

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case No: CA 157/2022

Reportable

In the matter between:

KGA LIFE LIMITED

APPELLANT

and

**MULTISURE CORPORATION
(PTY) LTD**

FIRST RESPONDENT

Q LINK HOLDINGS (PTY) LTD

SECOND RESPONDENT

AFRICAN UNITY LIFE LIMITED

THIRD RESPONDENT

JUDGMENT

Krüger AJ:

Background

[1] This matter concerns an urgent appeal in terms of section 18(4)(ii) of the Superior Courts Act 10 of 2013 against a court order granting an execution order pending an appeal.

[2] The first respondent in the current proceedings, Multisure Corporation (Pty) Ltd, was successful in obtaining declaratory and mandatory relief against the appellant in these proceedings, KGA Life Limited on 15 March 2022.

[3] For the sake of convenience, the parties are referred to as 'Multisure' and 'KGA'. The second and third respondents are before court since the relief ordered on 15 March 2022 affects them. They have not actively participated in the litigation to date.

[4] On 17 March 2022, KGA was granted leave to appeal to the Supreme Court of Appeal against the whole of the judgment in favour of Multisure. That appeal is to be heard in due course.

[5] The effect of the order granting leave to appeal suspended the operation and execution of the court order of 15 March 2022 as provided for in section 18 of the Superior Courts Act.

[6] Some three months later, in June 2022, Multisure applied to the court in terms of section 18(3) of the Superior Courts Act for an execution order in respect of the court order of 15 March 2022, pending the determination of the appeal by the Supreme Court of Appeal. On 30 August 2022, Govindjee J granted the relief requested by Multisure.

[7] KGA exercised its right of automatic appeal in terms of section 18(4)(ii) of the Superior Courts Act against the judgment granting the execution order. This judgment concerns the automatic appeal.

The dispute and litigation between the parties

[8] Multisure and KGA are involved in the insurance business and operate respectively as an 'independent intermediary', and a 'licenced insurer' and 'long-term insurer as defined in the Long-term Insurance Act 52 of 1998 and the regulatory framework created in terms thereof.

[9] Multisure offers funeral cover policies to individuals and families. Many of the persons who take up Multisure's funeral cover are recipients of social security grants in terms of the Social Assistance Act 13 of 2004.

[10] Multisure and KGA entered into an intermediary agreement, which became operational on 1 January 2015, in terms whereof KGA underwrote the funeral cover policies of Multisure's clients as part of a 'group scheme' as was permitted by the insurance regulatory framework at the time. On 5 July 2021, Multisure cancelled its intermediary agreement with KGA and entered into a new intermediary agreement with African Unity Life Limited, the third respondent.

[11] Premium deductions from social grants are managed through Q Link Holdings (Pty) Ltd, the second respondent. Premiums from social grants are paid directly to the underwriting insurer, who in turn pays the intermediary the commission due to it. Q Link is authorised to change the deduction codes at the South African Social Security Agency.

[12] With its cancellation of its intermediary agreement with KGA, and the conclusion of a new intermediary agreement with African Unity Life, Multisure intended for a transfer of the underwriting of the funeral cover policies of its existing clients from KGA to African Unity Life. In the insurance industry this is referred to as 'transferring the book'. For the new intermediary agreement to be operational, Q Link would have to change the deduction codes to allow payment of the premiums of Multisure's clients to African Unity Life.

[13] While KGA initially seemed amenable to 'transfer the book', it did not comply with Multisure's repeated requests to notify Q Link of the cancellation of their agreement and transfer to African Unity Life. KGA admitted that the intermediary agreement had been cancelled but it did not 'transfer the book' as requested.

[14] KGA contended that a change in the definition of 'group' in the insurance regulatory framework by a 2017 legislative amendment which came into operation in 2018, meant that the 'group scheme' as it existed under the intermediary agreement between itself and Multisure could not be transferred as such. This, according to KGA left the individual insurance relationships between the policyholders who signed up with Multisure and itself in place. Those policies, it contended could only be cancelled by the individual policyholders.

[15] KGA ceased making payments of the commission from its clients' policies to Multisure in September 2021.

[16] Multisure insisted that it validly cancelled the intermediary agreement and that it could transfer the policies of its clients to a different underwriter as a group.

