Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.s: 11141 and 15887/2018

Before: The Hon. Mr Justice Binns-Ward
Hearing: 12-13 December 2018
Judgment: 18 December 2018

In the matters between:

THE TRUSTEES OF THE
TWO OCEANS AQUARIUM TRUST NNO. First to Seventh Applicants

and

AQUARIDES ENTERTAINMENT CC
T/A VISTA MARINA Respondent

JUDGMENT

BINNS-WARD J:

[1] I handed down judgment on 8 November 2018 in the applications brought by the trustees of the Two Oceans Aquarium Trust in case no.s 11141/2018 and 15887/2018, respectively, for the perfection of their security in terms of a notarial bond over the respondent's property and for the eviction of the respondent from the premises that it leased from the trust for the purposes of conducting a restaurant business. The applications were heard together and disposed of in a single judgment. The judgment (to which I shall hereinafter refer as 'the principal judgment') went in favour of the applicants in respect of both of their applications. It has since been

published on SAFLII, *sub nom*. *Green NO and Others v Aquaride* (sic) *Entertainment CC t/a Vista Marina* [2018] ZAWCHC 145).

[2] On 5 December 2018, I refused applications by the respondent in both of the matters for leave to appeal. The judgment refusing leave to appeal was delivered *ex tempore*, and a transcript of it has not yet been submitted to me for approval and signature. Suffice it to say that I explained in that judgment that I had refused to grant leave to appeal because I was not persuaded that an appeal would enjoy reasonable prospects of success. My actual view on the prospects of any appeal against the principal judgment may be more robustly expressed: I am virtually certain that it would be doomed to failure.

[3] Irrespective of my gloomy view of its prospects, the respondent is, however, enabled by the courts' processes to persist in its intention to appeal by petitioning the Supreme Court of Appeal for leave to appeal, and should it also fail in that forum, then to apply to the Constitutional Court for audience in that court. The procedures available to the respondent permit it, if so minded, to delay for many months yet the execution of the orders obtained against it by the applicants. That reality, and their assessment of its attendant prejudicial consequences for the trust's interests, have prompted the applicants to apply, in terms of s 18 of the Superior Courts Act 10 of 2013, for an order that the operation and execution of the orders made in the principal judgment should not be suspended pending the exhaustion by the respondent of the avenues still open to it to challenge that judgment. The application in terms of s 18 was lodged prior to the hearing of the respondent's application for leave to appeal, and with a view that it should be heard together with the latter application. It was postponed for hearing a week later, however, because the respondent sought more time to prepare its answering papers.

[4] Section 18 currently regulates the use of the power that the superior courts have exercised historically under the common law to provide in appropriate cases for exceptions from the default position that the operation of a decision that is subject of an appeal or an application for leave to appeal is suspended pending the decision of the application or appeal. The provision explicitly allows for the default position to be overridden only in 'exceptional circumstances'.[1] That, in essence, is a reiteration

[1] See s 18(1).

of the principle manifested in the common law.[2] It also places an onus on any party seeking such exceptional relief to prove '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' grants an order of the sort contemplated in s 18(1). Although there was uncertainty at times as to the incidence of the onus,[3] these were also considerations that were pivotal in applications under the common law for a departure from the default position; see in this regard points (1) and (2) in the list of pertinent considerations identified by Corbett JA in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A), [1977] 4 All SA 53.[4] The most significant change wrought by s 18 to the position that obtained under the common law is its provision that any order permitting a deviation from the default position has been made automatically appealable. Previously, such orders were generally non-appealable on account of their interlocutory character; with appeals against them being entertained only exceptionally, in circumstances in which the interests of justice demanded that.

[5] The proper construction of s 18 and the manner in which it falls to be applied have been settled in a series of judgments, most notably *Incubeta Holdings (Pty) Ltd and another v Ellis and another* 2014 (3) SA 189 (GJ), *Minister of Social Development Western Cape and Others v Justice Alliance of South Africa and Another* [2016] ZAWCHC 34, [2016] JOL 35612 (WCC), *University of the Free State v Afriforum and another* [2017] 1 All SA 79 (SCA), 2018 (3) SA 428 and *Ntlemeza v Helen Suzman Foundation and another* [2017] 3 All SA 589 (SCA), 2017 (5) SA 402. It would therefore be a supererogation to rehearse here in any detail the exegeses that can be easily turned up there. Suffice it to record that I have approached the determination of the current application mindful of what is set out in

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[2] Note the observation by Fourie AJA in *University of the Free State v Afriforum and another* [2017] 1 All SA 79 (SCA), 2018 (3) SA 428, in para. 9, that in enacting s 18 of the Superior Courts Act the legislature 'proceeded from the well-established premise of the common law that the granting of relief of this nature constitutes an extraordinary deviation from the norm that, pending an appeal, a judgment and its attendant orders are suspended'. That observation was reiterated by Navsa JA in *Ntlemeza v Helen Suzman Foundation and another* [2017] 3 All SA 589 (SCA), 2017 (5) SA 402, in para. 38.

