)* or *(b)* as the case

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[8] *Fein and Cohen v Colonial Government* (1906) 23 SC 750; *Yamamoto v Athersuch and Another* 1919 WLD 105 at 106.

[9] *Fein and Cohen v Colonial Government* at 758.

may be of the Companies Act, 71 of 2008 in seeking the termination of the business rescue;

(b) when he formed the intention to terminate the business rescue;

(c) the basis upon which he gave notice to the Commission in terms of s 132 (2)*(b)*, read with s 141 (2) of the Companies Act 71 of 2008.

2 Mr Tayob is to file heads of argument not exceeding 15 pages in length by no later than 30 October 2020 dealing with the following matters:

(a) As the operation of the execution order in terms of ss 18(1) and (3) of the Superior Courts Act 10 of 2013 (the Act) was automatically suspended in terms of s 18(4)(iv) of the Act, on what basis does he contend that he has a legal interest in the outcome of the appeal in Case No 116/2020 and, if he did so, on what basis was he entitled to terminate the business rescue?

(b) Given the likelihood that the evidence he now seeks to tender will be disputed, on what basis is it admissible at the stage of an appeal?

(c) The delay in bringing the application for leave to intervene.

3 The parties and Mr Tayob are to be represented at the hearing on 6 November 2020. The hearing will commence at 9.45am by dealing with the urgent appeal under Case No 115/2020. The appellants will be allocated 35 minutes and the respondent 35 minutes, with 5 minutes for a reply. Counsel for Mr Tayob will be entitled to address the court on issue 1(a) above for no more than 15 minutes, subject to the directions of the court.

4 Judgment in the urgent appeal under Case No 115/2020 will then be reserved and the court will adjourn to consider the further disposition of the appeal in Case 116/2020. When it resumes it will either grant an adjournment and hear argument on the wasted costs occasioned by the adjournment, or it will proceed to hear the appeal in accordance with directions to be given at that stage of the hearing.

5 Pending the hearing on 6 November 2020 Mr Tayob is to take no further steps to give effect to any purported termination of the business rescue proceedings or in any way to transfer control, or facilitate the transfer of control, of the company under business rescue, Islandsite Investments 180 (Pty) Ltd, to its directors.

6 The local attorneys for Mr Tayob, who are also the local attorneys for Mrs Gupta in these appeals, are directed forthwith to draw their client's attention and that of the principal deponent to the affidavits on her behalf, Ms Ragavan, to the terms of these directives and in particular paragraph 5 thereof.

7 Any party affected by this directive is given leave to apply to the presiding judge on notice to the Registrar and the parties to the appeals for a variation of the terms of the directive.'

[17] Mr Tayob filed an affidavit and heads of argument, and was represented before us by counsel. In consequence of the directive, supplementary heads of argument were delivered on behalf of the appellants dealing with the suspension of the execution order and the urgent appeal. Mrs Gupta's attorneys wrote to the Registrar objecting to the supplementary heads of argument and sought a direction in that regard. We indicated that whether the supplementary heads would be accepted would be dealt with at the hearing. The attorneys were advised that if their counsel thought it appropriate to deliver supplementary heads of argument their reception would likewise be dealt with at the hearing. On the morning of the appeal they delivered two sets of supplementary heads of argument, one dealing with mootness and the other with the merits of the urgent appeal. Neither party suggested that we should disregard these supplementary heads and we are grateful to counsel on both sides for the assistance they have provided.

[18] The final development came on 2 November 2020 when the Registrar received a letter from Mrs Gupta's attorneys informing the court that on 23 October 2020 Mr Naidoo had, like Mr Tayob, purported to terminate the business rescue in respect of Confident Concept. That completed the background against which we dealt with this urgent appeal. Had it been heard and disposed of as a matter of extreme urgency as provided in the SC Act the court would simply have had to determine whether the execution order should have been granted. Instead it was faced with a number of other issues arising from the basic question of

whether the execution order was enforceable and could validly be acted upon pending the hearing of the urgent appeal. How that came about is set out in the next section of this judgment.

Was the execution order enforceable?

[19] Section 18(4) of the SC Act reads as follows:

' 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.*'

(My emphasis)

[20] The section provides a safeguard against irreparable prejudice being occasioned as a result of a court granting an execution order when it should not have done so. The court must record its reasons immediately and the aggrieved party has an automatic right of appeal, unlike the ordinary situation where it is necessary to obtain leave to appeal. An appeal against an execution order is one of right and the party that obtained the execution order cannot object to it. If they wish to sustain the execution order, they must oppose the appeal. If they wish to avoid being prejudiced by the execution order being suspended, their remedy is to approach the head of the court to which the appeal lies and take all steps within their power to secure a hearing of the extremely urgent appeal for which the section provides. As noted above, Mrs Gupta's attorneys did nothing of the sort, and at every stage have sought to rely on technicalities to avoid both appeals being heard on its merits.

[21] As an example of what is envisaged by the section, when Fisher J granted an execution order on 18 April 2018 against Ms Ragavan and others at the instance of Messrs Knoop and Klopper, giving the BRPs access to the premises from which the companies under business rescue operated, Ms Ragavan's appeal was heard on 23 April and dismissed on 3 May 2018. Appeals under s 18(4) can be disposed of equally expeditiously by this court. In *Ntlemeza*[10] the execution order was granted on 12 April 2017; the high court furnished its reasons on 10 May 2017; the appeal was heard on 2 June 2017; and judgment was delivered on 9 June 2017.[11] Had the President been approached shortly after 12 February 2020 for a date for an urgent appeal it could easily have been accommodated in the first term of this year.