[17] It was this dispute that brought the parties before Schoeman J in October 2021. Multisure obtained judgment in its favour. The court order of 15 March 2022 granted declaratory relief to the effect that the intermediary agreement between Multisure and KGA had been cancelled with effect from 1 September 2021 and that the group scheme established in terms of that agreement has been terminated. The court further directed Q Link to change the deduction codes to ensure payment of premiums to African Unity Life. It further issued an order directing payment of premiums collected since 1 September 2021 to be paid over to African Unity Life.

[18] On 21 June 2022, Multisure launched an application in terms of section 18(1) and (3) of the Act to obtain an execution order pending the appeal to the Supreme Court of Appeal.

[19] Govindjee J granted the execution order as requested on the basis that Multisure met the statutory requirements set out by section 18(1) and (3).

[20] The court was alive to the more onerous requirements set by the Act for the exceptional relief requested. The judge held the financial difficulties faced by Multisure because it has not received payments from KGA placed it in 'an extraordinary position' thus demonstrating exceptional circumstances. It had to close branch offices, lost staff and cut working hours. The court considered the merits of the matter in much detail in concluding that KGA's prospects of success on appeal was poor. This, it was held, supported Multisure's case for the exceptional relief it requested. The court further held, with reference to *Premier, Gauteng v Democratic Alliance*¹ that the same facts giving rise to exceptional circumstances may indicate irreparable harm. Multisure, it was held, suffered irreparable financial harm. The court held that KGA, on the other hand, will not suffer irreparable harm since the premiums it would pay over in terms of the 15 March 2022 order could be returned to it should it succeed on appeal. Security for the restitution of any payment made could be provided in terms of Uniform Rule 49(12). No order to this effect was made.

¹ 2021 (1) All SA 60 (SCA).

[21] It is the appeal against this judgment that concerns this court.

The arguments before this court

[22] At the core of KGA's argument was the contention that Multisure failed to meet the statutory requirements as determined by section 18(1) and (3) for the exceptional relief of an execution order pending appeal. KGA contended that Govindjee J's finding that the statutory requirements were met was incorrect.

[23] Mr *Meiring* contended that Govindjee J conflated the prospects of success with the exceptional circumstances requirement. As such, much weight was – incorrectly it was submitted – attached to the prospects of success in the absence of exceptional circumstances placed before the court by Multisure. It was further contended that the court accepted vague assertions of financial harm without evidence about the details of its assets, income and liabilities of Multisure. It was argued that section 18(3) refers to future irreparable harm, whereas Multisure focused exclusively on its past financial distress. Additionally, counsel contended that Multisure failed to prove, on a balance of probabilities that KGA will not suffer irreparable harm. Multisure provided no evidence of the absence of harm to KGA and simply contended that any financial loss it may suffer due to the execution of the court order if it were successful on appeal, could be rectified by a return of the premiums. The court, it was contended, erred in considering the harm to Multisure in comparison to that KGA would suffer. This 'balancing exercise', it was submitted, informed in part, the exercise of a discretion by the court to grant an execution order pending appeal under the common law, but does not form part of the assessment in terms of section 18(1) and (3).

[24] Further arguments in support of KGA's appeal were that the original court order was incapable of implementation, that there was material non-joinder of the individuals whose policies KGA had underwritten and lastly, that KGA has strong prospects of success. As a result of the findings in relation to section 18(1) and (3), these grounds are not considered in detail.

[25] Multisure resisted the urgent appeal and maintained that the judgment lifting the suspension to allow execution of the earlier order was unassailable on both law and fact.

[26] It was submitted for Multisure that it suffered financially as a result of the non-payment of commission due to it by KGA. Its loss of income necessitated Multisure to sell shares it owned and withdraw savings to keep afloat. Multisure also contended that it downsized as a result of the loss of income and that struggled to retain staff since it could not afford to pay increases. It was submitted that Multisure suffered reputational harm since KGA failed to pay claims out speedily or at all, and that it had to step in to make payments to its clients. Multisure, it was submitted, stood to suffer significant harm in comparison to the financial loss which KGA would suffer as a result of the execution of the order.

The legal framework

[27] Section 18 of the Superior Courts Act regulates the legal position regarding the impact of a pending appeal on the operation and execution of the court order subject to the appeal. The section, in the relevant parts, provides 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) ...
- (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.’

