CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 91/15

In the matter between:

PROVINCIAL GOVERNMENT: NORTH WEST PROVINCE	First Applicant
DIRECTOR GENERAL: OFFICE OF THE PREMIER	Second Applicant
and	
TSOGA DEVELOPERS CC	First Respondent
WANDILE BOZWANA	Second Respondent
HANNES PEYPER INCORPORATED	Third Respondent
SHERIFF OF THE HIGH COURT: MAHIKENG	Fourth Respondent
HEAD OF DEPARTMENT: NORTH WEST DEPARTMENT OF PUBLIC WORKS	Fifth Respondent
HEAD OF DEPARTMENT: NORTH WEST DEPARTMENT OF HEALTH	Sixth Respondent
HEAD OF DEPARTMENT: NORTH WEST DEPARTMENT OF FINANCE	Seventh Respondent

Neutral citation: *Provincial Government: North West Province and Another v Tsoga Developers CC and Others* [2016] ZACC 9

Coram:	Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J, Van der Westhuizen J, Wallis AJ and Zondo J
Judgment:	Madlanga J (unanimous)
Heard on:	29 September 2015
Decided on:	24 March 2016

ORDER

On application for leave to appeal the decision of the High Court of South Africa, North West Division, Mahikeng (Djaje AJ):

1. Condonation of the late filing of the applicants' written submissions is granted.
2. Leave to appeal is refused.
3. The applicants must pay the costs of the first and third respondents, including costs of two counsel.

JUDGMENT

MADLANGA J (Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Matojane AJ, Nkabinde J, Van der Westhuizen J, Wallis AJ and Zondo J concurring):

Introduction

[1] This is an application for leave to appeal directly to this Court against the refusal of interim relief by the North West Division of the High Court (High Court).[1] At the centre of the dispute is the lawfulness of a writ of execution. The writ flowed from an order granted pursuant to a settlement agreement (settlement order). The writ was issued in favour of the first respondent, Tsoga Developers CC (Tsoga), against the Department of Public Works of the North West Province (Department of Public Works). An amount of R30 476 839.71, held in a bank account in the name of the Department of Public Works, was attached in terms of the writ. The applicants, the Provincial Government: North West Province and the Director-General: Office of the Premier, North West Province, brought a two-part application before the High Court. In Part A – brought on an urgent basis – they asked for interim relief that the execution process be halted pending finalisation of Part B, which was not urgent. It is this interim relief that Djaje AJ refused.

[2] Argument on the Part B relief was heard on 29 October 2015. The High Court has reserved judgment. The Part B relief has more than one prong. In the main,[2] the applicants are asking for (a) the review and setting aside of the settlement agreement that was the basis of the settlement order and (b) a declarator that the writ is unlawful.

[3] After interim relief had been refused, the attached sum of R30 476 839.71 was paid over to the third respondent, Hannes Peyper Incorporated, who are Tsoga's attorneys of record.[3] As a result, before us the interim relief has morphed and – subject to leave to appeal being granted – the applicants are asking us to order the repayment of the R30 476 839.71 pending finalisation of the Part B proceedings. In part, this relief is based on section 3(10) of the State Liability Act.[4]

[1] *Provincial Government: North West and Another v Tsoga Developers CC and Others* [2015] ZANWHC 36 (Djaje AJ judgment).

[2] The applicants filed a multi-prayer notice of motion. I do not set out all its details, but merely capture what I see as its essence.

[3] The firm of attorneys was not a respondent before the High Court.

[4] 20 of 1957. Section 3(10) provides:

Background

[4] In July 2008, the Department of Public Works awarded a tender for the construction of the Brits Hospital to a joint venture formed by Tsoga and Ilima (Pty) Ltd (Ilima). Applicants for the tender had to have a Construction Industry Development Board (CIDB) contractor grading certificate of at least 9GB.[5] Tsoga was graded 2GB and Ilima was graded 9GB. This gave the joint venture a grading of 11GB. A building contract was subsequently concluded in the sum of R456 548 505 between the joint venture and the Department of Public Works.

[5] The agreement stipulated that in the event of either of the parties to the joint venture becoming insolvent, the Department of Public Works was entitled to terminate the contract. In August 2009, Ilima was liquidated on account of insolvency. Following litigation between Tsoga and Ilima, a court settlement was concluded allowing Tsoga to continue with the construction contract. Although the Department of Public Works was informed of Ilima's insolvency in October 2009, it did not terminate the contract immediately.

[6] There is some detail on: payment certificates that Tsoga issued in the name of the joint venture subsequent to the liquidation of Ilima; the odd payment by the Department of Public Works; pressure brought to bear by senior officials of the Department of Public Works and the then Premier on officials of the North West

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"(a) A party having a direct and material interest may, before the attached movable property is sold in execution of the judgment debt, apply to the court which granted the order, for a stay on grounds that the execution of the attached movable property—

(i) would severely disrupt service delivery, threaten life or put the security of the public at risk; or

(ii) is not in the interests of justice.