[3] See *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A), [1977] 4 All SA 53 (at pp. 547-9 SALR; pp. 59-61 All SA).

[4] At p. 545 SALR; p. 57 All SA.

those judgments; and, in particular, the observation in *Ntlemeza*[5] that the provision 'has set the bar fairly high'.

[6] Section 18(4)(i) provides that if a court grants an order permitting execution of its judgment notwithstanding a pending application for leave to appeal, or an appeal, as the case might be, it must record its reasons for doing so. As noted in *Ntlemeza*,[6] that does not require a list of reasons to be drawn up. It implies rather that the order must be supported by a reasoned judgment, which must include the court's findings on irreparable harm for the purpose of compliance with s 18(3).

[7] I proceed now from that introduction to consider whether the 'exceptional circumstances' requirement has been satisfied. In *S v Dlamini* the Constitutional Court (per Kriegler J), in the context of dismissing an attack based on vagueness of the employment of the term 'exceptional circumstances' in s 65(11) of the Criminal Procedure Act, explained that the use of it by the legislature was acceptable because 'one can hardly expect the lawgiver to circumscribe that which is inherently incapable of delineation'.[7] It is hardly surprising therefore that all of the authorities cited in paragraph [5] above accept that exceptionality is a fact-and-context specific question, and that any conclusion as to whether the circumstances are exceptional or not will depend on a judicial evaluation of the facts of the given case in their peculiar context.[8]

[8] The determination of exceptionality was referred to by Thring J in *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas and another* 2002 (6) SA 150 (C) at 156H–157C as entailing the exercise of a discretion. Even though it has been cited in respect of the import of 'exceptional circumstances' in a number of judgments dealing with s 18 of the Superior Courts Act, the decision in *Ais Mamas* was given in a matter involving a quite different statutory context.[9] I can understand why the

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[5] In para. 28.

[6] In para. 38.

[7] *S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat* [1999] ZACC 8; 1999 (4) SA 623; 1999 (7) BCLR 771, at para. 75.

[8] See *Incubeta* supra, in para. 22, *Minister of Social Development Western* Cape supra, in para. 20, *UFS v Afriforum* supra, in para. 13, and *Ntlemeza* supra, in para. 37.

[9] Section 5(5)(a) of the Admiralty Jurisdiction Regulation Act 105 of 1983, which, in relevant part reads:

> *(a) A court may in the exercise of its admiralty jurisdiction at any time on the application of any interested person or of its own motion –*
>
> *(i) if it appears to the court to be necessary or desirable for the purpose of determining any maritime claim, or any defence to any such claim,*

learned judge postulated a discretionary exercise, for the determination entails making a decision upon a weighing of any number of disparate and incommensurable features in the given case (cf. *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (SCA), [1996] 3 All SA 669 (A)[10]). And the assessment of the correctness or otherwise of the determination might also be treated on appeal in essentially the same manner as an appellate court is able to deal with first instance decisions made in the exercise of a wide discretion because the appellate court might weigh the facts differently to the first instance court, and to different effect. The characterisation of the determination as discretionary is therefore understandable. However, I find myself in respectful agreement with the point made by Sutherland J in *Incubeta*[11] that the determination, notwithstanding that 'what is cognisable as "exceptional circumstances" may be indefinable and difficult to articulate', is founded on the facts of the case, and *not* on the exercise of judicial discretion. It is only the decision whether to exercise the power that a court has if the fact-based requirements of s 18(1) and (3) have been satisfied that is discretionary.[12]

[9] 'Exceptional circumstances' within the meaning of s 18(1) are the factual characteristics of the given case that are such as to make it appropriate, assuming that the requirements of s 18(3) have also been met, for the court to consider exercising its discretionary power to make an order concerning execution that would deviate from the default position. Even a combination of unexceptionable circumstances might in a given context amount to 'exceptional circumstances' within the meaning of the provision; cf. *S v Dlamini* supra, at para. 76. The determination whether they would

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which has been or may be brought before a court, arbitrator or referee in the Republic, make an order for the examination, testing or inspection by any person of any ship, cargo, documents or any other thing and for the taking of the evidence of any person

(ii) *...*

(iii) *...*

(iv) *In exceptional circumstances, make such an order as is contemplated in subparagraph (i) with regard to a maritime claim which has been or may be brought before any court, arbitrator, referee or tribunal elsewhere than in the Republic,...*

(Underlining supplied for highlighting purposes.)

[10] At p. 361 (SALR); p. 680 (All SA).

[11] In para. 17-22.