[28] The requirements for this remedy which allows for the execution of the order pending an appeal, has been pertinently considered by the Supreme Court of Appeal on four occasions. The judgments, in chronological order of delivery, illuminating the requirements set by section 18(1) and (3) are *University of the Free State v Afriforum*,² *Ntlemeza v Helen Suzman Foundation*,³ *Premier Gauteng v Democratic Alliance*⁴ and *Knoop NO v Gupta (Execution)*.⁵

[29] In the first judgment of the SCA to deal with the requirements of section 18(1) and (3), *University of the Free State v Afriforum*, Fourie AJA highlighted that the relief to allow the execution of a court order pending an appeal, is ‘an extraordinary deviation from the norm’ to suspend the judgment and its attendant orders pending an appeal.⁶ In the first instance, an applicant for this extraordinary relief must demonstrate ‘exceptional circumstances’⁷ which must be ‘truly exceptional’.⁸ Fourie AJA referred with approval to Sutherland J’s interpretation of the exceptional circumstances requirement in *Incubeta Holdings (Pty) Ltd v Ellis*⁹ who held that

‘... 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.’

² 2018 (3) SA 428 (SCA).

³ 2017 (5) SA 402 (SCA).

⁴ 2021 (1) All SA 60 (SCA).

⁵ 2021 (3) SA 135 (SCA).

⁶ *University of the Free State* para 9.

⁷ Para 10.

⁸ Para 12.

⁹ 2014 (3) 189 (GJ) para 22.

[30] The court in *University of the Free State* acknowledged that the exceptional nature of the relief in terms of section 18(1) and (3) is further underscored by the requirements that the court granting the relief must immediately record its reasons for granting the relief, the creation of an automatic right of appeal against the order granting the relief to be dealt with on an urgent basis and the automatic suspension of the order.¹⁰

[31] Fourie AJA further pointed out that these statutory requirements for the relief to permit the execution of an order which is subject to appeal are more stringent than the requirements under the common law which granted the court a wide general discretion to grant or refuse the execution order.¹¹ In demonstrating the higher threshold, Fourie AJA approved the dictum of Sutherland J in *Incubeta Holdings (Pty) Ltd v Ellis*,¹² holding that subsection 3 requires the applicant to prove two distinct facts; namely that it will suffer irreparable harm if an order permitting the operation and execution of the court order subject to the appeal were not permitted, and that the respondent will not suffer irreparable harm if such an order is made.¹³ This stands in contrast with the determination of the balance of hardship or convenience under the common law which required the court to engage in a balancing exercise when considering the potentiality of irreparable harm to both the applicant and the respondent.¹⁴

[32] Fourie AJA further endorsed the approach of the High Court in *Minister of Social Development v Justice Alliance*¹⁵ insofar as the role of the prospects of success on appeal in exercising a discretion to grant the execution order. He rejected the contrary approach in *Incubeta* which held that the prospects of success played no role in the determination.¹⁶ Binns-Ward J, writing for the full court in *Justice Alliance*, held that the prospects of success remain a relevant factor in

¹⁰ Para 9, referring to the provisions of section 18(4).

¹¹ Para 11.

¹² *Incubeta Holdings* para 24

¹³ *University of the Free State* para 11.

¹⁴ As set out in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) 545F.

¹⁵ 2016 JDR 0606 (WCC).

¹⁶ *University of the Free State* paras 14-16.

exercising a 'wide discretion' as to whether to grant an execution order or not once the statutory requirements had been satisfied.¹⁷

[33] In *Ntlemeza v Helen Suzman Foundation*, Navsa JA prefaced his elaboration on section 18 by noting that, with the enactment of section 18, the 'legislature has set the bar fairly high'¹⁸ for an order allowing departure from the norm. Like Fourie AJA in *University of the Free State*, Navsa JA referred to *Incubeta Holdings* and its exposition of the two-fold test, relating to the demonstration of exceptional circumstances in the first instance, and secondly, proof on a balance of probabilities, of irreparable harm to the applicant should the earlier court order not be put into operation and the absence of such harm to the respondent if it were to be granted.¹⁹ These requirements act as 'controlling measure[s],²⁰ to regulate deviations from the norm.

