IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2024-071038

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE:

2.OF INTEREST TO OTHER JUDGES:

3.REVISED:

20 AUGUST 2025

Judge Dippenaar

In the matter between:

CANCER ALLIANCE	**APPLICANT**
and	
MEMBER OF EXECUTIVE COUNCIL FOR HEALTH, GAUTENG PROVINCE	**FIRST RESPONDENT**
HEAD OF DEPARTMENT: HEALTH GAUTENG PROVINCE	**SECOND RESPONDENT**
MEMBER OF EXECUTIVE COUNCIL FOR GAUTENG TREASURY, GAUTENG PROVINCE	**THIRD RESPONDENT**

VARIAN MEDICAL SYSTEMS AFRICA (PTY) LTD	**FOURTH RESPONDENT**
MINISTER OF HEALTH	**FIFTH RESPONDENT**
DIRECTOR GENERAL: DEPARTMENT OF HEALTH	**SIXTH RESPONDENT**
CHIEF EXECUTIVE OFFICER: CHARLOTTE MAXEKE JOHANNESBURG ACADEMIC HOSPITAL	**SEVENTH RESPONDENT**
CHIEF EXECUTIVE OFFICER: STEVE BIKO ACADEMIC HOSPITAL	**EIGHTH RESPONDENT**
MINISTER OF FINANCE	**NINTH RESPONENT**
NATIONAL TREASURY	**TENTH RESPONDENT**
SIEMENS HEALTHCARE (PTY) LTD	**ELEVENTH RESPONDENT**

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and uploading it onto the electronic platform. The date and time for hand-down is deemed to be 10h00 on the 20th of AUGUST 2025.

DIPPENAAR J:

[1] This is an application in terms of s 18 of the Superior Courts Act 10 of 2013 ('the Act'), launched under s 18(2) alternatively s 18(1) and s 18(3). The applicant, Cancer Alliance, is a voluntary collective group of thirty cancer control non-profit organisations and cancer advocates 'who have come together under a common mandate to provide a platform of collaboration for civil society to speak with one voice with the aim to be a powerful tool to effect change for all SA adults and children affected by cancer'. It acts

here in the public interest and in the interest of vulnerable cancer patients on a backlog list who are awaiting radiation oncology treatment since at least March 2022.

[2] The first and second respondents are respectively the MEC and Head of Department, Health, Gauteng Province. The seventh and eighth respondents are the chief executive officers of respectively the Charlotte Maxeke Johannesburg Academic Hospital and the Steve Biko Academic Hospital ('the hospitals'). They are collectively referred to as the respondents as none of the remaining respondents participated in the proceedings.

[3] The genesis of this application lies in application proceedings launched by the applicant in two parts, A and B, concerning the alleged failure of the respondents to provide timely, life-saving radiation oncology treatment to patients on a backlog list, dating back to at least March 2022. Part A concerned the provision of radiology oncology services at the hospitals. An interim interdict was sought, pending the determination of a review application in part B, restraining use of an amount of R250 million allocated to address the radiation oncology backlog in Gauteng. An order was further sought declaring the respondents' failure to devise and implement a plan to provide radiation oncology services at the hospitals to cancer patients on the backlog list to be unlawful and unconstitutional, together with ancillary relief aimed at addressing the situation by compelling the respondents to update the backlog list, take all steps necessary to provide radiation oncology services to backlog list patients and to file updated progress reports with the court. Leave was sought to re-enroll the application if the respondents failed to comply with these orders and to supplement the application in relation to relief sought in Part B. Part B, which relates to a review of the second respondent's decision of 30 April 2024 to allocate R250 million out of an allocated R784 million for the outsourcing of radiation oncology services, remains pending.

[4] Part A was heard by van Nieuwenhuizen AJ on 21 November 2024. On 27 March 2025, he granted an order. In relevant part, the order provides:

'Interim order:

1. The matter is urgent and heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court, and forms and service provided for in the rules are dispensed with to the extent necessary;

2. The Strike out Application is dismissed and the provincial health respondents are awarded costs against the Alliance on the party and party Scale C same to include the costs of 2 Counsel one of which is Senior Counsel;

3. The First, Second, Seventh and Eighth Respondents' failure to devise and implement a plan to provide radiation oncology services at Charlotte Maxeke Johannesburg Academic Hospital and Steve Biko Academic Hospital timeously (after receiving ring-fenced funding for same) in Gauteng to cancer patients on the backlog list is declared to be unlawful and unconstitutional and in breach of sections 7(2), 27, 33 and 195 of the Constitution.