(b) If an application referred to in paragraph (a) is brought by the department concerned, the application must contain a list of movable property and the location thereof, compiled by the department concerned, that may be attached and sold in execution of the judgment debt.

(c) Notice of an application in terms of paragraph (a) must be given to the judgment creditor and sheriff concerned."

[5] The CIDB awards "General Building" – abbreviated "GB" – grading certificates to contractors.

Department of Health to make certain payments to Tsoga;[6] and an unwavering refusal by the officials of the Department of Health to bow to the pressure. I need not get into this detail. Suffice it to say that progress on site was unsatisfactory.

[7] Agitation by the Brits community, who were anxious that construction of the hospital be completed without delay, caused the national Minister of Health to intervene. As a result, a contract was concluded with another entity to take over construction. The Department of Public Works was forced to terminate the contract with the joint venture. It then found itself in a predicament. Tsoga – claiming to rely on a lien – refused to leave the site. Tsoga's stance was that the cancellation amounted to a repudiation. And it claimed that it had suffered damages in the amount of R30 647 381.91. Negotiations resulted in the Department of Public Works making a written settlement offer in an amount of R22 608 794.39, which Tsoga accepted. Tsoga vacated the site. The newly appointed entity continued with construction, which it completed in due course.

[8] In the event, the Department of Public Works failed to make payment to Tsoga. Tsoga instituted proceedings in the High Court to enforce the agreement. The matter came before Leeuw JP on 16 May 2013. A settlement was concluded which, by consent, was made an order of Court.[7] The Department of Public Works was ordered to pay the R22 608 794.39 plus VAT, together with interest at 15.5% per annum from 30 July 2010 and costs.

[9] In March 2014, the Department of Public Works brought an application for rescission of the settlement order on the basis that the settlement agreement on which it was premised was fraudulent and that the Department of Public Works' legal representatives did not have a mandate to settle the matter. The application was

[6] Although the contractual obligation to pay rested on the Department of Public Works, apparently this Department would get monies for payment from the Department of Health.

[7] This is the settlement order referred to at [1] above.

dismissed by Hendricks J.[8] An application for leave to appeal the dismissal was later withdrawn. Thus the settlement order stands.

[10] The Registrar of the High Court issued a writ (first writ) in September 2014 for the attachment of the Department of Public Works' motor vehicles. The Sheriff of the High Court attached and removed 44 vehicles belonging to the Department. Apparently, this led to another agreement between the Department of Public Works and Tsoga, which was concluded in November 2014. In terms of this agreement, the Department of Public Works acknowledged that it was indebted to Tsoga in an amount of R47 002 201.57. In their High Court affidavits the applicants claim that this amount is "inexplicable". It is understandable why the amount would have escalated to this extent. On 16 May 2013 the judgment debt was pronounced as R22 608 794.39 attracting interest at the rate of 15.5% per annum from 30 July 2010. Unsurprisingly, interest at that rate on so huge an amount over so long a period would amount to quite a lot. Added to this were costs awarded against the Department of Public Works. Surely then, this demystifies any confusion there might have been about the figure of R47 002 201.57.[9]

[11] Under the November 2014 agreement R20 million was payable immediately and the balance was to be paid by 28 February 2015. The Department of Public Works paid the R20 million. The end of February 2015 came and went without the outstanding balance being paid. During March 2015, at the instance of Tsoga, the

[8] *Mokgothi Samuel Thobakgale, NO and Another v Tsoga Developers CC and Others* [2014] ZANWHC 9.

[9] The detail to be gleaned from the agreement itself is as follows:

- R22 608 794.36 being the agreed capital amount;
- R3 165 231.21 being VAT;
- R3 994 973.86 being interest at 15.5% per annum from 1 August 2010 until 30 July 2011;
- R4 614 194.93 being interest at 15.5% per annum from 1 August 2011 until 30 July 2012;
- R5 329 395.14 being interest at 15.5% per annum from 1 August 2012 until 30 July 2013;
- R6 155 451.38 being interest at 15.5% per annum from 1 August 2013 until 30 July 2014;
- R1 164 160.69 being interest at 9% per annum from 1 August 2014 to 11 November 2014.

The agreement states the total amount based on the above calculations to be R47 002 201.57. This appears to be mathematically incorrect, but I will accept this as the total based on the parties' agreement. After the Department of Public Works effected payment in the amount of R20 million on 12 November 2014, the outstanding balance was R27 002 201.57.

writ for the attachment of the R30 476 839.71 (second writ)[10] was issued by the Assistant Registrar of the High Court. The second writ instructed the Sheriff to attach a "bank account of the Department of Public Works . . . in the amount of R30 476 839.71 due and payable in terms of a court order dated 16 May 2013". The Sheriff acted on the writ. And this is the amount now held in trust by Hannes Peyper Incorporated.