[22] The provisions of s 18(4)(iv) are clear and emphatic. An execution order is suspended pending an urgent appeal by the aggrieved party.[12] The suspension of the original order in terms of s 18(1) of the SC Act continues until the disposal of the urgent appeal. In those circumstances it may well be asked on what basis Messrs Tayob and Naidoo were appointed and on what basis they have acted as BRPs since their appointment; purported in that capacity to withdraw Messrs Knoop and Klopper's appeals; and now, as the appeal hearing was looming, purported to terminate the business rescue in relation to both companies?

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[10] *Ntlemeza v Helen Suzman Foundation and Another* [2017] ZASCA 93; 2017 (5) SA 402 (SCA); [2017] 3 All SA 589 (SCA) (*Ntlemeza*).

[11] In *University of the Free State v Afriforum and Another* [2016] ZASCA 165; 2018 (3) SA 428 (SCA); [2017] 1 All SA 79 (SCA) (*UFS v Afriforum*) the execution order was granted on 21 July 2016 and affected the university's lecture arrangements for the ensuing academic year. The appeal was heard at the beginning of the November term on 3 November and judgment was delivered on 17 November. In *Premier for the Province of Gauteng and Others v Democratic Alliance and Others* [2020] ZASCA 136 the execution order was granted on 20 June 2020 and the appeal was heard on 17 August 2020.

[12] *Minister of Social Development and Others v Justice Alliance of South Africa and Another* [2016] ZAWCHC 34 (*Justice Alliance*) para 2.

[23] The answer to those questions lies in the following paragraphs of the judgment granting leave to execute.

'[23] In terms of section 18(4)(ii) the respondents have an automatic right of appeal to the next highest court, being the Supreme Court of Appeal.

[24] Section 18(4)(iv) provides that the order will automatically be suspended pending the outcome of the appeal.

[25] The suspension would in the normal course require a further application for leave to execute.

[26] The Supreme Court of Appel in *Ntlemeza v Helen Suzman Foundation* 2017 (5) SA 402 (SCA) was alive to the multiplicity of applications that would follow in view of the provisions of section 18(4)(iv) and held that a court seized with an application in terms of sections 18(1) and (3) may order that the order will operate and be executable despite the noting of any further appeals by any party.

[27] The principle underlying the decision of the Supreme Court of Appeal in *Ntlemeza supra* is the inherent right of courts to control its own judgments to prevent a toing and froing of litigants [See *Ntlemeza supra* at paragraph [32]].

[28] In executing our inherent right in this regard an order that any present or future appeals, applications and petitions by any party relating to this judgment shall not suspend the operation of the order granted on the 13 December 2019 shall follow.'

[24] In the result, apart from granting leave to execute the full court granted the following order:

'Any present or future appeals, applications and petitions by any party relating to this judgment shall not suspend the operation of the order granted on the 13 December 2019.'

I will refer to this as the suspension order.

[25] The suspension order was explicitly directed at overriding the provisions of s 18(4)(iv) and Islandsite and Confident Concept took advantage of it in the respects set out above. That might not have mattered practically so far as this appeal and the main appeal are concerned, had Messrs Tayob and Naidoo done nothing more than

purport ineffectually to withdraw Messrs Knoop and Klopper's appeals. However, Mr Tayob's application to intervene in the main appeal necessitated, in the first instance, a consideration of his *locus standi* to do so. The subsequent conduct of both Mr Tayob and then Mr Naidoo aimed at terminating the business rescue of both companies, on which Mrs Gupta's attorneys relied in contending that the appeals were now moot, compelled us to consider whether the full court's order was properly granted. If it was not, the further question would arise of the validity of the steps taken in reliance upon it.

[26] These issues arose because Mrs Gupta and her attorneys, who informed us in a letter on 2 November 2020 that they acted also for Islandsite, presumably on the instructions of the Guptas as a whole, sought to rely on the validity of the full court's order seeking to override s 18(4)(iv). They relied on the validity of the actions of the substitute BRPs in order to advance three contentions. Firstly, they contended that Messrs Knoop and Klopper had no *locus standi* to appeal because their removal and replacement meant that they lacked any official capacity and standing to pursue the appeal as BRPs. Secondly, they contended that the substitute BRPs had withdrawn the appeal insofar as they were appeals by the BRPs of Islandsite and Confident Concept. Thirdly, and most recently, they claimed that in consequence of the termination of business rescue in relation to both companies the main appeal had become moot. I turn then to address these questions commencing with the validity of the full court's order.

Was the full court's order valid?

[27] The short answer to that question is 'No'. There are four reasons why this is so. They are:

(a) No such order was asked for in the application for leave to execute. We were informed that none of the parties were called upon to address the court on this specific issue and that the court made the order *mero motu*. In the result it was granted without affording Messrs Knoop and Klopper a hearing on the issue.

(b) The order flew directly in the face of the statute, that explicitly says that pending an urgent appeal under s 18(4) the operation of an execution order is suspended.

(c) *Ntlemeza* not only did not provide any authority in favour of the grant of such an order, but was authority against it.

(d) The inherent power of a court to regulate its own procedure cannot be used to override the provisions of a statute directly governing the issue.