4. The Applicant is directed deliver to the Second Respondent a copy of the backlog list as it existed after it was compiled by itself;

5. The First, Second, Seventh and Eighth Respondents are directed to update the backlog list of cancer patients who are awaiting radiation oncology services in Gauteng within 45 days from the date of this order and maintain its POPIA compliancy and broken down by hospital;;

6. The First, Second, Seventh and Eighth Respondents are directed to take all steps necessary to provide radiation oncology services to backlog list patients who are awaiting treatment at Charlotte Maxeke Johannesburg Academic Hospital and Steve Biko Academic Hospital in Gauteng at a public and/or private facility;

7. The First, Second, Seventh and Eighth Respondents are directed to file an updated report within 3 months from date of this order detailing the following:

7.1. A progress report on the steps taken to provide radiation oncology services to cancer patients who are on the backlog list in Gauteng;

7.2 A progress report on the First Respondent's long-term plan to provide radiation oncology services to cancer patients at Charlotte Maxeke Academic Hospital and Steve Biko Academic Hospital.

8. In the event that the First Respondent fails to comply with the orders set out in paragraphs 4 to 7 above, the Applicant is entitled to re-enroll the matter on the same papers duly supplemented to the extent necessary and where necessary to make use of oncology radiotherapy medical experts;

9. The Applicant is granted leave to supplement the application in relation to the relief sought in Part B of the application;

10. Orders 2-9 will remain in place until the relief sought in Part B as it stands at present or may be amended has finally been disposed of;

11. The First, Second, Seventh and Eighth Respondents are directed to pay the Applicant's costs under Part A, on scale C as between party and party with such costs to include the costs of 2 counsel.'

[5] The interim interdict was not granted. On 7 May 2025, Van Nieuwenhuizen AJ granted leave to appeal his judgment and order to the Supreme Court of Appeal at the behest of the respondents. Leave to cross appeal the costs order granted in paragraph 2 of the order was granted to the applicant.

[6] The present application, launched on 10 July 2025 as an urgent application, concerns the interim enforcement of paragraphs 5, 6 and 7 of van Nieuwenhuizen AJ's order ('the order'), underlined for ease of reference. The applicant seeks an order declaring that the operation and execution of paragraphs 5 to 7 are interim as contemplated in s 18(2) of the Act and shall remain operational and enforceable against the respondents until the final determination of Part B and any future leave to appeal applications and appeals. It further seeks an order directing the respondents to comply with paragraphs 5 to 7 of the order. In the alternative, an order is sought directing that the operation of the order is not suspended pending any decision on the respondents' appeal to the Supreme Court of Appeal and the determination of any appeal that may be launched pursuant thereto to the Constitutional Court. Costs are sought, only in the event of opposition. Costs of three counsel was sought on Scale C.

[7] The respondents oppose the application on various grounds. In sum, they first challenge urgency on the basis that despite leave to appeal having been sought and granted on 7 May 2025, the present application was only launched some three months later on 10 July 20252, after the execution and operation of the orders were suspended. They contended that the applicant failed to sufficiently state any grounds for the present

application, either in support of their self-created urgency or the stringent requirements of a s 18 application. Second, the competency of the relief sought is challenged, including the jurisdiction of the high court to entertain the application. Third, it is disputed that the order is interim in nature and that s 18(2) is applicable. Lastly it is disputed that that the requirements for relief under ss 18(1) and 18 (3) are met. Costs are sought on a punitive basis.

[8] It is apposite to deal with the jurisdictional challenge first. According to the respondents, the application should have been brought earlier and at the time of their application for leave to appeal. It was argued that after the application for leave to appeal was granted, the High Court was *functus officio* and cannot entertain the application. As the Supreme Court of Appeal is now seized with the appeal, it is that court which must deal with an application for enforcement. The applicant contended the opposite.

[9] In my view, the respondents' challenge lacks merit. The respondents did not offer any authority in support of their proposition. The wording of s 18 does not support the respondents' submissions. In express terms, it refers to '*an application for leave to appeal or appeal*'. Seen in context, s 18 regulates the enforcement or suspension of a high court's orders pending an application for leave to appeal or an appeal by a high court. There is nothing in the text, purpose or context of the section that deprives the high court of jurisdiction to entertain an application once leave to appeal has been granted. The text clearly refers to 'an appeal', without any limitation. As held by the Supreme Court of Appeal in *Ntlemeza*[1], the purpose of s 18 is to reiterate the common law position on the ordinary effect of the appeal process. Contextually, the powers granted to courts must be seen against the inherent powers of courts to regulate their own process.[2] The common law position was set out in *South Cape Corporation*.[3] There, express reference is made

[1] *Ntlemeza v Helen Suzman Foundation* 2017 (5) SA 401 (SCA) paras 18-23,28.
[2] Ibid, paras 28,30.
[3] *South Cape Corporation (Pty) Ltd v Engineering Management Servies (Pty) Ltd* 1977 (3) SA 534 A at 544H-545G

to the power of a high court to order enforcement of its order.[4] In explaining the extraordinary nature of a remedy under s 18(3), the Supreme Court of appeal in *Tshwane Metropolitan Municipality*[5] held that it empowers a high court to deviate from the principle that its order is supended. That power is not lost once an appeal is pending.