[12] The applicants approached the High Court on an urgent basis seeking the relief set out in paragraph 1 above. The applicants also raised the issue of a claim for R8.8 million that they say is yet to be instituted against Tsoga. It was said to arise from damages suffered by the Department of Public Works when the entity that took over from Tsoga on site had to perform corrective work in respect of alleged malperformance by Tsoga. The applicants asked that execution of the order of 16 May 2013 be stayed pending the determination of this claim.

[13] In those proceedings they lumped together six respondents, half of whom are the North West Province's own Heads of Departments, namely, the Head of Department: Department of Public Works,[11] the Head of Department: Department of Health[12] and the Head of Department: Department of Finance.[13]

[14] In refusing interim relief, the High Court held that the applicants lacked standing, had not shown that the balance of convenience favoured them, nor had they proved irreparable harm.

[10] This is the writ referred to at [1] above.

[11] Before us this is the fifth respondent, the fourth respondent before the High Court.

[12] In this Court this is the sixth respondent, the fifth respondent before the High Court.

[13] Here this is the seventh respondent, the sixth respondent before the High Court. For completeness, the second respondent was Mr Wandile Bozwana, cited by the applicants as the "purported representative of [Tsoga]". He is reported to have been murdered a few days after the hearing before this Court. Because no suggestion of conduct by him in his personal capacity has been made and, therefore, no relief can appropriately be sought against him, no issues of substitution arise. The last respondent is the Sheriff of the High Court, Mahikeng, who is the fourth respondent before us and was the third respondent before the High Court.

Leave to appeal

[15] The applicants contend that they are entitled to the return of the R30 476 839.71 for a number of reasons. First, they claim that the second writ is invalid, as it was not issued in accordance with the requirements of the State Liability Act. In this respect, they aver that the writ was issued without the settlement order having been served by Tsoga on the provincial treasury in terms of section 3(4) of the State Liability Act.[14] Second, they argue that they have satisfied the requirements for the grant of interim relief. Third, they contend that the attachment of a government bank account and the resultant transfer of funds from it constitute a withdrawal from the Provincial Revenue Fund which is proscribed by section 226 of the Constitution.[15]

[16] In substantiating this revenue fund argument, the applicants submit that the attachment and transfer of funds were in contravention of section 226(2). The substratum of this contention is that the bank account was, in fact, part of the Provincial Revenue Fund. This, despite indications that the attached amount was in an account held by the Department of Public Works.[16]

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[14] Section 3(4) of the State Liability Act provides:

> "If a final court order against a department for the payment of money is not satisfied within 30 days of the date of the order becoming final as provided for in subsection (3)(a)(i) or the time period agreed upon as provided for in subsection (3)(a)(ii), the judgment creditor may serve the court order in terms of the applicable Rules of Court on the executive authority and accounting officer of the department concerned, the State Attorney or attorney of record appearing on behalf of the department concerned and the relevant treasury."

[15] Section 226 of the Constitution provides:

> "(1) There is a Provincial Revenue Fund for each province into which all money received by the provincial government must be paid, except money reasonably excluded by an Act of Parliament.
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> (2) Money may be withdrawn from a Provincial Revenue Fund only—
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> (a) in terms of an appropriation by a provincial Act; or
>
> (b) as a direct charge against the Provincial Revenue Fund, when it is provided for in the Constitution or a provincial Act."

[16] See the wording of the writ, which says:

> "You are hereby directed to attach and take into execution . . . the right, title, and interest in and to the bank account of the Department of Public Works, Roads and Transport: North West Provincial Government, the respondent . . . held at First National Bank, Batho Pele with account number 622 5840 2917 in the amount of R30 476 839.71 due and payable in terms of a court order dated 16 May 2013."

[17] The basis of the applicants' contention seems to be regulation 15.2 of the Regulations[17] made under the Public Finance Management Act (PFMA).[18] This regulation provides that each Provincial Revenue Fund must have a bank account configuration that consists of at least an Exchequer bank account and a Paymaster-General bank account. If a department requires a separate bank account, the relevant treasury may approve one sub-account within the Paymaster-General account of the relevant revenue fund. The subaccount remains an integral part of the bank account configuration of the relevant revenue fund. This part of the Regulations appears to get its force from sections 7(1) and 21(3) of the PFMA.[19]

[18] The argument continues that section 226(2) permits withdrawals from the Provincial Revenue Fund – including the Paymaster-General account – only "(a) in terms of an appropriation by a provincial Act; or (b) as a direct charge against the Provincial Revenue Fund when it is provided for in the Constitution or a provincial Act". The applicants point out that in *Golden Arrow*[20] the Supreme Court of Appeal cast doubt on whether a judgment sounding in money constitutes a "direct charge" against the Provincial Revenue Fund. The attachment and transfer of funds do not fall under either of the permitted forms of withdrawal and are invalid, concludes the submission.

The applicants have not suggested that the attached and transferred funds were not in an account held by the Department of Public Works.

[17] Treasury Regulations for departments, trading entities, constitutional institutions and public entities, GN R225 *GG* 27388, 15 March 2005.

[18] 1 of 1999.