[34] With reference to *Incubeta's* reliance on *MV Ais Mamas: Seatrans Maritime v Owners, MV Ais Mamas*,²¹ the SCA in *Ntlemeza* confirmed that 'exceptional circumstances' must be determined with reference to the facts of the particular case.²²

[35] In *Premier, Gauteng v Democratic Alliance*, the SCA confirmed the requirements for relief under section 18 as outlined in *University of the Free State* and *Ntlemeza*.²³ Significantly, the court held that, while exceptional circumstances and irreparable harm to the applicant were separate requirements, the facts could be relevant in relation to both requirements.²⁴

[36] In *Knoop NO v Gupta*, Wallis JA confirmed the established approach of *University of the Free State* and *Ntlemeza*, and the three requirements to be proven to justify deviation from the norm.²⁵ Exceptional circumstances, the court explained,

¹⁷ *Justice Alliance* paras 26-29.

¹⁸ *Ntlemeza* para 28.

¹⁹ Para 36.

²⁰ Para 35.

²¹ 2002 (6) SA 150 (C) 156H-157C.

²² *Ntlemeza* para 37.

²³ *Premier, Gauteng* para 13.

²⁴ Para 25

²⁵ *Knoop NO* 45.

must be 'something out of the ordinary and of an unusual nature', determined on the facts of the particular case.²⁶ In relation to the case before it, the court held that the mere fact that the court order subject to the appeal held that a particular person should be removed from an office he or she holds in terms of a statutory provision, does not in and of itself constitute exceptional circumstances. There must be something more in the circumstances of the case to warrant the immediate implementation of the order.²⁷

[37] The need to establish exceptional circumstances is closely linked to the applicant establishing that they will suffer irreparable harm if the order is not implemented.²⁸ The applicant must prove 'a real and substantial risk of immediate and irreparable harm' should the court order not be executed pending the appeal.²⁹

[38] Wallis JA confirmed the approach taken in *University of the Free State* which identified the proof of absence of irreparable harm to the respondent as a distinct requirement which does not involve a balancing exercise between the harm suffered by the applicant and the respondent.³⁰ As such, the SCA explained, a failure to prove absence of irreparable harm to the respondent should the execution order be granted 'is fatal' to the case of an applicant.³¹

[39] On the issue of the consideration of the prospects of success, Wallis JA highlighted the challenge presented as follows:

[49] In *Justice Alliance* 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 a dictum in *UFS v Afriforum* 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.

²⁶ Para 46.

²⁷ Ibid.

²⁸ Para 47.

²⁹ Ibid.

³⁰ Para 48

³¹ *Knoop NO* para 48.

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

(Emphasis added)

[40] Wallis JA in *Knoop NO* clarified that the three requirements of section 18(1) and (3) are peremptory requirements for granting an execution order. Whether the court has a discretion to grant the relief and what role the prospects of success should play therein, were not decided.

[41] While the prospects of success thus received a nod of approval from Fourie AJA in *University of the Free State* as a consideration in the exercise of a discretion to determine whether an execution order pending appeal should be granted, it *de facto* played no role in that matter, in *Ntlemeza* or in *Knoop NO*.

[42] From the SCA judgments the following is evident:

- (a) The suspension of a court order pending an appeal is the norm.
- (b) An execution order pending an appeal is extraordinary relief for which an applicant have to make out a case on the specific facts in the matter
- (c) This requires the applicant, as a first hurdle,
 - I. to demonstrate that exceptional circumstances exist which warrant departure from the norm, and
 - II. to prove on a probabilities, that
 - i. he or she will suffer irreparable harm if the execution order is not granted and
 - ii. the respondent will not suffer irreparable harm should the execution order be granted.
- (d) Failure on the part of the applicant to prove any one of these facts, is fatal to the application.
- (e) Facts may be relevant to both the requirements of exceptional circumstances and irreparable harm.
- (f) The position as to whether the court retains a discretion³² to grant the relief and the role of the prospects of success in the exercise of that discretion remains unclear. However, it would seem that the prospects of success on appeal do not take centre stage in the determination of an application for an execution order in terms of section 18(1) and (3) since these were not considered in the cases before the SCA.

Did Multisure meet the requirements for the extraordinary relief it sought?

[43] The court *a quo* held that Multisure established exceptional circumstances with reference to its financial hardship and KGA's poor prospects of success on appeal. Multisure's financial hardship was also considered in relation to the requirement of irreparable harm.

[44] It is indeed so that facts relevant to the determination of exceptional circumstances may be relevant to the determination of irreparable harm.

³² At common law, the court had a discretion whether to grant an execution order pending appeal: *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A).