[28] The first reason requires little explanation. Section 34 of the Constitution guarantees a 'fair public hearing' before a court. In *De Beer*,[13] Yacoob J said: 'A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order.' Where an issue is not raised in the pleadings or affidavits in a case, and the order granted is one on which neither party has been heard, there is a breach of a fundamental constitutional right. Had the court raised the issue with counsel, the fact that it had no power to grant such an order would have been dealt with. Any misconception in regard to *Ntlemeza* and the scope of its inherent power to regulate its own procedure, could have been dispelled. On that ground alone the suspension order should not have been granted.

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[13] *De Beer NO v North Central Local Council and South Central Local Council and Others (Umhlatuzana Civic Association Intervening)* [2001] ZACC 9; 2002 (1) SA 429 (CC) para 11.

[29] The language of s 18 (4)(iv) is explicit and allows for no misunderstanding. The operation of an execution order is suspended pending the outcome of an urgent appeal against that order. That is the statutory position and a court can no more grant an order contrary to a statute, than it can order a party to perform an illegal act.[14] Mr Tsatsawane SC, who appeared for Mrs Gupta here, but not in the full court, quite properly accepted that the correct position is that the high court could not rely on its inherent jurisdiction to grant an order that was in direct conflict with the statute. Unless the statutory provision in question is subject to a constitutional challenge – and none was raised in this case – it must be applied. Mr Cassim SC, who appeared for Mr Tayob following the court's directive, conceded from the outset that the purported override of the statutory suspension of the execution order was a nullity.

[30] Mr Snijders, junior counsel for Mrs Gupta, advanced an argument that the wording of s 18(4)(iv) reflected the wording of s 18(1) and therefore it was open to the court to revert to the latter section in order to suspend the suspension of the execution order. There is no merit in the argument. The fundamental difference between the two sections is that the suspension provision in s 18(1) is qualified by the words 'unless the court under exceptional circumstances orders otherwise' whereas there is no such qualification in s 18(4)(iv). To stress the point the suspension of the execution order under that section is said to be 'automatic'.

[31] The reliance on *Ntlemeza* was misplaced. That was an urgent appeal where a preliminary argument was advanced that a pending

[14] *Hosain v Town Clerk Wynberg* 1916 AD 236 at 240; *Pottie v Kotze* 1954 (3) SA 719 (A) at 726H-727A.

application for leave to appeal or a pending appeal was a jurisdictional requirement for the grant of an execution order. Leave to appeal had been refused and it was submitted that the court was precluded from granting an execution order because there was then no application for leave pending, although an application to this court for such leave was highly likely and duly materialised. The argument was rejected as inconsistent with the language of s 18(1), which does not make an application for an execution order dependent on a pending application for leave to appeal or an appeal at the time the application is made. The court pointed out that once an application for leave to appeal was lodged with this court, execution of the high court order would be stayed and it would be open to the respondents to make an application for an execution order. The court remarked that courts are guardians of their own process and should avoid 'a to-ing and fro-ing of litigants', but that related solely to the interpretation of s 18(1). It did not mean that a court could allow execution to take place in terms of an execution order when the statute said that order was automatically suspended pending the exercise of the right to an extremely urgent appeal. Other than the fact that the judgment set out s 18 as a whole, including s 18(4)(iv), it did not refer to the latter section and did not question that the effect of the section was to suspend the execution order pending an appeal against it.

[32] Paragraphs 27 and 28 of the full court's judgment, quoted above in para 23, suggest that it thought that it could create a right to reverse the automatic suspension of its execution order on the basis of its inherent power to protect and regulate its own process. But that power is one to protect and regulate process in cases properly before it, not to assume powers that would override the explicit provisions of the statute. That there was no application before the full court for an order granting leave

to execute on the execution order pending the appellants urgent appeal has already been dealt with. However, if there had been such an application, s 18(4)(iv) provided a complete answer to it. The Constitutional Court pointed out in *Molaudzi*[15] that the inherent power of courts to regulate their process does not apply to substantive rights, but rather to procedural or adjectival rights. The position is clear that Messrs Knoop and Klopper had a right to an urgent appeal and a right not to have the execution order implemented against them – something that would have substantive law consequences – until that appeal had been disposed of. Protecting and regulating the court's process could not be invoked to deprive them of those rights.[16]

[33] It follows that the full court's suspension order, purporting to override the suspension of its execution order, was invalid. It had no power and no authority to make that order. It is inexplicable that it made the order without being asked to do so and without having heard argument. The order was void. In very similar circumstances that was the conclusion of this court in *Motala*.[17] There a company was placed under judicial management in terms of the Companies Act 61 of 1973 (the 1973 Act) and the court made an order appointing two named individuals as joint judicial managers. It had no power to do that because s 429 of the 1973 Act vested the power of appointment exclusively in the Master.[18] The Master was caught between Scylla and Charybdis, or in the modern iteration of that classical allusion, between a rock and a hard place. The

[15] *Molaudzi v The State* [2015] ZACC 20; 2015 (2) SACR 341 (CC) para 33.
[16] One cannot alter a statutorily prescribed procedural situation by resort to the court's inherent powers to regulate process, any more than the inherent power to develop the common law can be invoked to change the meaning of a statute. See *The Minister of Safety and Security v Sekhoto and Another* [2010] ZASCA 141; 2011 (5) SA 367 (SCA) [2011] 2 All SA 157 (SCA) para 22.
[17] *Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO and Others* [2011] ZASCA 238; 2012 (3) SA 325 (SCA).
[18] *Ex parte The Master of the High Court South Africa (North Gauteng)* 2011 (5) SA 311 (GNP).

unpalatable choices facing him were to act in terms of the court order by issuing certificates of appointment in disregard of the statute, or to act in terms of the statute and make appointments as he deemed appropriate, but disregard the court order. He chose the latter and declined to appoint the one person named in the court order on the grounds that he was unqualified for appointment and to do so was in conflict with the 1973 Act. The high court held him to be in contempt of court. That order was set aside on appeal to this court on the grounds that the court order was void from inception because it directly contradicted the statute.