[19] Section 7(1) provides:

> "The National Treasury must prescribe a framework within which departments, public entities listed in Schedule 3 and constitutional institutions must conduct their cash management."

Section 21(3) provides:

> "A provincial treasury must establish appropriate and effective cash management and banking arrangements for its Provincial Revenue Fund in accordance with the framework that must be prescribed in terms of section 7."

In terms of section 1, the definition section in the PFMA, "prescribe" means "prescribe by regulation".

[20] *Minister of Finance v Golden Arrow Bus Services (Pty) Ltd* [2009] ZASCA 174; 2010 (2) All SA 237 (SCA) at para 14.

[19] What guides us on whether to entertain a direct appeal is section 167(6)(b) of the Constitution. Section 167(6) provides:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
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> (a) to bring a matter directly to the Constitutional Court; or
>
> (b) to appeal directly to the Constitutional Court from any other court."

In essence, interests of justice are paramount in deciding whether to accept a direct appeal. This is true of direct appeals brought either on an urgent basis or in the normal course.

[20] Two issues that warrant being disposed of at the outset, without considering their merits and demerits, are the revenue fund argument and the validity of the first writ in terms of which the Department of Public Works' motor vehicles were attached. It is not in the interests of justice to entertain them.

[21] The revenue fund argument raises complex issues, some of which have serious implications. For example, does "withdrawn" in section 226(2) imply that an attachment of State monies in a revenue fund – whether national or provincial – in satisfaction of a judgment debt is subject to the strictures of section 226(2)? Put differently, is an attachment a "withdrawal" at all? The argument presented on this aspect was minimal.

[22] Another question is whether – in view of the applicants' argument set out in paragraph 18 above – a judgment sounding in money is a direct charge against a Provincial Revenue Fund as envisaged in section 226(2)(b). But this question is ancillary to the first.

[23] Not unmindful of the provisions of sections 7 and 21 of the PFMA and regulation 15.2,[21] the question arises whether – once monies are sitting in an account held by a government department – they have not, in fact, been appropriated to that department as envisaged in section 226(2)(a).[22] If they have been, can their attachment amount to a contravention of this section? If – in accordance with section 226(2) – "appropriate" includes the transfer of monies from a Provincial Revenue Fund to an account held by a department, can that understanding be trumped by the provisions of sections 7 and 21 of the PFMA and regulation 15.2?

[24] Section 3(3)(b)(ii) of the State Liability Act makes specific reference to funds appropriated to a department. This section provides that payment of a judgment debt by the accounting officer of a department "must be charged against the *appropriated budget of the department concerned*".[23] If payment is expected to be from an "appropriated" budget, how is it that funds held under that same budget are somehow no longer "appropriated" and thus no longer available for attachment, as the applicants appear to contend?

[25] Further, does the scheme of the State Liability Act permit the attachment of State monies at all in terms of section 3(6)? States do go bankrupt, their major creditors often being international entities, and sometimes other States. At times – through sovereign default[24] – they may not honour their financial obligations.

[21] In respect of both, see [17] accept above.

[22] Annually, at both national and provincial level, an Appropriation Act is passed by the relevant legislature. The purpose of this Act is to provide for the appropriation of money from the relevant revenue fund for the financial requirements of the State as well as to provide for incidental matters. During argument, no reference was made to this legislation which is a matter of public record and has to be passed before any department can spend anything. The fact that this was not dealt with strengthens the point that it is not in the interests of justice to grant leave in respect of the section 226 argument.

[23] Emphasis added.

[24] Sovereign default refers to the failure of a sovereign state to pay its debts as they come due. This often occurs in the context of political or economic turmoil; the 2010 Euro zone crisis provides one recent example, as Greece, Ireland and Portugal sought to stave off sovereign default by seeking help from their creditors. Because there is no universal sovereign insolvency regime, the options available to the struggling state will vary, with creditors likely to impose strict conditions for any debt relief or debt restructuring. See Tirado "Sovereign Insolvency in the Euro Zone Public and Private Law Remedies" (2012) 28 *Annual Review of Insolvency Law* and Mushell "The Weight of the World on its Shoulders: How US-Style Reform at the IMF Can Ease the Global Sovereign Debt Crisis" (2016) 31 *Journal of International Banking Law and Regulation* 151.

Should that happen to South Africa, must it be taken to have laid itself wide open for its monies – possibly all its monies where huge debts are involved – to be attached by these international creditors, bringing the State to a grinding halt? But then, as section 3(6) of the State Liability Act undoubtedly sanctions the attachment of movables like motor vehicles, machinery, office furniture, computers and other office equipment and fittings, the effect might well be the same if an international creditor owed vast sums of money were to attach virtually all these categories of the State's movable assets. The question then is: is there much in seeking to draw a distinction between sanctioning the attachment of State monies, on the one hand, and movables other than money, on the other? What is the position in other jurisdictions? How comparable are their laws on this to ours?