[12] See *Minister of Social Development Western* Cape supra, in para. 26.

or not requires a 'judicial evaluation'[13] of the facts for the purpose of deciding whether the circumstances are such as to justify a departure from the default position in the interest of justice.

[10] I have summarised what I consider to be the relevant facts of the two cases in the principal judgment. This judgment should be read together with the principal judgment, which makes it unnecessary for me to re-traverse the factual matrix in any detail here. It also bears recording that the founding papers in the s 18 application incorporated by reference the papers in the principal applications, and that the treatment of the facts in this judgment proceeds on the premise of such incorporation.

[11] It is convenient to treat firstly of the eviction order. In my view one of the most salient features of the case that makes the circumstances exceptional is that the respondent is remaining on in the leased premises, and intending to challenge the order that was made that it must vacate them, in circumstances in which it is common ground that it has failed to pay the rent since January 2018. The fact that the respondent was liable to pay rent, and that it did not dispute its liability to have done so, was borne out by its payment of the rent that would have been due in September 2018. As noted in para. 3 of the principal judgment, the payment was dishonoured.

[12] The 'defences' raised in the eviction application were identified and disposed of in the principal judgment in paras. 20-27. None of them, even were they found to be good (which they were not), would have entitled the respondent to remain on in the premises without paying rent. On what basis is it then entitled to remain there? The defences it raised do not offer an answer.

[13] This characteristic signally distinguishes the current case from the run of the mill eviction matter predicated on a lessee's failure to pay rent, where the tenant admits the non-payment but contends that it was entitled to have withheld payment for one or other reason and nevertheless remain in occupation. Examples of such cases are to be found in *Hencetrade 15 (Pty) Ltd v Tudor Hotel Brasserie & Bar (Pty) Ltd* [2017] ZASCA 111 at para. 3 and [2016] ZAWCHC 55 at para. 6-8 (in which the lessee raised the defences of set-off and the *exceptio non adimpleti contractus*), *Ntshiqa v Andreas Supermarket (Pty) Ltd* [1996] 3 All SA 154 (Tk), 1997 (1) SA 184 (in which the *exceptio non adimpleti contractus* was relied on by the lessee to good

[13] Cf. *S v Dlamini* supra, at para. 76.

effect) and *Steynberg v Kruger* 1981 (3) SA 473 (O) (in which the tenant alleged an entitlement to remission of rental due to defects in the premises). The defences raised in those cases were of a nature that if they were upheld, the tenant's right to continue to occupy the let premises would be sustained notwithstanding a purported cancellation of the lease by the landlord.

[14] In the current case, by contrast, it was obvious that the applicants were entitled to cancel the lease when the respondent failed to pay the rent,[14] which they did. The effect of the cancellation was that the respondent thereafter had (and has) no right to remain in occupation of the premises. Its attempt to justify its continued occupation on the bases of the defences described in the principal judgment is in itself, as mentioned, something that makes the case exceptional; for none of them afforded a basis upon which the cancellation of the lease might be exposed as invalid or ineffectual. All of them were in any event found to be without merit and, as I have already noted, the prospect of any of them being upheld on appeal with the effect of reversing the principal judgment is very remote in my view. The principal judgment points out that some of the 'defences' are actually self-defeating in that pressing them home would imply that there never had been a valid lease in place,[15] which, if true, would beg the (unanswered) question 'then on what basis does the respondent justify its continued occupation of the premises?'

[15] It is now authoritatively established that the court's assessment of the prospects of any appeal or application remains, as it was under the common law, a relevant factor to be taken into account in determining whether in the peculiar factual setting of the given case 'exceptional circumstances' within the meaning of s 18(1) have been established.[16] If the respondent, in availing of the appellate process, is seeking to press on with absolutely untenable defences, that is in itself a fact that can contribute towards a justifiable finding in a given factual matrix that the circumstances are exceptional.

[16] The applicants have alleged that the respondent's resort to the appeal process is part of a stratagem of delay designed to allow it to remain in the premises to take

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[14] See clause 3.5 of the lease read with clause 15.1 and 15.2 thereof.

[15] See para. 26 of the principal judgment.

[16] See *UFS v Afriforum* supra, at paras. 13-15.

advantage of the high season at the Waterfront during the Cape summer months. The probabilities support the cogency of the applicants' allegation. The respondent's action in desperately clinging onto the premises notwithstanding the parlous financial situation in which it has been for some time and its inability for the better part of a year thus far to pay any amount whatsoever in redemption of its rent obligation; its failure to have put up any plausible reason why the applicants' cancellation of the lease was invalid or ineffectual; and its resort to the court's appeal processes in circumstances in which its prospects of success are dismal combine to make the circumstances of the case sufficiently exceptional to warrant the court to consider, subject to the applicant having satisfied the provisions of s 18(3), the making of an order that would allow a departure from the default position.