[10] In supporting the urgency of the application, the applicants submitted that the original urgency which existed and was accepted by the court in the initial proceedings remains and that the cancer patients on the backlog list would not obtain substantial redress at a hearing in due course.

[11] I am not persuaded that the application should not be entertained for lack of urgency or that urgency was self-created, as argued by the respondents. The explanation provided by the applicant that it reasonably anticipated that the respondents would comply with the orders, expressly characterised as interim in the order, and that it had to wait for the time periods to run out for the respondents to comply with the order, is reasonable. It is well established that state organs should observe the law scrupulously.[6]

[12] It was undisputed that the applicant was obliged to re-furnish a copy of the backlog list to the respondents and did so on 14 April 2025.[7] Under paragraph 5 of the order the respondents had to update the backlog list within 45 days of the order, requiring to file such list on 4 June 2025. Under paragraph 7 an updated report had to be filed within 3 months of the order detailing the matters in paras 7.1 and 7.2 of the order. That had to occur by 26 June 2025. The conundrum faced by the applicant is understandable. It was

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[4] *South Cape Corporation*, cited with approval in *Department of Transport and Others v Tasima (Pty) Ltd and Others; Tasima (Pty) Ltd and Others v Road Traffic Management Corporation and Others* [2018] ZACC 21 2018 (9) BCLR 1067 (CC) ("Tasima').
[5] *Tshwane Metropolitan Municipality v Vresthena (Pty) Ltd and others* 2023 (6) SA 434 (SCA) para 14, 20.
[6] *MEC Department of Police, Roads and Transport Free State Provincial Government v Terra Graphics (Pty) Ltd t/a Terra Works and Another* [2015] 4 All SA 255 (SCA) para 21.
[7] Being the same list supplied on 11 March 2022.

not unreasonable for it to wait until the relevant deadlines had expired before launching this application. That election is further not destructive of the urgency of the application.

[13] Given the facts and the subject matter of the application, I am satisfied that the applicant has established that the application should be determined urgently and that it would not obtain substantial redress at a hearing in due course.[8] It does not appear that there has been any material change in circumstances for the cancer patients on the backlog list, who are on the margins of the healthcare system. This vulnerable group of people are at the heart of this application. Whilst the respondents contended that they are taking steps to provide radiation oncology treatment to cancer patients, they did not present any evidence that the patients who are on the backlog list are receiving such treatment. The application concerns matters of public interest, relating to matters of life and death for some 3000 cancer patients who are on the backlog list, some since 2018. It was undisputed that radiation oncology treatment is of itself time sensitive.

[14] Moreover, it was not established that the respondent suffered any prejudice in the enrolment of the matter on an urgent basis. The respondents did not raise any prejudice nor complain that they were afforded insufficient time for their opposition. The respondents were afforded adequate time to present their case[9] and had sufficient time to present argument at the hearing.

[15] I turn to the merits. The first issue to determine is whether the order falls under s 18(2) or under ss 18(1) and 18 (3) of the Act. Section 18 draws a distinction between interlocutory orders on the one hand and final orders on the other. Section 18 in relevant part provides:

"18. Suspension of decision pending appeal

[8] *East Rock Trading (Pty Ltd and Another v Eagle Valley Granite (Pty) Ltd & Others* 2011 JDR 1832 (GSJ) paras 6 and 7.
[9] *Mogalakwene Local Municipality v Provincial Executive Council, Limpopo and Others* [2014] 4 All SA 67 (GP) para 64.

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

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

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders'.

[16] The applicant, relying on the phrase an interlocutory order not having the effect of a final judgment' in s 18(2) and on *Lebashe*[10], submitted that the orders are clearly interlocutory and the effect of the orders temporary. In *Lebashe* it was held :

'Whether an order is purely interlocutory in effect depends on the relevant circumstances and factors of a particular case. In Zweni it was held that for an interdictory order or relief to be appealable it must: (a) be final in effect and not susceptible to alteration by the court of first instance; (b) be definitive of the rights of the parties, in other words, it must grant definite and distinct relief; and (c) have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings'.