[34] I am aware that some of the reasoning in *Motala* has been subjected to criticism by the Constitutional Court.[19] However, it remains authority for the proposition that if a court 'is able to conclude that what the court [that made the original decision] has ordered cannot be done under the enabling legislation, the order is a nullity and can be disregarded'.[20] This principle can be invoked where the invalidity appears on the face of the order as in *Motala* and in this case.[21] The suspension order granted by the full court was therefore a nullity.

The consequences of nullity

[35] The nullity of the suspension order meant that the execution order was suspended pending this appeal. No lawful steps could be taken to remove Messrs Knoop and Klopper as BRPs until the urgent appeal had been heard and dismissed. Substitute BRPs could not be appointed to take their place, because the order for their removal was not yet effective and

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[19] *Department of Transport and Others v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (SCA)(*Tasima*) paras 188-196.

[20] Ibid para 197 relying on *Provincial Government North West and Another v Tsoga Developers CC and Others* [2016] ZACC 9; 2016 (5) BCLR 687 (CC) (*Tsoga*) para 50.

[21] See to similar effect *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* [2012] ZASCA 116; 2012 (6) SA 294 (SCA); [2013] 1 All SA 8 (SCA) para 8, referred to in support of this proposition in *Tsoga* para 48.

they were still in place. The order directing the appointment of new BRPs was suspended and could not be acted on.

[36] The consequences of that are perfectly clear. Messrs Tayob and Naidoo did not become BRPs of Islandsite and Confident Concept. Messrs Knoop and Klopper remained in office as BRPs of those two companies. The purported withdrawals of their appeals, by two individuals who were complete strangers to the dispute between the BRPs and Mrs Gupta, were invalid and of no effect. To be clear, that would have been so whether or not Messrs Tayob and Naidoo's appointments had been valid. The court had ordered that Messrs Knoop and Klopper be removed as BRPs. They were entitled to appeal against that decision. It was not for two people, who had no involvement in that dispute and no authority to represent Messrs Knoop and Klopper, to withdraw their appeals or in any other way to interfere with their constitutionally protected right to have their dispute with Mrs Gupta resolved by a court of law in accordance with the judicial hierarchy established by the Constitution.

[37] For the same reason, the objection to the continued *locus standi* of Mr Knoop and Mr Klopper was without merit. The convoluted argument advanced on behalf of Mrs Gupta was that they were removed in their capacity as BRPs and given leave to appeal in that capacity, but not in their personal capacity. Therefore, when they were replaced as BRPs by Messrs Tayob and Naidoo, they no longer had *locus standi* because they did not have the right in their personal capacity to seek their reinstatement. This argument went beyond fantasy into the realms of the surreal. They had been joined in the removal application in their capacity as BRPs. It was in that capacity that they were removed and it was that

decision that they challenged in the main appeal. Their only involvement in their personal capacity was the failed attempt to obtain an order for costs against them as individuals. There was nothing for them to appeal against in their personal capacity. The effect of the argument was that they had no right of appeal notwithstanding that the full court granted leave to appeal to this court. The argument smacks of a desperate endeavour to avoid the appeal being heard and the high court judgment ordering their removal being reconsidered.

[38] It was also contended on behalf of Mrs Gupta that Messrs Knoop and Klopper had accepted the execution order and perempted their appeal by abiding by it and submitting in their heads of argument that it had become moot as a result of being set down for hearing simultaneously with the main appeal. That was clearly incorrect. The heads of argument merely reflected the sensible view that, once the merits of the main appeal had been disposed of, the question of leave to execute upon it would be moot, save in respect of costs, which s 16(2)*(a)*(ii) of the SC Act renders an irrelevant consideration. The correspondence made it clear that, apart from the coincidence of the two appeals being heard on the same day, Messrs Knoop and Klopper were persisting with the urgent appeal. The point was rightly not pressed in argument.

[39] Potentially the most difficult issue relates to the purported termination of the business rescue of the two companies. Reliance was placed upon the principles in cases such as *Tasima*[22] to contend that there needed to be an application to set aside the termination. But that was based upon the misconception that the termination was an official act by the CIPC. This is not correct. When one is dealing with a company that is

[22] Op cit fn 18.

placed in business rescue voluntarily by way of a resolution of the board of directors, the process of business rescue is conducted on the basis of the actions of the company; affected persons, that is, shareholders, any trade union representing employees and employees;[23] the BRP; and the creditors. It is the company, acting through its directors that commences the process and appoints the BRP.[24] The company then gives notice of the resolution to commence business rescue.[25] During the course of the business rescue the directors of the company remain in office and must continue to perform their functions as directors[26] and perform their management functions in accordance with the express instructions of the BRP to the extent that it is reasonable to do so.[27] The BRP must investigate the affairs of the company and develop a business rescue plan to be considered by affected persons.[28] If the plan is adopted the company is obliged to implement it under the direction of the BRP.[29]