[17] The factual matrix gives rise to the very strong impression that the respondent is not availing of the appeal procedures with the bona fide intention of seeking to reverse the judgment, but actually for the purpose of buying several months of time to capitalise on the rent-free occupation of the premises for trading purposes while those procedures are being exhausted.[17] That, in itself, also makes the circumstances exceptional, because ordinarily the bona fides of a litigant's resort to a right of appeal are either readily identifiable or not easily questionable.

[18] A further factor to be taken into account is that the arrangement that the respondent entered into with Bidvest to hold the latter off from pressing its application for the respondent's winding-up to conclusion[18] is a compromise of the sort that quite evidently, in the context of the other information before this court, constitutes an act of insolvency in terms of s 8(c) of the Insolvency Act 24 of 1936,[19]

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[17] See the third of the four pertinent considerations in respect of the making of an exceptional order for execution before the appeal process has been exhausted identified by Corbett JA in *South Cape Corporation* supra, (at p. 545 SALR; p. 57 All SA), namely, '*the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, e.g., to gain time or harass the other party*'. I obviously do not purport to make or anticipate any finding in this connection, but the respondent's member would be well advised in this context to consider his position in respect to both civil and criminal liability with regard to the provisions of s 64 of the Close Corporations Act 69 of 1984.

[18] See paras.4-6 of the principal judgment.

[19] Section 8(c) of the Insolvency Act provides:

> *A debtor commits an act of insolvency –*
>
> *(c) if he makes or attempts to make any disposition of any or his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another*'.

The word '*disposition*' is widely defined in terms of s 2 of the Act. It includes any payment or compromise and any contract therefor.

which in itself is a feature suggestive of at least the commercial insolvency of the respondent close corporation. It is in any event clear, in the context of the unresolved claims against the respondent in respect of its undisputed or undisputable indebtedness to other creditors such as the applicant, the local authority and its employees, that the payments being made by the respondent to Bidvest have the effect of unduly preferring the latter over the respondent's other creditors.

[19] As noted in the principal judgment, Bidvest is exacting the payments with the assistance of the effect of an order that it obtained by agreement with the respondent postponing its pending application for the liquidation of the respondent *sine die* subject to compliance by the respondent with the terms of the compromise arrangement.[20] The existence of such an order, which is very much out of the ordinary as it effectively places Bidvest's interest in the settlement of its claim in an unduly preferred position over those of other creditors such as the applicant in the redemption of theirs, makes the circumstances exceptional.

[20] The prejudice occasioned by such an order to the respondent's other creditors is obvious. It is not something that the scheme of the Companies Acts and the Close Corporations Act contemplates or would justify.[21] While it stands, it complicates the ability of any other creditors, like the applicants, themselves to obtain a winding-up order against the respondent.[22]

[21] I was informed from the bar, without contradiction by the respondent's counsel, that the applicants are currently attempting to obtain the winding-up of the respondent. Were it not for the pending application by Bidvest for the same relief, I doubt that they would have much difficulty in getting such an order. I equally doubt, having regard to the very poor prospects of success, that any liquidator would seek to prosecute an appeal against the principal judgment. The fact that the respondent, currently still under the management of its sole member rather than a liquidator only because of the incidental effect of the postponement on a never-never basis of

[20] A copy of the order, which was made on 28 June 2018 – the day after service of the applicant's application in case no. 11141/2018 had been served at the respondent's place of business – is to be found at p. 341 of the papers in case no. 11147/18.

[21] Consider in particular the effect in the established factual context of s 66 of the Close Corporations Act 69 of 1984 read with s 340 of the Companies Act 61 of 1973.

[22] My understanding of the position is that they would have to obtain leave to intervene in the pending application instituted by Bidvest; see the cases referred to in the general note on s 347 in *Henochsberg on the Companies Act 61 of 1973*.

Bidvest's winding-up application, is able to pursue the appeal procedures at the instance of the member underscores the exceptionality of the circumstances consequent upon the postponement order.

[22] For all the aforegoing reasons I am satisfied that the applicants have established 'exceptional circumstances' within the meaning of s 18(1).

[23] Turning now to the requirements of s 18(3). There is little room to doubt that the applicant will suffer irreparable harm if the eviction order is not executed immediately notwithstanding the respondent's evident intention to petition the Supreme Court of Appeal for leave to appeal. It is plain that the respondent is in serious financial difficulty. As noted, it is the object of a pending winding-up application. It is not paying its rent, and, as also already noted, its recent attempt to partially redeem its default in that regard resulted in a dishonoured payment. It is also in breach of the payment obligations undertaken to the applicants in terms of the acknowledgement of debt executed on 23 March 2017. Moreover, the papers in the s 18 application suggest that it is not able to pay its staff punctually or in full, and is in default in its contributions on behalf of its staff to their trade union.[23] It sought to meet the applicants' allegation that it was also materially in arrears with its payments for services to the local authority, and that there was a consequent danger that services to the premises might be suspended, by putting up evidence of substantial payments in redemption of these arrears, but even then it emerged that one of these payments made to the City of Cape Town in the sum of R140 000 had been dishonoured.