[17] The applicant argued that the order does not finally determine the issues in the Part B review proceedings and that it would be open to the court determining Part B of the application to amend or supplement the temporary order if the circumstances require it in terms of its remedial powers under s 172(1)(b) of the Constitution. It submitted that

[10] *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* 2023 (1) SA 353 (CC) *('Lebashe')* para 41.

the purpose of the interim order was to ensure that life-saving radiation oncology treatment was immediately available to cancer patients on the backlog list due to the urgent nature of such treatment. Thus, so the argument goes, the uncertainty regarding the effect of the order, pending appeal, is causing severe harm to cancer patients on the backlog list who require urgent radiation and oncology treatment. The declaratory order sought in its main relief, it was submitted, would have practical effects in putting an end to confusion and uncertainty and provide the necessary guidance on the respondents' constitutional obligations going forward.

[18] The respondents contended the opposite. They submitted that the orders have a final effect in their substance. They submitted that a court has no power to grant these orders, which are legally impermissible and incompetent as they are devoid of any legal basis. It was argued that the application is legally incompetent as this court has become *functus officio* regarding the matter when it granted leave to appeal and the case was transferred entirely to the Supreme Court of Appeal. Moreover, as the case is pending in that court, this court cannot duplicate proceedings or decide on the same matter. I have already dealt with the jurisdictional issue.

[19] Some debate ensued regarding the appealability of the order and the effect of Van Nieuwenhuizen AJ having granted leave to appeal. From the record of the proceedings, it does not appear that the *ex tempore* judgment delivered at the time of the application for leave to appeal is available. The parties did not provide it. All that is available is the order granted on 7 May 2025, granting leave to appeal to the Supreme Court of Appeal, with costs to be in the appeal. No guidance can thus be gleaned from the learned Acting Judge's reasons for granting leave to appeal. These matters cannot be speculated upon.

[20] The respondents contended that this meant that the orders were final as interim orders are not appealable. They submitted that the applicant sought a revisiting of the application for leave to appeal, where the arguments pertaining to the interim nature of the order were raised and rejected and the court effectively determined that the orders were final in effect.

[21] The test for appealability is ultimately the interests of justice.[11] The test for appealability must not be conflated with the test for whether an order is interim in effect. The arguments advanced by the respondents are accordingly not dispositive of the issue.

[22] The order must be interpreted in its terms in the well-established triad of language, context and purpose.[12] In interpreting the judgment and order of Van Nieuwenhuizen AJ, the starting point was stated in *Eke*[13] to be: '*to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole to ascertain its intention'.*[14]

[23] In interpreting the judgment or order the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the well-known rules relating to the interpretation of documents. The order and reasons are to be read as a whole.[15]

[24] In the express terms of the order, the orders in paragraphs 5 to 7 as read with paragraph 10, would *'remain in place until the relief sought in Part B as it stands at present or may be amended has finally been disposed of'.* In an extensive judgment of some 157 pages, Van Nieuwenhuizen AJ concluded that the facts of the case *'fell within the meaning of egregious infringements of rights*' and found he had little option but to establish a temporary structural or supervisory remedy to provide effective relief.[16] From the wording of the order and the reasons provided therefor, it appears that the learned

[11] *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* 2020 (6) SA 325 (CC) para 50.
[12] *Department of Transport and Others v Tasima (Pty) Ltd and Others; Tasima (Pty) Ltd and Others v Road Traffic Management Corporation and Others* 2018 (9) BCLR 1067 (CC) *(Tasima*) para 42-56
[13] *Eke v Parsons* 2016 (3) SA 37 (CC) para 29.
[14] Quoted in *Tasima,* para 42
[15] *Tasima* supra paras 42-56.
[16] Judgment paras 601-603.

Acting Judge intended the operation of the order to have temporary duration only. That intention, however, has no weight in determining the effect of the order.[17]

[25] In *Metlika Trading*[18], the issue of whether an order was interim or final arose in the context of the appealability and an appeal of an interim interdict compelling the appellant to procure the return to South Africa of certain aircraft pending the finalization of an action instituted by the respondent. In relevant part, the Supreme Court of Appeal, per Streicher JA held:

> '*In determining whether an order is final, it is important to bear in mind that 'not merely the form of the order must be considered but also, and predominantly its effect' (South African Moror Industry Employers Association v South African Bank of Athens 1980 (3) SA 91 (A) at 96H and Zweni at 532I*[19]*'.*

[26] The issue of appealability and the final effect of an interim interdict also arose in *Cipla.*[20] As pointed out by Rogers AJA, it has been consistently held that final in effect means that an issue in the suit has been effected by the order such that the issue cannot be revisited either by the court of first instance or the court hearing the action. It was further held that prejudice which does not affect the issues in the suit is dealt with under the rubric of balance of convenience in an application for an interim interdict. If a court grants an interim interdict in circumstances where it should have treated it as one for final relief, the interdict, although interim in form, is final for purposes of appealability.[21]