[26] Some of these questions may not be that difficult to answer. But others definitely do not admit of easy resolution. I am not comfortable that we have enough before us to grapple with them meaningfully. This applies even in respect of those questions that are not necessarily too complex. Nor, for reasons that now emerge, are these proceedings apposite for their resolution. Accordingly, it is not in the interests of justice to pronounce on them. This is more so now that the Part B relief has been argued before the High Court and judgment is awaited.

[27] The first writ should not detain us. That is so because, from the papers, it is plain that what precipitated these proceedings was the attachment of the R30 476 839.71, not the motor vehicles. In argument before us, Tsoga said the Department of Public Works is at liberty to take back the motor vehicles and that the keys are with the Department. In addition, the Department of Public Works had previously been advised as much. The applicants did not suggest that there would be any difficulty in collecting the motor vehicles. I do not consider it in the interests of justice for us to deal with this aspect of the case as it is as good as settled between the parties. Any insistence that we should would border on trifling with this Court. In fact, it passes more than strange that the applicants, who portray themselves as being

concerned with service delivery, have not recovered the motor vehicles, which are obviously necessary tools in service delivery.

Jurisdiction

[28] If we are not to deal with the revenue fund argument, do we still have jurisdiction? The alleged non-compliance with section 3(4) of the State Liability Act raises a constitutional issue related to the principle of legality and thus, the rule of law. The reason is that the Registrar of the High Court has power to issue a writ against movable property owned by the State only in compliance with the provisions of the State Liability Act. Issuing a writ in contravention of the provisions of this Act – as is the allegation here – implicates the principle of legality.

[29] The exercise of all public power – which the issuing of a writ is – must be in accordance with the law. As Chaskalson P, Goldstone J and O'Regan J held in *Fedsure Life Assurance*, organs of state "may exercise no power and perform no function beyond that conferred upon them by law".[25] This was echoed in *Pharmaceutical Manufacturers,*[26] *Affordable Medicines Trust*[27] and *Masetlha*.[28] This

[25] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 58.

[26] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 19.

[27] *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 49.

[28] *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at para 173, where Ngcobo J said:

> "Another source of constraint on the exercise of public power is the rule of law which is one of the foundational values of our constitutional democracy. The rule of law principle requires that the actions of all those who exercise public power must comply with the law, including the Constitution. It is central to the conception of our constitutional order that those who exercise public power including the President, are constrained by the principle that they may exercise only those powers and perform only those functions which are conferred upon them by the law. Their sole claim to the exercise of lawful authority rests in the powers allocated to them under the law. The common law principle of ultra vires is now underpinned by the constitutional doctrine of legality which is an aspect of the rule of law. Thus what would have been ultra vires under the common law by reason of a public official exceeding a statutory power is now invalid according to the doctrine of legality." (Footnotes omitted.)

issue concerns the possible violation of the principle of legality and the rule of law. That is an issue that is clearly within this Court's jurisdiction.

Interests of justice

[30] This Court has a "wide appellate jurisdiction" to determine appeals from any court provided it is in the interests of justice so to do.[29] This includes appeals against refusals of interim relief in cases where "the interests of justice so demand".[30] But this Court will entertain appeals against interim relief only in exceptional circumstances.[31] This is especially so in matters brought to it on an urgent basis.[32]

[31] It must be tempting to many litigants in pending review proceedings who believe themselves to have strong or unanswerable law points pertaining to interim relief to appeal directly to this Court and skip the perceived inconvenience of first going to the Full Court and the Supreme Court of Appeal. There must be countless cases of that nature. If we were not to be strict and, instead, readily allow direct appeals in matters involving interim relief, we would soon face an impossible deluge. Other appellate courts may minimise this deluge. In addition, these courts exist for a laudable purpose within our court hierarchy. Without doubt, this Court only stands to benefit from their views. This is especially so now that our jurisdiction is no longer restricted to constitutional matters.[33] Pronouncements by the other appellate courts, in

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[29] *South African Informal Traders Forum and Others v City of Johannesburg and Others* [2014] ZACC 8; 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC) (*Informal Traders*) at para 17.

[30] Id.

[31] Id.

[32] Id at paras 18-9.

[33] Section 167(3) of the Constitution, which was amended by the Constitution Seventeenth Amendment Act of 2012, now reads:

> "The Constitutional Court—
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> (a) is the highest Court of the Republic; and
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> (b) may decide—
>
> (i) constitutional matters, and issues connected with decisions on constitutional matters; and
>
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general

particular the Supreme Court of Appeal, will undoubtedly help enrich this Court's jurisprudence. In a slightly different but relevant context, this Court in *Amod* held:

> "When a constitutional matter is one which turns on the direct application of the Constitution and which does not involve the development of the common law, considerations of costs and time may make it desirable that the appeal be brought directly to this Court. But when the constitutional matter involves the development of the common law, the position is different. The Supreme Court of Appeal has jurisdiction to develop the common law in all matters including constitutional matters. Because of the breadth of its jurisdiction and its expertise in the common law, its views as to whether the common law should or should not be developed in a 'constitutional matter' are of particular importance. Assuming, as Mr Omar contends, that this Court's jurisdiction to develop the common law in constitutional matters is no different to that of the Supreme Court of Appeal, it is a jurisdiction which ought not ordinarily to be exercised without the matter having first been dealt with by the Supreme Court of Appeal."[34]

[32] There are also practical considerations why – unless circumstances are exceptional – litigants must be discouraged from rushing directly to this Court. In *African National Congress*, it was held that "this court is not suited to hear urgent matters, because of its composition and functions".[35]

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public importance which ought to be considered by that Court; and

(c) makes the final decision whether a matter is within its jurisdiction."