[24] The respondent's financial difficulties have been manifest over an extended period of time. There is nothing in the evidence to support a belief that the close corporation will enjoy a turnaround in its fortunes sufficient to enable it to redeem its substantial indebtedness to the trust. On the contrary, the likelihood is that the respondent will be compulsorily wound up within the next few months. As time goes by, however, the debt owed by the respondent to the applicant in respect of past rental

[23] The applicants' allegations concerning the late and short payment of staff and trade union contributions were based on information obtained by the applicants from a trade union representative. They were denied by the respondent, but if did not provide corroborating evidence in support of its denial. These being interlocutory proceedings (see paragraph [40] below), the evidence falls to be assessed with a view to the probabilities as they appear from the papers, and *not*, as the respondent's counsel sought to argue, by applying the rule in *Plascon-Evans*. The probability of the veracity of the reports given to the applicant concerning problems with the payment of the respondent's staff is supported by the incidence of the direct evidence concerning the problems that the respondent has experienced on an ongoing basis with the payment of its other creditors.

and damages for holding over continues to grow. The applicants have only one opportunity to rent out the premises at any given time and the respondent's continuing occupation of the property without paying rent is keeping the applicants out of turning that opportunity to gainful account. The applicant is unlikely to be able to recover anything other than, at best, a fraction of its damages from the respondent, when, as I have noted appears likely, the respondent is eventually wound up. The probability that the trust will suffer irreparable, and ever-increasing, harm for as long as the respondent stays on in the premises under cover of its cynical resort to the courts' appeal procedures is starkly evident.

[25] The only cognisable harm that the respondent could suffer as a result of it being required to vacate the premises is of a financial nature. It may well be inconvenient, but, like the 'reputational harm' that General Ntlemeza contended for in *Ntlemeza*, inconvenience is not the sort of harm that is cognisable in terms of s 18(3). It is only if it were to be granted leave to appeal and succeed in the consequent appeal that the respondent could claim to have suffered harm as a result of having to vacate the premises at this stage. It cannot otherwise rely on the revenue it would be able to generate during any time it was able to stay there buying time by availing unsuccessfully of the courts' appeal procedures for that ulterior purpose.

[26] The applicants have undertaken to indemnify the respondent in the event of it succeeding in any appeal against the principal judgment against any losses or damages it might suffer as a consequence of being required to vacate the premises at this stage. They put up a draft deed of indemnity for endorsement by the court in their supplemented founding papers. An acceptable deed of indemnity has often been accepted in the past as adequate provision against a judgment debtor suffering irreparable loss as a consequence of execution being permitted before the judgment debtor has exhausted its appeal remedies. This usually happens when the judgment in issue is one sounding in money. But I see no reason for a distinction in principle in a case like the present, in which any cognisable harm that the respondent might suffer would be calculable and compensable in money.

[27] The supplemented papers establish that the trust would be comfortably able to meet any obligation that might arise were it required to perform in terms of the indemnity that has been offered by the applicants. In the circumstances I am satisfied that the applicants have discharged the onus on them to prove that the respondent will

not suffer irreparable harm if the eviction order is executed at this stage, provided that the applicants furnish it with a suitable indemnity.

[28] I have slightly reworked the wording of the draft deed of indemnity attached to the applicants' supplemented papers. The reworked draft, which is attached as Annexure A to this judgment, will be incorporated by reference in the order that will issue. I have provided for the deed to be executed by all of the trustees of the trust. The draft put up in the applicants' papers provided for it to be executed on the trust's behalf by Mr Farquhar, who is employed by the trust in the capacity of chief executive officer. It was contended by the respondent's counsel that Mr Farquhar lacked authority to execute such an obligationary document on behalf of the trust, and also that it was outside the trustees' powers under the trust deed to purport to delegate any such authority to him. I do not consider that there is any merit in either of these contentions, but to put the matter beyond debate the order to be made will provide for deed of indemnity to be executed by all the trustees. The plenary powers invested in the trustees by the trust deed are unqualified, and plainly afford them the authority to furnish the indemnity.