[27] The Supreme Court of Appeal further held that when an order incidentally given during the progress of litigation has a direct effect upon the final issue, when it disposes of a definite portion of the suit or when it causes prejudice which cannot be repaired at

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[17] *MR v KR* 2021 JDR 0601 (GJ) para 21.
[18] *Metlika Trading Ltd and Others v Commissioner, South African Revenue Service* 2005 (3) SA 1 (SCA) para 23.
[19] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A)
[20] *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation and Others* 2018 (6) SA 440 (SCA) para 21.
[21] Ibid para 23.

the final stage, in essence it is final, though in form it may be interlocutory.[22] However: '*We have not to look to any inconvenience or even expense which an interim order to the person against whom such an order operates. We must look to its effect upon the issue or issues order may cause in the suit. An interlocutory order may of course cause some degree of prejudice -using this word in its widest sense – to the person required to carry it out, but…[this] does not constitute that 'irreparable prejudice' which would give to an interlocutory order the effect of a final judgment'.*[23] Not every kind of prejudice is relevant, only that which directly affects the issue of the ultimate suit.[24]

[28] There is little merit in the respondents' contention that, although cast in interim terms, the effect of the orders in paragraphs 5 to 7 have final effect in that the respondents are obliged to do certain things and take certain steps that ultimately cannot be undone, even if the interim order is set aside during the proceedings in Part B. Prejudice of the kind complained of, namely that money and effort must be expended on those steps, does not elevate it to the kind of prejudice required to have final effect. As pointed out by the applicant, the orders in paragraphs 5 to 7 do no more than compel the respondents to comply with duties which they are constitutionally obliged to perform. The importance of this cannot be overstated.

[29] Although the order does not finally determine the main issues in the part B review proceedings, as the application papers currently stand, no order is sought that the orders granted in Part A be confirmed in part B. For that reason, there is merit in the respondents' argument that such relief was finally sought and granted in Part A of the application.

[30] Although it is open to the applicant to amend its notice of motion relating to Part B of the main application in due course, considering the papers as they stand, it would thus not be appropriate to grant the main declaratory order sought. A judicial exercise of the

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[22] Ibid para 38.
[23] *Globe and Phoenix Gold Mining Company Ltd v Rhodesian Corporation* 1932 AD 146 at 155 quoted in *Cipla*, para 39
[24] Para 42

discretion afforded in relation to declaratory orders militates against the granting of that relief. It is thus necessary to consider the alternative relief sought.

[31] The applicant, in the alternative sought an order under s 18(1) and s 18(3) of the Act, that the operation and execution of the order of 24 March 2025 is not suspended pending any decision on the respondents appeal to the Supreme Court of Appeal and the determination of any appeal that may be launched pursuant thereto to the Constitutional Court.

[32] The requirements under s 18(3) are well established. An applicant must show that there are exceptional circumstances that warrant divergence. On a balance of probabilities, it must further establish (i) that it will face irreparable harm if the order is not enforced despite the possibility of it being overturned on appeal; and (ii) that the respondents will not suffer irreparable harm by virtue of the court deciding that the order appealed against is not being suspended.[25] In considering whether exceptional circumstances are present, a court will have regard to the prospects of success in the appeal. The stronger the prospects, the less inclined a court will be to accept the notion that there is a truly exceptional basis on which to deviate from the rule that the order is suspended on appeal.[26]

[33] In *University of the Free State v Afriforum ('UFS'),* the Supreme Court of Appeal confirmed that the existence of exceptional circumstances must be fact-specific and *'be derived from the actual predicaments in which the given litigants find themselves'.* It further confirmed that a court may take into account a party's prospects of success on appeal when considering whether to grant enforcement relief.[27]

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[25] *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* 2014 (3) SA 189 (GJ) para 16, cited with approval in *Ntlemeza v Helen Suzman Foundation and another* 2017 (5) SA 402 (SCA) para 36.
[26] *University of the Free State v Afriforum and another* 2018 (3) SA 428 (SCA) para 15.
[27] Ibid paras 13 and 15 referring with approval to *The Minister of Social Development Western Cape & others v Justice Alliance of South Africa & another* [2016] ZAWCHA 34.