[45] What this court has to determine, in the first instance, is whether Multisure had indeed established that exceptional circumstances exist. These are circumstances which are 'out of the ordinary' or 'unusual'. What must be determined is whether the 'actual predicament' of Multisure warranted a deviation from the norm.

[46] Other than the SCA in *University of the Free State* and *Ntlemeza*, the court *a quo* and this court had the benefit of having the appeal record before it. However, I do not think that it means that the court *a quo* had to, or this court has to engage the merits of the appeal in exacting detail. The appeal on the merits will be determined by the SCA.

[47] The fact that the SCA did not consider the prospects of success pertinently in *University of the Free State*, *Ntlemeza* or in *Knoop NO* in determining whether exceptional circumstances existed, points to a less significant role in determination whether an execution order pending appeal should be granted.

[48] In my view, the prospects of success of Multisure's opposition to the appeal, as assessed by the court *a quo*, do not in and of itself constitute exceptional circumstances. Without engaging in the merits of the appeal, I am satisfied that KGA has some prospects of success on appeal. It was, after all, granted leave to appeal on the merits by Schoeman J in respect of her judgment.

[49] The court *a quo* held that the financial predicament of Multisure as a result of the non-payment of commission by KGA placed it in an 'extraordinary position'.

[50] The sole shareholder and co-director of Multisure deposed to an affidavit outlining a decline in the income and profits of Multisure, confirmed by its auditor on oath. In the six months preceding the withholding of payments, Multisure received income of R 4 922 560 and made a profit of R 1 054 766. From 1 September 2021 to 28 February 2022, Multisure's income was R 1 873 893 and it suffered a loss of R703 177. Prior to September 2021, Multisure received payments of commission in the amount of R 1 059 000 from KGA. It was not clear whether these payments were made on a monthly basis or not. As at 21 June 2022, Multisure estimated that an amount of R 5 683 377.40 was due to it in commission. But for the pending

appeal, it contended, it would have received this payment after the premiums were paid to the third respondent.

[51] The court *a quo* accepted the evidence of Multisure that it sold shares and used its savings to keep its business afloat. It further accepted that the business was downsized as a result of its financial hardship. KGA contested Multisure's evidence regarding its financial hardship and submitted that the information lacked detail which could easily have been provided. In particular, it contended that Multisure without providing detail, attributed its financial decline solely to the KGA's non-payment, while ignoring the impact of the Covid 19-pandemic which had a negative impact on all the sectors of the economy.

[52] While it is true that Multisure could have bolstered its case by providing details of its other income, its expenditure, the shares it had sold, income raised from shares and how that was used, its evidence on the hard figures confirmed by its auditor demonstrates a clear decline in income and in profit from the time when KGA ceased making payments.

[53] Does the financial decline demonstrated by Multisure constitute exceptional circumstances? Multisure was successful in obtaining the relief it sought against KGA from the court. However, KGA's leave to appeal suspended the execution of the order, as does this automatic appeal which followed after Multisure succeeded in the court *a quo*. Multisure demonstrated that it finds itself in a financial predicament which places its business at risk. In my view that constitutes exceptional circumstances.

[54] In addition to demonstrating exceptional circumstances, Multisure had to prove, on a balance of probabilities, that it will suffer irreparable harm if the execution order was not granted. I accept that the facts relating to exceptional circumstances are relevant to the determination of irreparable harm on the part of Multisure. I further accept that the evidence of a trajectory of financial decline since KGA stopped its payments to Multisure, gives a clear indication of continuing future harm. Whether this harm is irreparable or not, stands to be determined.

[55] Multisure contended that the financial harm to KGA should the execution order be granted, can be undone by a repayment of the premiums to it. It is not evident why the same could not apply in relation to the financial harm it has suffered and will suffer until the finalisation of the appeal. Multisure has not placed evidence about its overall financial position before the court. It is unclear whether it owns assets, what other income it has, what its liabilities are and whether it can raise loans to remain financially afloat pending the appeal. The information before the court is too sparse to make a determination. While Multisure has certainly established that it will suffer harm, it has not proven that harm to be irreparable on a balance of probabilities.

[56] Multisure's contentions regarding the absence of harm to KGA should the execution order be granted, were set out as follows in the founding affidavit:

'153. Any prejudice to the First Respondent [KGA], should the Applicant [Multisure] be entitled to execute against the order of the Honourable Madam Justice Schoeman, pales into comparison to the prejudice/irreparable harm to the Applicant should the Applicant not be permitted to execute thereon.