[40] If it transpires at any stage of the process that the company cannot be rescued, the BRP is obliged to give notice of this and approach the court for a liquidation order.[30] If the business rescue plan is substantially implemented, the BRP files a notice with the CIPC[31] and the business rescue terminates when that notice is filed.[32] If the business rescue plan is proposed and rejected and no affected person has acted to extend it in terms of s 153 (1) of the Act, the business rescue terminates. The BRP is obliged in that event to file a notice of termination of the

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[23] Definition of 'affected person' in s 128(1)*(a)* of the Act.
[24] Sections 129(1) and (3)*(b)* of the Act.
[25] Section 129 (4) of the Act.
[26] Section 137(2)*(a)* of the Act.
[27] Section 137(2)*(b)* of the Act.
[28] Sections 141(1) and 140(1) of the Act.
[29] Section 152(5) of the Act.
[30] Section 141(2)*(a)* of the Act.
[31] Section 152(8) of the Act.
[32] Section 132(2)*(c)* of the Act.

business rescue.[33] If at the end of the BRPs investigation, they conclude that there are no longer grounds for thinking that the company is financially distressed, they must inform the court, the company and all affected persons of that fact and file a notice of termination of the business rescue.[34] On filing that notice the business rescue proceedings end.[35]

[41] That summary of the process that ensues after a company enters voluntarily into business rescue demonstrates that the CIPC has no role to play in the process beyond receiving and maintaining in its records the information about the commencement and termination of business rescue. There is accordingly no public act by the CIPC that has legal efficacy and requires to be set aside in accordance with the principles in *Tasima*. Instead there is an entirely private process involving the company, the BRP and all affected persons. The role of the CIPC is simply to hold the public record of the company's status.

[42] The correct position is therefore that the 'termination' of the business rescue of these two companies was effected by two people who were not the BRPs duly appointed and in office at the time. They had no right or power to terminate the business rescue, however much they may have believed that they did. The termination was accordingly invalid and void. As a result, both companies remain in business rescue. That conclusion means that we are back where we started, with an appeal against the execution order in this appeal and an appeal against the removal order in the main appeal.

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[33] Section 153(5) of the Act.
[34] Section 141(2)*(b)* of the Act.
[35] Section 132(2)*(b)* of the Act.

[43] Before turning to deal with the urgent appeal it is necessary to make it clear that, save to the extent set out above, these conclusions do not either validate or invalidate actions by Mr Tayob and Mr Naidoo while they were acting as the BRPs of these companies. Those actions may have affected third parties or, for example in the case of their remuneration, Messrs Tayob and Naidoo themselves. The precise consequence of those actions in the light of the fact that they were not validly appointed as BRPs will, if need be, have to be explored in other litigation where the issues will be properly defined and those third parties are before the court. The order makes this clear. I can then move on to the urgent appeal.

The merits of the urgent appeal

[44] This is an appeal against the execution order. Section 18(1) of the SC Act provides that:

'Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.'

Messrs Knoop and Klopper's removal as BRPs was therefore suspended by their application for leave to appeal and would have continued to be suspended after being granted leave to appeal, subject only to the provisions of s 18(3). That section provides that:

'A court may only order otherwise as contemplated in subsection (1) . . . 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.'

[45] These provisions have now been considered by this court in three judgments.[36] The effect of these is that an applicant for an execution order must prove three things, namely, exceptional circumstances; that they will suffer irreparable harm if the order is not made; and that the party against whom the order is sought will not suffer irreparable harm if the order is made.

[46] Courts have always eschewed any attempt to lay down a general rule as to what constitutes exceptional circumstances.[37] The reason is that the enquiry is a factual one.[38] There is a helpful summary in the *MV Ais Mamas*[39] that has been endorsed both by this court and by the Constitutional Court.[40] In the context of s 18(3) the exceptional circumstances must be something that is sufficiently out of the ordinary and of an unusual nature to warrant a departure from the ordinary rule that the effect of an application for leave to appeal or an appeal is to suspend the operation of the judgment appealed from. It is a deviation from the norm.[41] The exceptional circumstances must arise from the facts and circumstances of the particular case. When dealing with someone's removal from office, be it a BRP or a liquidator in relation to a company, or a trustee or an executor, or some other office bearer, the mere fact that the court has held that they should no longer fill that office does not, in and of itself, constitute exceptional circumstances. There must be something more in the circumstances of the particular case that makes the immediate implementation of the removal order necessary.

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[36] *UFS v Afriforum* op cit fn 10 paras 5-6; *Ntlemeza* op c*it fn 9* paras 19-22; *The Premier for the Province of Gauteng and Others v Democratic Alliance and Others* [2020] ZASCA 136.
[37] *Norwich Union Life Insurance Society v Dobbs* 1912 AD 395 at 399.
[38] *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* 1999 (4) SA 623 (CC) para 75-77.
[39] *MV Ais Mamas: Seatrans Maritime v Owners MV Ais Mamas and another* 2002 (6) SA 150 (C) at 156E-157.
[40] *Liesching and Others v The State* [2018] ZACC 25; 2019 (4) SA 219 (CC).
[41] *UFS v Afriforum* op cit, fn 10 para 13.

[47] The need to establish exceptional circumstances is likely to be closely linked to the applicant establishing that they will suffer irreparable harm if the removal order is not implemented immediately. One can readily imagine that an order for the removal of a dishonest BRP will provide grounds for the court to order that the removal order should have immediate operative effect. But unless there is a real and substantial risk of immediate and irreparable harm being suffered while waiting for the enrolment, hearing and outcome of the appeal, the foundation for an execution order will be absent.