[29] Turning now to consider the application for the execution of the order in the perfection of security application. In this case too the virtually absolute lack of prospects of any appeal against the confirmation of the rule *nisi* in terms of which the goods subject to the notarial bond makes the circumstances exceptional. It is not, and cannot be disputed that the respondent is indebted to the applicants in terms of the acknowledgment of debt. The respondent's abortive attempt to pay the rent due in respect of the premises in September bears that out. The respondent has placed the calculation of the amount of the debt in dispute, but that does not detract from the effectiveness of the notarial bond that was registered pursuant to the acknowledgement of debt or the applicants' entitlement to perfect the security provided thereby. The bond was furnished as security for all the respondent's indebtedness to the trust, including any amount owing pursuant to the parties execution of the deed of lease. The amount due in terms of the acknowledgment of debt fell immediately due and payable, amongst other situations, in the event of the respondent committing an act of insolvency. I have already described that that has happened. The applicants were entitled in terms of the bond to perfect their security in a number of situations. The ones that were applicable on the facts were the

respondent's breach of the lease agreement and its compromise or deferment in the respect of the payment of its debt to Bidvest. I pointed out in the principal judgment, with reference to the dicta of Harms JA in *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd and Others* 2003 (2) SA 253 (SCA) at para. 10, that the scope for any court to refuse the applicants an order perfecting their security is extremely limited, and finds no basis in the facts of the current matter.[24] What prospect is there then, in the face of the appeal court's clear pronouncement of principle, of any appeal against the confirmation of the rule succeeding?

[30] That the respondent should in these circumstances proceed to try to take the principal judgment on appeal in respect of the perfection of security application underscores my impression that its availment of the courts' processes is not bona fide, and only to give it time to cash in for its member's benefit on the high season's trading. As I have already reasoned in respect of the execution of the order in the eviction application, that is sufficient to render the circumstances exceptional for the purposes of s 18(1) of the Superior Courts Act.

[31] A failure to permit the execution of the order at this stage would probably result in irremediable harm to the trust. It would effectively be deprived of the benefit of its security in the form of the limited real right in the respondent's property that the notarial bond was intended to provide. In making this finding I do not overlook that the suspension of the execution of the order in the ordinary course would not suspend the effect of the provisional order or the effectiveness of the attachment of the respondent's movable property that has already been effected thereunder. Nevertheless, the mere attachment, without physical possession, that is in place does not in the peculiar circumstances of the case afford sufficient protection of the applicants' rights.

[32] For one, it is evident that the movables were not kept insured by the respondent as it was liable to do in terms of the notarial bond. The respondent was only prompted to obtain a quotation from an insurance broker after the institution of these proceedings in terms of s 18. It has failed to adduce any evidence that a contract of insurance has been concluded and that the premium has been paid or adequately secured. It is obvious in the circumstances of the respondent's

[24] See para. 16 of the principal judgment.

demonstrably poor credit record that it cannot be relied upon to keep up the insurance payments. The bond permits the applicants to insure the goods if the respondent fails to do so, and to recover the costs from the respondent. However, in the context of the respondent's parlous financial state, their prospect of actually making any recovery from the respondent were they to exercise the right to keep the goods insured at the respondent's expense is nugatory.

[33] A further factor to be taken into account in assessing the potentiality of irreparable harm to the trust in the peculiar circumstances of this case is that the goods are currently being used in the conduct of the respondent's restaurant business at the leased premises, and while that situation endures the applicants could at least take some comfort that the danger that they would be dissipated or not be properly looked after was relatively limited. But that comfort will fall away in the context of the immediate execution of the eviction order. Although it is notionally possible that the respondent could set up its business elsewhere and use the goods at the new address, the prospect of that actually happening is unrealistic in the context of the respondent's financial circumstances.

[34] The fact that the perfection of their security in terms of the notarial bond may well be rendered void if the respondent is wound up - which as I have said is a likely prospect in my view – is something that is extraneous to the balancing exercise between the interests of judgment creditor and judgment debtor contemplated in terms of s 18(3) of the Superior Courts Act. It is instead an incident of the relationship between the interests of the applicants and those of the other creditors of the respondent should such an eventuality come to pass.

[35] For all these reasons I am satisfied that the applicants have proven that the trust will probably suffer irreparable harm if the order permitting them to perfect the trust's security is not made immediately executable, which will allow the pledged goods to be removed from the premises and kept in possession by or at the instance of the applicants in accordance with the terms of the court's order in the principal application.

[36] I am also satisfied that the execution of the order will not cause irreparable harm to the respondent, for the terms of the court order in case no. 11147/2018 do not authorise the applicants to dispose of the attached goods, and it would be necessary

for them to obtain a further court order to be able to do so. They would not be able to obtain such an order at least until the pending winding-up application against the respondent has been determined. For the reasons given earlier it is my assessment that the applicants will probably have to surrender the attached movables to a liquidator. But should that not transpire before the respondent has exhausted its resort to the courts' appeal processes, it is possible to deal with the possibility that the respondent's interests would be irreparably harmed by including a direction in the order to be made prohibiting the applicants from disposing of the attached goods prior to the exhaustion by the respondent of its ability to challenge the principal judgment on appeal. A direction to that effect will therefore be incorporated in the order to be made.