[34] *Amod v Multilateral Motor Vehicle Accidents Fund* [1998] ZACC 11; 1998 (4) SA 753 (CC); 1998 (10) BCLR 1207 (CC) at para 33.

[35] *African National Congress v Chief Electoral Officer of the Independent Electoral Commission* [2009] ZACC 13; 2010 (5) SA 487 (CC); 2009 (10) BCLR 971 (CC) at para 11. See also *President of the Republic of South Africa and Others v United Democratic Movement (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae)* [2002] ZACC 34; 2003 (1) SA 472 (CC); 2002 (11) BCLR 1164 (CC) at para 30, where the Court held:

> "[The Court] consists of 11 members and a *quorum* of the Court is eight of them. This Court is in recess for some months of each year and during those times its members disperse to their homes which, in some cases, are a considerable distance from the seat of the Court in Johannesburg. . . .[I]t is not always possible to convene a *quorum* of the Court at very short notice during a recess." (Footnotes omitted.)

[33] On whether to entertain an appeal against an interim order, in *Informal Traders* Moseneke DCJ made the point that "[t]he applicable test is whether hearing the appeal serves the interests of justice".[36] He then proceeded to make a useful collection of factors that assist this Court in deciding whether it is in the interests of justice to hear an appeal against interim relief. He gleaned these factors from a number of cases.[37] They include:

> "(a) The kind and importance of the constitutional issue raised;
> (b) whether irreparable harm would result if leave to appeal is not granted;
> (c) whether the interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review;
> (d) whether there are prospects of success in the pending review;
> (e) whether, in deciding an appeal against an interim order, the appellate court would usurp the role of the review court;
> (f) whether interim relief would unduly trespass on the exclusive terrain of the other branches of government, before the final determination of the review grounds; and
> (g) whether allowing the appeal would lead to piecemeal adjudication and prolong the litigation or lead to wasteful use of judicial resources or legal costs."[38] (Footnotes omitted.)

[34] Importantly, these factors constitute neither a closed list nor a checklist. Where they take us is a balancing exercise and a matter of judgement. The relevance and relative weight of the factors will vary depending on the circumstances of each case. In this case, I deal with only some of the above factors and two others. I take the view that these are dispositive of the matter. They are: the final effect of the interim order; irreparable harm; prospects of success in the pending review; the gravity of an attachment and transfer of government money in violation of the provisions of the

[36] *Informal Traders* above n 29 at para 20.

[37] See *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) at paras 50 and 55; *Machele and Others v Mailula and Others* [2009] ZACC 7; 2010 (2) SA 257 (CC); 2009 (8) BCLR 767 (CC) (*Machele*) at paras 23-8; and *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (*OUTA*) at paras 25-6.

[38] *Informal Traders* above n 29 at para 20.

State Liability Act; and the continued non-satisfaction of a court order that dates as far back as 16 May 2013. I deal with them in turn.

Final effect

[35] The refusal of interim relief by the High Court cannot be divorced from the consequences that flowed from it. After interim relief had not been granted, Tsoga secured transfer of the attached R30 476 839.71 from the Department of Public Works' account. The Department of Public Works now does not have access to that money and cannot use it. Surely then, in this sense, the refusal of interim relief has had a final effect. This makes the order appealable.

Irreparable harm

[36] In *Machele*, this Court held that the primary consideration in determining whether it is in the interests of justice for a litigant to be granted leave to appeal against an interim order of execution is whether irreparable harm would result if leave to appeal is not granted.[39] In *TAC 1*, the Court tells us:

> "Ordinarily, for an applicant to succeed in such an application, the applicant would have to show that irreparable harm would result if the interim appeal were not to be granted – a matter which would, by definition, have been considered by the Court below in deciding whether or not to grant the execution order. If irreparable harm cannot be shown, an application for leave to appeal will generally fail. If the applicant can show irreparable harm, that irreparable harm would have to be weighed against any irreparable harm that the respondent (in the application for leave to appeal) may suffer were the interim execution order to be overturned."[40]

[37] The applicants must show that irreparable harm will result if the appeal against the refusal of interim relief does not succeed. The applicants argue that the attached funds were earmarked for service delivery and important capital and infrastructure

[39] *Machele* above n 37 at para 24. Importantly, this factor is also listed in the collection of factors in *Informal Traders* above n 29 at para 20.
[40] *Minister of Health and Others v Treatment Action Campaign and Others (No 1)* [2002] ZACC 16; 2002 (5) SA 703 (CC); 2002 (10) BCLR 703 (CC) at para 12.

projects in the Department of Public Works and that, as a result of the attachment, all these have come to a halt. Although on the face of it this seems convincing, the applicants have done no more than make bald unsubstantiated allegations. They do not disclose how much had been allocated to the Department of Public Works for the financial year in issue. They do not say how much of that had been spent and how much still remained at the time of the attachment. It is only with that kind of detail that this Court would be in a position to assess whether, indeed, the Department cannot deliver services or finance capital or infrastructure projects. The bare assertions placed before us will not suffice. The applicants must take the Court into their confidence and give all the necessary detail.