[48] Section 18(3) requires the applicant for an execution order to establish that the respondent will not suffer irreparable harm if the order is granted. The judgment in *UFS v Afriforum*[42] indicates that the requirements of irreparable harm to the applicant and no irreparable harm to the respondent, unlike the common law position, do not involve a balancing exercise between the two, but must both be established on a balance of probabilities. If the applicant cannot show that the respondent will not suffer irreparable harm by the grant of the execution order that is fatal. It is unnecessary to decide whether in those circumstances the court would be empowered to grant other relief pending the hearing of the appeal in order to protect the applicant's position.

[49] In *Justice Alliance*,[43] it was held that the court has a wide discretion to grant or refuse an execution order once the statutory requirements are satisfied, and that prospects of success in the appeal have a role to play in considering the exercise of that discretion. There is

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[42] Op cit, fn 10, para 10. *Incubeta Holdings and Another v Ellis and Another* 2014 (3) SA 189 (GSJ)(*Incubeta*) para 24.
[43] Op cit, fn 11, paras 26-29.

a dictum in *UFS v Afriforum*[44] that supports this approach, but in both that case and *Ntlemeza* the record in the main appeal was not before this court and the appeals had perforce to be decided without the full record or any consideration of the merits of the main appeals.

[50] We had the full record in the main appeal before us and had read it in anticipation of dealing with the main appeal, but the argument on the urgent appeal did not include any debate over prospects of success in the main appeal. Our finding that the three requirements for making an execution order were not established means that we did not have to consider whether there is a discretion once they are present and, if so, whether the prospects of success should affect its exercise. There may be difficulties if the high court takes the prospects of success into account in granting an execution order, because it is not clear that the court hearing an urgent appeal under s 18(4) will always be in a position to assess the weight of this factor. As I have noted, in both *UFS v Afriforum* and *Ntlemeza* the court disposed of the appeal by disregarding the prospects of success on appeal. The urgency of the appeal almost inevitably dictates that in this court and possibly in a full court, the appeal court will not have the record before it and will be confined to assessing the prospects of success in the main appeal from the judgment alone. The usual principle that an appeal court decides the appeal on the record before the high court cannot apply in those circumstances. If the language of s 18(4) confers a discretion, is that a full discretion or a power, combined with a duty to exercise that power on proof of the requirements for its

[44] Op cit, fn 10, para 15. It is contrary to the approach in *Incubeta* that the section codifies the law completely.

exercise?[45] These issues may warrant a reconsideration of the approach in *Justice Alliance* on an appropriate occasion.

Exceptional circumstances

[51] Ms Ragavan, who deposed to the founding affidavit in the application for leave to execute, said that Mrs Gupta's case was exceptional for the following reasons:

(a) there had been inordinate delay in completing the business rescue, during which damage had been caused to certain properties of Islandsite and Confident Concept, the creditors' debts had not been settled and the BRPs had continued to generate fees for themselves;

(b) the business rescue plans could have been implemented by the sale of a single asset, an aircraft owned by Islandsite that had been allowed to fall into a state of disrepair;

(c) this was manifestly prejudicial to the companies and the creditors;

(d) the BRPs could not be trusted to take decisions for the companies while the matter was delayed by an appeal 'which is in any event doomed to predictable failure';

(e) the BRPs had not adequately responded to certain demands made on Mrs Gupta's behalf by her attorneys in a letter written the day after the application for leave to appeal the removal order was served. In particular Ms Ragavan complained that a full accounting had not been furnished.

[52] In his answering affidavit Mr Knoop dealt with each of these as follows:

(a) the delays in completing the business rescue had been occasioned by the deliberate actions of Ms Ragavan and others in the employ of, or associated with, companies in the Oakbay Group to frustrate the BRPs in

[45] *Schwartz v Schwartz* 1984 (4) SA 467 (A).

performing their duties. The BRPs had been denied access to premises, records and information. Properties that should have been sold could not be sold because they were occupied by employees of the Oakbay Group and Ms Ragavan refused to instruct these employees to vacate and said she would oppose any attempt to evict them;

(b) every endeavour to obtain information about the aircraft, which was owned by Islandsite and not available to be sold to satisfy Confident Concept's debts, had been blocked. It had been removed from South Africa and there were attempts to re-register it in the Isle of Man. The BRPs had reason to believe that it was being used by the Gupta family for private purposes. When its whereabouts in Dubai were discovered, the entity having responsibility for it, DC-Aviation, refused to provide the BRPs with any information concerning it. The potential 'sale' was in terms of an agreement where the identity of the purchaser was not disclosed and on terms in regard to the condition of the plane that were extremely onerous;

(c) the general allegations of prejudice were unparticularised;

(d) details of the fees that the BRPs had earned were given and it was pointed out that it had never been suggested in the removal application that they were excessive or a ground for their removal;

(e) the attorneys' letter had been responded to, certain undertakings had been given and details of information about the progress of the business rescues had been furnished. Detailed reconciliations of sales were annexed to the affidavit.

[53] The replying affidavit delivered by Ms Ragavan does little credit to her or to the legal practitioner or practitioners responsible for drafting it. Its contents consisted of a number of intemperate, but unsubstantiated attacks on Mr Knoop; repeated and unnecessary assertions of the lack of

prospects of success in obtaining leave to appeal or in any appeal; and a joining of issue on many factual assertions thereby compounding the already apparent dispute of fact on the papers. All in all, there was nothing exceptional in the circumstances set out in Ms Ragavan's affidavit. Overwhelmingly they reiterated complaints advanced in the removal application, some being complaints that had not been dealt with by the full court in its judgment. All of them had been dealt with extensively in the answering affidavit and the supplementary affidavit delivered by Mr Knoop in the removal proceedings. There were disputes of fact on fundamental issues.