[34] In the most recent judgment of the Supreme Court of Appeal on the issue, *Tyte Security Services CC v Western Cape Provincial Government and Others,* Ponnan JA took the following approach:[28]

> *'[16] The overarching enquiry is whether or not exceptional circumstances subsist. To that end, the presence or absence of irreparable harm, as the case may be, may well be subsumed under the overarching exceptional circumstances enquiry. As long as a court is alive to the duty cast upon it by the legislature to enquire into, and satisfy itself in respect of, exceptional circumstances, as also irreparable harm, it does not have to do so in a formulaic or hierarchical fashion.*
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> *[17] Although it has been postulated that the second and third are distinct and discrete enquiries, they are perhaps more accurately to be understood as being two sides of the same coin. The same facts and circumstances, which by that stage ought largely to be either common cause or undisputed, will inform both enquiries. The logical corollary of an applicant suffering irreparable harm will invariably – but not always – be that the other party has not. The enquiry into each can thus hardly be mutually exclusive, particularly because, as far as the third is concerned, unlike the second, the onus cast upon an applicant would be to prove a negative, in accordance with the usual civil standard. This suggests that, as with the exceptional circumstances enquiry, a court considering both the second and third must have regard to all of the facts and circumstances in any particular case. Insofar as the third goes, although s 18(3) casts the onus (which does not shift) upon an applicant, a respondent may well attract something in the nature of an evidentiary burden. This would be especially so where the facts relevant to the third are peculiarly within the knowledge of the respondent. In that event it will perhaps fall to the respondent to raise those facts in an answering affidavit to the s 18 application, which may invite a response from the applicant by way of a replying affidavit'.*

[28] *Tyte Security Services CC v Western Cape Provincial Government and Others* 2024 (6) SA 175 (SCA) paras 14-15.

[35] The respondents placed reliance on *Incubeta*[29] in emphasising the need for two distinctive findings in relation to harm. The approach in *Tyte Security* is instructive and proposes a more holistic approach.

[36] Exceptional circumstances envisage something out of the ordinary and unusual, which must be established as a matter of fact.[30] The applicant contended that exceptional circumstances exist, given that the application concerns matters of life and death and the order sought goes no further than what the respondents' constitutional requirements require of them. The respondents contended the contrary. They submitted that there were no exceptional circumstances present and that implementation of the said orders would frustrate the appeal process and the rights of the respondents, rendering the entire process nugatory and useless. It was submitted that the relief presently under consideration could be granted after the appeal process was finalised.

[37] In assessing exceptional circumstances, a court will also have regard, as best as it is able in the given case, to the applicant's prospects of success in the pending or prospective appeal'.[31] The respondents argued that, as leave to appeal had been granted in their favour, they enjoyed strong prospects of success. The relevant principle was stated thus in *Justice Alliance*[32], approved in *UFS:*

> '*The less sanguine a court seized of an application in terms of s18(3) is about the prospects of the judgment at first instance being upheld on appeal, the less inclined it will be to grant the exceptional remedy of execution of that judgment pending the appeal. The same quite obviously applies in respect of a court dealing with an appeal against an order granted in terms of s 18(3)*'.

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[29] Para 24
[30] *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* 2014 (3) SA 189 (GJ) para 16, cited with approval in *Ntlemeza* supra para 36.
[31] *UFS* supra, paras 14 and 15; referring with approval to *The Minister of Social Development Western Cape & others v Justice Alliance of South Africa & another* [2016] ZAWCHA 34.
[32] Ibid.

[38] Considering the architecture of s 18(1), which refers to the operation and execution of a decision that is the *'subject of an application for leave to appeal or appeal'*, it is thus one of the jurisdictional facts which must be present before an enforcement order may be sought.[33] It envisages a situation where enforcement may be sought also in proceedings which are the subject matter of an appeal, put differently, where leave to appeal has been granted. That fact that leave to appeal has been granted is thus not destructive of an application to enforce, nor does it weigh against the granting of relief. It is a neutral fact and a consideration of the prospects of success on appeal should still be considered, if the facts permit it. In the present instance, the record of the proceedings which culminated in the Van Nieuwenhuizen AJ order were not placed before the court nor referred to, to enable this court to fully gauge the prospects of success of appeal.

[39] It must be accepted that the appeal has some prospects of success. However, the respondents' contention that those prospects are strong, is an overstatement. The issues raised by the respondents are primarily of a technical nature, including urgency and other procedural issues. In the main application, as in the present one, the respondents' papers significantly fail to grapple meaningfully and comprehensively with the very issues and complaints raised by the applicant in relation to the present status of the cancer patients who are on the backlog list. Their denial of the existence of a backlog list which has not been updated and the conflation thereof with the limited treatment lists relied on, fails to address the very question which lies at the heart of the legal proceedings.