[37] It will be apparent from what I have said thus far that I have been persuaded that it would be appropriate for the court in the exercise of its discretion to exercise its power to make the order sought by the applicants in terms of s 18 of the Superior Courts Act.

[38] It remains only to consider the issue of costs.

[39] When the application was argued on 12 December it was made apparent that I had significant reservations as to whether the applicants had discharged the onus to prove that the respondent would not suffer irreparable harm if the principal judgment were put into effect before its attempts to appeal were exhausted, or any appeal that it might be given leave to prosecute were determined. I made it clear to the applicants' counsel that I doubted whether the bland averment that an indemnity was offered to the respondent for any loss it might suffer would suffice. I indicated that I would have expected the terms of the proffered indemnity to be expressly spelled out, and for there to be evidence in support of the trust's financial ability to honour its obligations in terms of it if called upon to do so. The difficulties that I raised with counsel prompted him to seek the opportunity for the applicants to supplement their founding papers, as mentioned above.

[40] The respondent's counsel demurred at my readiness to accede to the applicants' counsel's request and contended that the applicant was bound to stand or fall by its supporting papers when the application was lodged. As I pointed out at the time, the position adopted by the respondent's counsel was misconceived. The

application is for simple interlocutory relief not having final effect,[25] and any refusal of the application on account of some or other shortcoming in the papers would not have precluded the applicants from making a fresh application for the same relief on improved papers. Furthermore, as pointed out by Corbett JA in *South Cape Corporation*,[26] any order made by a court of the sort contemplated by s 18 is amenable, while it is in operation, to correction, alteration, or even to being recalled by the court that made it at any time before the final determination of the matter on appeal or the refusal of the right to appeal. An order in terms of s 18 of the Superior Courts Act is an incident of the courts' regulation of their own process. Litigation is not a game, and, as Navsa JA observed in *Ntlemeza*, '[c]ourts must be the guardians of their own process and be [astute] to avoid a to-ing and fro-ing of litigants'.[27]

[41] In the event the matter was stood down until the 13th to allow the applicant to supplement its papers to meet the issues that I had raised. The only respectable point for the respondent to have taken in the circumstances, which it eventually duly did, was to ask that the applicants should pay its wasted costs incurred on account of the postponement. A direction to that effect will be incorporated in the order to be made at the end of this judgment.

[42] It seems to me that otherwise liability for the costs of the s 18 application should depend on the fate of the respondent's resort to the appeal processes. If those should be futile in the sense that it does not obtain leave to appeal, or should any appeal that is permitted not succeed, then the respondent should be liable for the applicants' costs of suit. If, on the other hand, the respondent succeeds in any appeal in having the principal judgment reversed in respect of both applications, the applicants should be liable to pay the respondent's costs, and if the respondent's success on appeal is limited to only one of the two applications, then the applicants should be liable to pay one half of the respondent's costs in these proceedings.

[43] The following order is made:

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[25] See *South Cape Corporation* supra, at pp. 549-552 (SALR), pp. 61-64 (All SA).

[26] At p. 552 SALR; p. 64 All SA.

[27] In para. 32. The learned judge actually used the word '*slow*' instead of '*astute*', but it is clear from the context that by '*slow*' he intended the meaning denoted by '*astute*' or '*careful*', or a word to similar effect.

1. It is ordered in terms of s 18 of the Superior Courts Act 10 of 2013 that, subject to the further provisions of this order, the orders made by this court on 8 November 2018 in case no.s 11147/2018 and 15887/2018, respectively, shall not be suspended pending the exhaustion by the respondent of the processes available to it to challenge the judgment of this court in which those orders were made on appeal.

2. The aforementioned orders of this court made on 8 November 2018 shall, however, notwithstanding the terms of paragraph 1 of this order, not be enforceable by the applicants until and unless they have executed a deed of indemnity in favour of the respondent in the form of the draft annexed as Annexure A to the judgment in these proceedings and have lodged a copy of the executed deed with the Registrar of this court and also procured the service of a copy thereof by the Sheriff at the respondent's registered office; and any goods attached and removed by or at the instance of the applicants in terms of the order made in case no. 11147/2018 shall in any event not be disposed of by the applicants prior to the exhaustion by the respondent of its ability to challenge the aforementioned judgment of this court in respect of that matter on appeal.

3. Save as provided in paragraph 4 hereof, the respondent shall be liable for the applicants' costs of suit in these proceedings in the event that it does not obtain leave to appeal against the judgment of this court dated 8 November 2018 in case no.s 11147/2018 and 15887/2018, or should it, having obtained leave, not be ultimately successful in any appellate court to which it is permitted to appeal; provided that the applicants shall be liable to pay the respondent's costs of suit in these proceedings should the respondent succeed on appeal in respect of the judgment in both the aforementioned case numbers, or for one half of the respondent's costs should the respondent succeed on appeal in only one of the said cases.