154. To the extent that the First Respondent may be financially distressed, as intimated hereinabove, and to the extent that the quantum of the Applicant's claim in respect of the unpaid commission as against the First Respondent continues to escalate for as long as the First Respondent continues with its conduct as aforesaid, it is likely that the Applicant will not be recover the full extent of the eventual debt against the First Respondent.

155.

156. It is abundantly clear that the irreparable harm to the Applicant if the order is not executed upon is far in excess of any harm which the First Respondent would sustain, should the Order be given effect to.

157. It is submitted that the only harm that the First Respondent may suffer, if the Order is executed, is financial loss due to the premiums it would have to

pay over to the Third Respondent, and the loss of future income which it would no longer receive.

158. As such harm, I submit, would not be irreparable harm in that any financial losses which the First Respondent may suffer as a result of paying over the collected premiums to the Third Respondent (including of future premiums not earned by the First Respondent), could be rectified by a return of the premiums to it in the event of the First Respondent eventually being successful with its appeal to the Supreme Court of Appeal'.

[57] Multisure thus argued that KGA would not suffer harm. It contended that the harm it would suffer if the execution order were not to be granted would far exceed that which KGA would suffer if it were to be successful. This approach reflects the common law position. At common law, the court, in exercising its 'wide discretion' as to whether an execution order should be granted pending appeal, would consider, among other factors, 'the balance of hardship or convenience' where harm would be suffered by both parties.³³

[58] Section 18(3) fundamentally altered the common law. To succeed in its application for the exceptional relief, Multisure must, in addition to demonstrating exceptional circumstances, prove two independent facts: the presence of irreparable harm to it should the order not be granted, and the absence of irreparable harm to KGA should the order be granted.

[59] The court *a quo* accepted Multisure's assertion that KGA would not suffer irreparable harm if the execution order were to be granted without more. The court *a quo* referred to security for restitution in terms of Rule 49(12), but made no order to that effect. More pertinently, the court *a quo* accepted Multisure's contention as evidence. However, a mere statement to the effect that KGA would not suffer irreparable harm, does not provide proof on a balance of probabilities.

³³ *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 543F.

[60] Multisure did not discharge the burden of proof placed on its by section 18(3) of the Superior Courts Act. This is fatal to its case.

[61] In the light of the above, the appeal must succeed. In my view, it is not necessary to consider the other grounds of appeal raised by KGA since the peremptory requirements for the relief in terms of section 18(1) and (3) were not met.

[62] Mr *Meiring* requested the court to order punitive damages against Multisure. He submitted that Multisure's application constituted an abuse of court process. Multisure delayed in bringing the application and ought to have done so when leave to appeal was granted. Mr *Nepgen*, in turn, highlighted that the parties sought to resolve their dispute amicably, thus causing the delay. Accordingly, he submitted a punitive order was not appropriate.

[63] It is trite that an award of costs is in the discretion of the court. I do not think that Multisure's conduct in the litigation warrants a punitive costs order. It legitimately brought an application for relief that it believed it was entitled to. It should not be punished for doing so.

[64] I am, however, of the view that the costs should follow suit, as is usual. Throughout the litigation and before the court *a quo*, KGA was represented by one counsel. There was nothing exceptional or complex in this matter that required the employment of two counsel.

[65] In the result, I make the following order:

- (a) The appeal is upheld with costs as to include the costs of one counsel.
- (b) The order of the court *a quo* of 30 August 2022 is substituted with the following order:
 - I. The application is dismissed with costs.

R KRÜGER AJ
ACTING JUDGE OF THE HIGH COURT

I agree:

S M MBENENGE JP
JUDGE PRESIDENT OF THE HIGH COURT

I agree:

N GQAMANA
JUDGE OF THE HIGH COURT

APPEARANCES:

For the Appellant:	<i>JJ Meiring and NT Dwayi</i>
Instructed by:	Greyvensteins Inc, Gqeberha C/O Huxtable Attorneys, Makhanda
For the First Respondent:	<i>J Nepgen</i>
Instructed by:	Vic Skelton Inc, Gqeberha C/O Cloete and Company, Makhanda
For the Second Respondent:	No appearance
For the Third Respondent:	No appearance
Date heard:	7 November 2022
Date judgment delivered:	14 December 2022