[40] As held in *Matinyarare*,[34] a party must expect to suffer harm of a kind that is ordinarily associated with the appellate process taking its course, without interim redress. But harm that is out of the ordinary requires intervention. Where a party runs the real risk of irreparable damage as exists here in relation to the vulnerable cancer patients on the

[33] *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) para 26-31.
[34] *Matinyarare and Another v Innscor Africa and Another* [2024] ZAGPJHC 945.

backlog list, this constitutes an exceptional circumstance in addition to representing irreparable harm.[35]

[41] Given all the facts, I am satisfied that the applicant has illustrated exceptional circumstances, given the plight of the vulnerable patients on the backlog list, some of whom have been awaiting treatment for many years. It was not strenuously disputed that delay in providing treatment has significant consequences for these patients and that it is imperative that such patients receive radiation treatment timeously. An important consideration is that irrespective of the ultimate outcome of the appeal and whether it is successful or not, enforcement of paragraphs 5 to 7 of the order would oblige the respondents to do no more than comply with their undisputable constitutional obligations under s 27 of the Constitution.

[42] Turning to the factual questions concerning harm, the holistic approach adopted in *Tyte Security* is apposite. Given that various material facts are almost exclusively within the respondents' knowledge, this is one of those instances where the respondents would attract an evidentiary burden. Yet the respondents' papers are substantially lacking when it comes to the presentation of those material and salient facts and in addressing the core issue being the determination of the true extent of the crisis pertaining to the provision of radiation oncology treatment to the vulnerable cancer patients.

[43] In sum, the applicant's case is that the health of the cancer patients on the backlog list continues to deteriorate with life threatening consequences and that the present application concerns life and death issues. It is beyond dispute that those patients face irreversible and permanent harm, with wider implications for their families and loved ones. Undoubtedly it also has implications for the wider public as the issue involves the public health care system and the burdens its failures place on society. It was not disputed that the backlog list, comprising of some 3000 patients, continues to grow and that absent

[35] Ibid, para 38.

radiation oncology treatment, the cancer patients who are on the backlog list face the inevitable risk of early death.

[44] Given the facts, the true extent of the crisis remains unknown. The respondents rely on dynamic waiting lists, reflecting patients who are receiving treatment at the hospitals at a specific moment in time. The applicants refer to a more comprehensive backlog list reflecting all patients who are awaiting radiation oncology treatment. It is unclear whether any of those cancer patients on the backlog list are receiving the necessary treatment. This backlog has resulted in cancer patients not being provided with radiation and oncology treatments within the treatment windows required for such lifesaving case by the respondents. Any subsequent enforcement of the order would add to the time delay, inevitably resulting in dire consequences for those patients on the backlog list who have not received timeous treatment. Actual irreparable harm has already eventuated in that certain of the patients on the backlog list have already passed away or cancer has metastasised, rendering such patients ineligible for oncology radiation treatment. Such harm continues to occur and is reasonably apprehended.

[45] According to the respondents, the applicant's case rests on speculation and not on fact. Given that the material facts are within the respondents' knowledge it could reasonably be expected of the respondents to provide them. That is lacking. There is no countervailing evidence presented to gainsay the factual averments made by the applicants. Given the circumstances, it does not avail the respondents to accuse the applicant of speculation. Considering the facts and the probabilities, irreparable harm to the cancer patients who do not timeously receive radiation oncology treatment and their risk of deteriorating health and even death is real. It is not a matter of speculation.

[46] The respondents' broad contention that there is no irreparable harm as the cancer patients are currently receiving the necessary medical attention, is not substantiated by the facts. Considering the number of patients on the backlog list relied on by the applicant whilst compared to the limited number of patients reflected on the lists relied on by the respondents, the numbers simply do not add up. A substantial number of cancer patients,

in fact the majority, remain unaccounted for. The respondents' arguments further disregards that the applicant is not acting in its own interests but in the public interest and specifically in the interests of the cancer patients on the backlog list. The suggestion that those patients' needs can be suitably addressed once the appeal process has been finalised is fanciful and unrealistic.

[47] The applicant's case is compelling. I am persuaded that the applicant has established on a balance of probabilities that the cancer patients on the backlog list would suffer irreparable harm if relief is not granted and that it has done so with reference to an actual predicament rather than a theoretical one. The stance adopted by the respondents makes it clear that it will not have regard to the backlog lists. Rather they are focusing on the waiting lists emanating from the hospitals. There is no indication from the respondents that they will in any way take steps to ensure timeous treatment for the vulnerable category of patients on the backlog list.

[48] I turn to the position of the respondents. The applicant submitted that there would be no irreparable harm suffered by the respondents if an enforcement order is granted, given that the respondents would be obliged to do no more than what is constitutionally required of them.

[49] The respondents in turn submitted that they would suffer irreparable harm as '*it is possible that significant and scarce public resources and time will be committed to comply with the orders to as far as they relate to the provision of the report of the steps taken by the respondents to provide radiation oncology treatment to cancer patients and updating the waiting list*.' It is further contended that the respondents are entitled in terms of s 34 of the Constitution to have the appeal adjudicated in a proper manner without frustrating the appeal process and rendering its outcome almost redundant. They submitted that their constitutional right associated with a fair appeal proceeding was likely to be irredeemably harmed, if an order was granted. It was submitted that there was no allegation by the applicant capable of showing that the respondents would not suffer irreparable harm. According to the respondents, there would be no significant harm

suffered by the cancer patients who could never suffer harm if the lists and reports were not provided.