[38] That the applicants' averments are bald and unsubstantiated is not surprising. It is not the Department of Public Works – the affected department – that is telling us what exactly it was going to do with the money, which it can now no longer do. Rather, it is the applicants who are giving us information that is totally lacking in specificity. In fact, the information is so generic that it describes virtually what any government department would do with money allocated to it. That cannot be enough.

[39] I am not satisfied that the applicants have placed enough before us to demonstrate that, pending finalisation of Part B of the High Court application, the Department of Public Works cannot deliver services and pay for capital and infrastructure projects.

[40] This conclusion takes care of the section 3(10) issue as well.[41]

[41] Without casting any aspersions, I am not unmindful that the very fact that government money is in the hands of a private entity is fraught with hazards for the Province. This does raise the possibility – and I put it no higher – of irreparable harm. But then, the private entity – a firm of attorneys – has undertaken to keep the money in its trust account pending finalisation of Part B. Although in the High Court

[41] See [3].

founding affidavit the applicants do express fear that the attorneys will not make good on their undertaking, in the written and oral submissions this point was not pursued. This is not to suggest that it was abandoned.[42] Of importance in this regard, the Attorneys' Fidelity Fund does reimburse persons who suffer loss at the hands of errant attorneys.[43] In the unlikely event that – despite the undertaking – the money were to be frittered away, the Department of Public Works would be entitled to claim reimbursement by the Attorneys' Fidelity Fund.

Prospects of success in the pending review

[42] Axiomatically, prospects of success in the pending review involve some consideration of the merits of the issues to be determined in the review. The question is: to what extent does an appellate court like ours delve into those merits? In *OUTA* Moseneke DCJ said:

> "Yet another important consideration is whether in deciding an appeal against an interim order, the appellate court would in effect usurp the role of the review court.

[42] An issue that was emphasised was that the Department of Public Works cannot use the money.

[43] Section 26 of the Attorneys Act 53 of 1979 provides:

> "Subject to the provisions of this Act, the fund shall be applied for the purpose of reimbursing persons who may suffer pecuniary loss as a result of—
>
> (a) theft committed by a practising practitioner, his candidate attorney or his employee, of money or other property entrusted by or on behalf of such persons to him or to his candidate attorney or employee in the course of his practice or while acting as executor or administrator in the estate of a deceased person or as a trustee in an insolvent estate or in any other similar capacity."

As to the extent of the Attorneys' Fidelity Fund liability, section 47 provides:

> "(2) A claim for reimbursement as contemplated in section 26 shall be limited, in the case of money entrusted to a practitioner, to the amount actually handed over, without interest, and, in the case of securities or other property, to an amount equal to the average market value of such securities or property at the date when written demand is first made for their delivery, or, if there is no average market value, the fair market value as at that date of such securities or other property, without interest.
>
> (3) Only the balance of any loss suffered by any person after deduction from the loss of the amount or value of all money or other benefits received or receivable by him from any source other than the fund, may be recovered from the fund."

In future, sections 55 and 56 of the Legal Practice Act 28 of 2014 shall regulate these aspects when the provisions are brought into effect. For present purposes, the new provisions are, for practical purposes, largely to the same effect.

> Ordinarily the appellate court should avoid anticipating the outcome of the review except perhaps where the review has no prospects of success whatsoever."[44]

[43] The Part B proceedings pending before the High Court are bifurcated. First, the applicants are asking for a declarator that the writ in terms of which the R30 476 839.71 was attached was issued unlawfully. As indicated above, I limit the discussion on this to the argument which relies on section 3(4) of the State Liability Act. Second, they are seeking to review, under the Promotion of Administrative Justice Act[45] (PAJA): (a) the decision to conclude the agreement that resulted in the settlement order of 16 May 2013; and (b) the settlement agreement itself.

[44] There are reasonable prospects of success on the facet concerning the State Liability Act argument. What is to be gleaned from the scheme of the Act is an insistence on a number of formal steps before movable property belonging to the State may be attached. Section 3(1) appears to emphasise that attachment, execution or "like process" may only take place in accordance with the procedure set out in section 3(4) to (8).[46] In terms of section 3(2) the State Attorney or attorney of record appearing for the department concerned must – within seven days of an order sounding in money becoming final[47] – inform the executive authority and accounting officer of the department and the relevant treasury of the order in writing. Section 3(3) stipulates that the judgment debt must be satisfied within 30 days of the

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[44] *OUTA* above n 37 at para 26.