4. The applicants shall in any event be liable to pay the wasted costs incurred by the respondent as a result of the postponement of the hearing of the application on 12 December 2018.

A.G. BINNS-WARD
Judge of the High Court

ANNEXURE A

Indemnity and Undertakings

by the Two Oceans Aquarium Trust

in favour of Aquarides Entertainment CC t/a Vista Marina

WHEREAS, the Western Cape Division of the High Court of South Africa ("the Court") gave judgment on 8 November 2018 in favour of the Two Oceans Aquarium Trust ("the Trust") in proceedings under case number 11141/2018 ("the Perfection Application") and case number 15887/2018 ("the Eviction Application") against Aquarides Entertainment CC (reg. no. 2010/080715/23) t/a Vista Marina ("Vista Marina") in terms of which the Court confirmed a rule nisi authorising the Trust to perfect its security in terms of a notarial bond executed by Vista Marina in favour of the Trust and authorised the eviction of Vista Marina from the premises at the Victoria and Alfred Waterfront that it had leased from the Trust and at which it currently carries on business;

AND WHEREAS, Vista Marina applied for leave to appeal against the said judgment, which application was refused by the Court on 5 December 2018;

AND WHEREAS, Vista Marina is entitled in law to persist with its intention to appeal against the said judgment by way of applications for leave to appeal to the Supreme Court of Appeal and ultimately to the Constitutional Court;

AND WHEREAS, on 18 December 2018, the Court made an order at the instance of the Trust in terms of s 18 of the Superior Courts Act 10 of 2013 directing that the judgment granted in favour of the Trust in the Perfection Application and the Eviction Application might be executed by the Trust notwithstanding any application for leave to appeal or appeal by Vista Marina;

AND WHEREAS, the said order made by the Court on 18 December 2018 is, according to its tenor, subject to the provision by the Trust of an indemnity in the terms set out in Annexure A to the Court's judgment in the Trust's application in terms of s 18 of the Superior Courts Act;

AND WHEREAS, the aforesaid order made by the Court on 18 December 2018 is subject, in terms of s 18(4)(iv) of the Superior Courts Act, to an automatic right of appeal by Vista Marina;

NOW THEREFORE BY THIS INSTRUMENT:

We, the undersigned trustees for the time being of the Trust –

1. do hereby, and subject to the terms of this instrument, bind the Trust to indemnify Vista Marina for any loss or damages it may sustain, and in respect of any liability, cost or expense it may incur as a result of the execution of the Court's judgment in the Perfection Application and/or the Eviction Application pursuant to the abovementioned order made by the Court in terms of s 18 of the Superior Courts Act on 18 December 2018; provided that this indemnity shall apply only if, and to the extent that, the Court's judgment in the Perfection Application and the Eviction Application is reversed on appeal, and provided further, that in the event of a dispute arising in respect of the quantification of any claim that might accrue to Vista Marina in terms of this indemnity it shall be determined by an arbitrator and the provisions of clauses 16.2 to 16.5.3 of the deed of lease executed by the Trust and Vista Marina on 13 September 2016 shall apply *mutatis mutandis*.

2. without derogating from the generality of the indemnity furnished hereby, undertake that in the event of any appeal against the judgment in respect of the Perfection Application being upheld, the Trust shall restore possession of the goods attached by the Trust under the judgment in perfection of its security, and to that end undertake further that the said goods will not be disposed of until Vista Marina's rights of appeal in terms of the relevant rules of court have been finally exhausted.

3. without derogating from the generality of the indemnity furnished hereby, undertake that in the event of any appeal against the judgment in respect of the Eviction Application being upheld, the Trust will permit the Vista Marina to resume occupation of the premises subject to the provisions of the deed of lease executed between the Trust and Vista Marina on xxx, and to that end undertake further to include a term in any lease of the said premises that the Trust may conclude with any replacement tenant before Vista Marina's rights of appeal in terms of the relevant rules of court have been finally exhausted binding such tenant to vacate the premises upon the written request of the

trustees in the event of any appeal against the judgment in respect of the Eviction Application being upheld.

The indemnity and undertakings furnished hereby shall be separate and severable and enforceable accordingly and shall endure subject to Vista Marina prosecuting any steps available to it to appeal the judgment in the Perfection Application and/or the Eviction Application in terms of the Superior Courts Act and the applicable rules of court strictly within the prescribed time limits.

[To be signed by each of the trustees.]

APPEARANCES

Applicants' counsel:	**Deneys van Reenen**
Applicants' attorneys:	**Hayes Incorporated**
	Cape Town
Respondent's counsel:	**Brendan Atkins**
Respondent's attorneys:	**Tanya Nöckler Attorneys**
	Cape Town