[54] The full court needed to engage with the evidence and set out in clear terms the facts on which it based a finding that exceptional circumstances were present, as well as an explanation of why, in its view, those circumstances were exceptional within the context of s 18(1). This was required in terms of s 18(4)(i), a provision designed to ensure that, when a party against whom an execution order has been granted exercises their right to an extremely urgent appeal, the appeal court will know precisely why the order was granted.

[55] Regrettably the full court merely stated in para 10 that the applicant submitted that the BRP's 'failure to meet the required standard expected of business rescue practitioners as dealt with in the judgment of this court constitutes exceptional circumstances'. Assuming this was intended as a summary of Ms Ragavan's complaints set out above in para 51 of this judgment, the complaints demonstrated that the circumstances were not exceptional. Were these to constitute exceptional circumstances, an execution order would have to issue in every case of the removal of a BRP under s 139(2) of the Act, and indeed in every removal of a

liquidator, trustee, executor or similar office holder. However routine or mundane the grounds for removal they would always be treated as exceptional.

[56] The full court said that business rescue was intended to be a speedy process requiring the BRPs to act in the best interests of all affected parties, conducting themselves as officers of the court with the duties of a director. No attempt was made to deal with the evidence of Mr Knoop in the answering affidavit, and in his affidavits in the main application, that the problems were caused entirely by the campaign waged by Ms Ragavan and others to hinder and prevent the BRPs from performing their duties. That evidence had to be accepted in accordance with the *Plascon-Evans* rule.

[57] The findings in the main judgment were summarised in saying that the BRPs failed to discharge their duties in good faith, objectively and impartially; failed to report criminal unlawfulness of the prior board and shareholders to the authorities; had a conflict of interest by acting as BRPs in respect of different entities in the Oakbay Group; and failed properly and timeously to perform their duties. The judgment then returned to the theme that business rescue must be a speedy process and that the BRPs needed to adhere to the high standards set out in the Act, and concluded:

'In our view, the purpose of business rescue proceedings combined with the interests of all affected and the fact that the respondents failed dismally in their duties constituted exceptional circumstances.'

[58] There were several errors in these reasons. The alleged failure to report criminal conduct to the relevant authorities had been introduced by

the full court itself in its removal judgment, without having been raised as a ground of complaint or dealt with in the papers. The likelihood of it having been a ground of complaint by Mrs Gupta, speaking through Ms Ragavan, was nil, inasmuch as any such criminal conduct would have been by the Guptas and directors and employees of companies in the Oakbay Group, such as Ms Ragavan and Mr Chawla. Given that it was raised in the removal judgment, Mr Knoop set the record straight in his answering affidavit, explaining that the BRPs had reported their suspicions of potentially criminal conduct to the SAPS, the National Prosecuting Authority, the Special Investigations Unit, the Asset Forfeiture Unit, SARS and the Zondo Commission. The full court was wrong to use the error as a ground for a finding of exceptional circumstances.

[59] The reliance on the finding of a conflict of interest was also unfounded and unjustified. In its judgment granting leave to appeal, delivered on the same day, it had accepted that there was a difference between its approach and that taken by a single judge in the same court in a similar application involving the same BRPs and Tegeta, another company in the Oakbay Group.[46] The need to resolve this difference of view was one of the grounds upon which it granted leave to appeal. A ground on which there was room for a difference of view could not render the circumstances exceptional.

[60] The full court's reasons consisted entirely of generalisations and there was no specific statement of the facts that made this case different from other similar cases and provided exceptional grounds for departing

[46] *Oakbay Investments (Pty) Ltd v Tegeta Exploration and Resources (Pty) Ltd (in business rescue)* [2019] ZAGPHC 411.

from the normal rule that the removal order would be suspended pending the outcome of the appeal. Making as much allowance as is possible for the fact that the judgment was delivered a week after argument was heard, it falls short of providing an explanation for finding that Mrs Gupta discharged the onus of establishing on a balance of probabilities that exceptional circumstances existed. Nor does a reading of the affidavits disclose such a basis. The heads of argument delivered in regard to the urgent appeal are long on rhetoric and assertions, but bereft of any analysis of the evidence, or the concept of exceptional circumstances, that would support the conclusion that such circumstances were present in this case. The existence of exceptional circumstances was not established.

Irreparable harm

[61] The application for leave to execute fell at the first hurdle and the appeal accordingly had to be upheld. However, it is desirable to point out that neither of the other two requirements were satisfied. As to Mrs Gupta's allegations of suffering irreparable harm, Ms Ragavan's affidavit went off on a tangent to the business rescue in respect of these two companies and alleged that the BRPs in their dealings with Optimum Coal Mine (OCM) and Koornfontein had turned OCM from being a profitable enterprise employing 2000 people to a ruin. She alleged that assets were being sold at a fraction of their value as part of a sale of the mine, which was the subject of litigation. She noted that an application had been brought for the liquidation of OCM.