[50] Respondents rely on *Knoop*[36] in arguing that 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. Given that each case is fact specific, it must be considered whether there is any potential to cause enormous harm if paragraphs 5, 6 and 7 of the order are enforced until the appeal process has been finalised.

[51] Considering the facts of this matter and the probabilities, the respondents' arguments lack merit. Their contentions of irreparable harm lack cogency. No irreparable harm to the respondents' appeal rights would follow if the order is enforced in the interim and the appeal would not be rendered nugatory or redundant. The respondents' constitutional duties necessarily include taking necessary steps to provide radiation oncology services to patients who require them, including the patients on the backlog list and matters ancillary thereto.[37] Those remain, irrespective of the outcome of the respondents' appeal.

[52] Updating the backlog list is admittedly an administrative process. So is the provision of a report.[38] Providing a report would do no more than document the steps which the respondents are constitutionally obliged to undertake and would provide some transparency to the process. The need to appreciate the full extent of the crisis and how many patients actually require time sensitive radiation oncology treatment is manifest, so that vulnerable cancer patients do not slip through the cracks of the public healthcare system. Time and effort expended on performing such administrative tasks can hardly constitute substantial prejudice or cause irreparable harm to the respondents.

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[36] *Knoop NO and another v Gupta (execution)* 2021 (3) SA 135 (SCA) para 1.
[37] As envisaged in paragraph 6 of the order of Van Nieuwenhuizen AJ.
[38] As envisaged in paragraphs 5 and 7 of the order of Van Nieuwenhuizen AJ.

[53] On the available facts the respondents would not face the threat of irreparable harm if an enforcement order is granted, given their constitutional obligations to provide access to healthcare services in terms of s 27 of the Constitution. This includes, *inter alia,* the provision of radiation oncology treatment for cancer patients on the backlog list. It is undisputed that financial resources are available to do so. An enforcement order would do no more than direct compliance with such obligations and ensure transparency and accountability as is required from public functionaries such as the respondents. It is undisputed that the respondents took no meaningful action to comply with the order. In my view, the applicant has also established on a balance of probability that the respondent will not suffer irreparable harm if an enforcement order is granted.

[54] Adopting the approach in *Tyte Security* and considering all the facts and circumstances of this case, I conclude that the applicant has on a balance of probabilities established the existence of exceptional circumstances, that it would suffer irreparable harm if relief is not granted and that the respondents would suffer no irreparable harm if relief is granted.

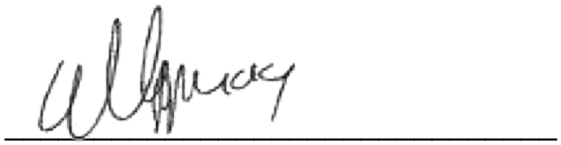
[55] For the reasons advanced, the applicant is entitled to an order that the operation of paragraphs 5, 6 and 7 of the order are not suspended under s 18(1) and (3) in accordance with the alternative relief sought. To direct otherwise may well be the death knell for many vulnerable cancer patients on the backlog list who have been waiting for years for life saving treatment. They do not have the luxury of time. Although the notice of motion is cast in wider terms, the applicant's case is predicated on the interim enforcement of paragraphs 5, 6 and 7 of the order. There is no reason to deviate from the normal principle that costs follow the result. Given the complexities involved, the costs of two counsel on scale C is warranted.

[56] I grant the following order:

[1] The matter is heard as one of urgency in terms of rule 6(12) and the forms and service provided for in the rules are dispensed with to the extent necessary.

[2] In accordance with s 18(1) and s 18(3) of the Superior Courts Act 10 of 2013, it is directed that the operation and execution of paragraphs 5, 6 and 7 of the judgment and order of Van Nieuwenhuizen AJ handed down under case number 2024 – 071038 on 27 March 2025 is not suspended pending any decision on the respondents' appeal to the Supreme Court of Appeal against the judgment and order and the determination of any appeal that may be launched pursuant thereto to the Constitutional Court.

[3] The first, second, seventh and eighth respondents are directed to pay the costs of the application, including the costs of two counsel on Scale C.



EF DIPPENAAR
JUDGE OF THE HIGH COURT
GAUTENG JOHANNESBURG

HEARING

DATE OF HEARING	: 07 AUGUST 2025
DATE OF JUDGMENT	: 20 AUGUST 2025

APPEARANCES

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