[62] The relevance of these allegations to Mrs Gupta suffering irreparable prejudice justifying the immediate implementation of the removal order in respect of Islandsite and Confident Concept was not

apparent on the papers. In any event they were firmly refuted by Mr Knoop in his answering affidavit. He said that these companies and their assets had been virtually destroyed before the commencement of business rescue and alleged that Ms Ragavan had been a party to this. Ms Ragavan in reply denied the relevance of these allegations claiming that they had only been raised to show the poor management of the businesses by the BRPs.

[63] Without referring to these allegations or the evidence the full court said:

'The conduct of the respondents thus far, however, establishes a pattern of their failure to properly conduct the business rescue proceedings. In our view the respondents lack of insight in their failure to adhere to the high standards expected of business rescue practitioners establishes at least on a balance or probabilities, that their continued involvement in the proceedings would cause irreparable harm, not only to the applicant but to all affected parties.'

[64] It is not apparent to which conduct of the BRPs reference was being made. There was no mention of the grounds of prejudice relied on by Mrs Gupta as set out in Ms Ragavan's affidavit. The conclusion had no basis in the evidence. As to the position of 'all affected parties' the majority of the affected parties in the two companies, were the three Gupta brothers, who together own 75% of the shares in the two companies, and their silence was deafening. They did not, publicly at least, make common cause with Mrs Gupta in her endeavours to have the BRPs removed. Did they support her efforts? Were they cheering her on from the sidelines? Ms Ragavan only holds office as the acting CEO of Oakbay by virtue of their support. Was she in receipt of instructions from them? Nothing at all was said in this regard and nothing can or should be

inferred. But in the absence of evidence from them, the full court could not reach generalised conclusions in regard to their interests.

[65] No irreparable prejudice to Mrs Gupta was established. Nor was the onus discharged of showing that the BRPs would not suffer irreparable harm as a result of an execution order being granted. Ms Ragavan said that the only possible harm was a loss of fees. This theme had its origins in the judgment granting the removal order, which was taken up by Ms Ragavan in the execution application and appeared again in the execution judgment. The full court added, even though Ms Ragavan had not said this, that they could make up the shortfall by doing other work as BRPs. These allegations were denied. The issue of reputational risk as a result of being removed as BRPs in these high-profile cases of business rescue was not canvassed. Mr Knoop pointed to the prejudice creditors would suffer if they were removed and new BRPs appointed with the very real risk of the approved business rescue plans not being implemented. I am not sure that this was relevant to the question whether he and Mr Klopper would suffer irreparable harm as a result of the grant of such an order as that was potential harm to third parties not the BRPs. Be that as it may, on the tenuous evidence advanced I do not think that the onus under this head was discharged.

Result

[66] For those reasons the urgent appeal had to succeed and at the conclusion of the argument on this appeal we granted the order set out at the head of this judgment and below. The order was granted before we heard argument in the main appeal and was not affected by any consideration of the merits of the main appeal.

[67] It remains to say something about the order. In view of the various issues that we have had to canvass and determine before reaching the main appeal, it was desirable that the order should reflect our conclusions on those issues. It therefore contains declaratory orders in relation to those issues. That is a proper approach given our power under s 19*(d)* of the SC Act to 'render any decision which the circumstances may require'. Insofar as any costs were occasioned to the appellants by Mr Tayob's abortive attempt to intervene, while his counsel addressed us during the argument on this appeal, the application to intervene was in the main appeal and the costs must be dealt with there.

[68] In the result, after hearing argument in this urgent appeal and taking the opportunity to consult among ourselves during an adjournment of the proceedings, the following order was made:

1 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

2 The order of the full court is set aside and replaced by the following order:

'The application is dismissed with costs, such costs to include those consequent upon the employment of two counsel.'

3 It is declared that pending the finalisation of this appeal:

(a) The operation and execution of the order of the full court granting leave to execute in terms of s 18(1), read with s 18(3), of the Superior Courts Act 10 of 2013 was suspended in terms of s 18(4)(iv) of the Superior Courts Act 10 of 2013.

(b) The appellants were not validly removed from office as business rescue practitioners in respect of Islandsite Investments One Hundred and Eighty (Pty) Ltd (Islandsite) and Confident Concept (Pty) Ltd (Confident Concept).

(c) The directors of Islandsite and Confident Concept were not entitled to act on the order for the removal of the appellants as business rescue practitioners in those two companies by nominating new business rescue practitioners and the appointments of Mr Tayob in respect of Islandsite and Mr Naidoo in respect of Confident Concept were invalid.

(d) The notices of termination of business rescue given by Mr Tayob in respect of Islandsite and Mr Naidoo in respect of Confident Concept in terms of s 132(2)*(b)* of the Companies Act 71 of 2008 were invalid and of no force and effect.

(e) Nothing in this order validates or invalidates any other action taken by Islandsite and Confident Concept since 7 February 2020 with the authority of Mr Tayob and Mr Naidoo as the case may be.

4 It is further declared that pending the finalisation of the main appeal under Case No 116/2020 Islandsite and Confident Concept remain in business rescue under the supervision of the appellants in accordance with their original appointments as business rescue practitioners.

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M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant:	P Stais SC (with him GD Wilkins SC)
Instructed by:	Smit Sewgoolam Inc, Johannesburg; McIntyre Van der Post, Bloemfontein
For respondent:	NK Tsatsawane SC (with him J-P Snijders)
Instructed by:	BDK Attorneys, Johannesburg; Honey Attorneys Inc, Bloemfontein.
For Mr M M Tayob:	NA Cassim SC (Heads of Argument by MA Chohan and L Kutumela)