[45] 3 of 2000.

[46] Section 3(1) provides:

> "Subject to subsections (4) to (8), no execution, attachment or like process for the satisfaction of a final court order sounding in money may be issued against the defendant or respondent in any action or legal proceedings against the State or against any property of the State, but the amount, if any, which may be required to satisfy any final court order given or made against the nominal defendant or respondent in any such action or proceedings must be paid as contemplated in this section."

[47] In terms of the definition of "final court order" in section 4A an order is final if given or confirmed by a court of final instance or otherwise becomes final after expiry of the period within which an appeal to a higher court may be lodged.

order becoming final or within such period as may be agreed between the judgment creditor and the accounting officer of the department.

[45] If the judgment debt is not satisfied within 30 days or the period agreed upon between the accounting officer and the judgment creditor, that still does not entitle the judgment creditor to proceed to execution. Instead, the judgment creditor "may serve the court order in terms of the applicable Rules of Court on the executive authority and accounting officer of the department concerned, the State Attorney or attorney of record appearing on behalf of the department concerned and the relevant treasury".[48] Within 14 days of service of the order, the relevant treasury must ensure that the judgment debt is satisfied or acceptable arrangements for its satisfaction have been made with the judgment creditor.[49] It is only upon the treasury failing in this that, at the request of the judgment creditor, the Registrar or Clerk of the Court concerned must issue a writ of execution.[50]

[46] Of the steps provided for in the State Liability Act, the applicants complain only about lack of service in terms of section 3(4). Tsoga has not denied this. It seems to me that a necessary jurisdictional fact entitling the Assistant Registrar of the High Court to issue the second writ was lacking. There are good prospects that this writ may be found to be invalid for having been issued in violation of the principle of legality. But this question cannot be viewed in isolation. It must be looked at in conjunction with the other prong of the applicants' attack. And that is the PAJA review relating to the settlement agreement that was made an order of Court on 16 May 2013. Do the applicants have prospects of success on this prong as well? I will assume, without deciding, that the proposed PAJA review is legally competent.

[48] Section 3(4).

[49] Section 3(5).

[50] Section 3(6).

[47] The applicants raise a number of review grounds for setting aside the settlement agreement.[51] The question is: even assuming that the settlement agreement were to be set aside, where does that take them? The fact of the matter is that not everything ended with the settlement agreement. An order of court was granted pursuant to the agreement. To this day, that order stands. Whatever underlying dispute there was between the parties may very well have been rendered *res judicata* (a matter judicially determined) by the order.[52] An application was brought to rescind it but it did not succeed. A subsequent application for leave to appeal against the refusal of rescission was later abandoned. That means the settlement order is final. The applicants suggested that the order will come crumbling down on the authority of two Supreme Court of Appeal judgments, *Changing Tides*[53] and *Motala*.[54] In oral argument the applicants jettisoned reliance on *Motala* on the basis that it did not support them. But they persisted with their reliance on *Changing Tides*. I do not understand the distinction they seek to draw between the two judgments.

[48] *Changing Tides* involved the eviction of a number of people who occupied a building as tenants of other people who had unlawfully taken it over.[55] Before Court

[51] Examples of these are the following. The applicants contend that when Ilima went into liquidation, the Principal Building Agreement came to an end. As a result, the applicants contend that the settlement agreement at issue is invalid as there was no foundation for its existence in the first place. They also claim that the decision to allow Tsoga to remain on site after the purported termination of the Principal Building Agreement violated section 217 of the Constitution. They further contend that the settlement agreement is invalid because it was concluded without the provisions of the Preferential Procurement Framework Act 5 of 2000 (Procurement Act) or section 217(1) of the Constitution having been complied with.

[52] In *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC) (*Eke*) at para 29, this Court states that "[o]nce a settlement agreement has been made an order of court, it is an order like any other [and] will be interpreted like all court orders". It further states, at para 31, that—

> "[t]he effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the *lis* between the parties; the *lis* becomes *res judicata*. . . . It changes the terms of a settlement agreement to an enforceable court order. The type of enforcement may be execution or contempt proceedings. Or it may take any other form permitted by the nature of the order." (Footnotes omitted.)

[53] *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* [2012] ZASCA 116; 2012 (6) SA 294 (SCA) (*Changing Tides*).

[54] *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others* [2011] ZASCA 238; 2012 (3) SA 325 (SCA) (*Motala*).

[55] The takeover had happened by means of the so-called hijacking of buildings that often takes place in, especially, central Johannesburg.

there was a measure of uncertainty on whether the list of occupants presented was comprehensive enough. A full list was considered necessary for purposes of the provision of temporary emergency accommodation to the occupants by the municipality upon their eviction. The South Gauteng High Court ordered the Sheriff to draw up a comprehensive list of the occupants for the municipality. On appeal, Wallis JA held that, in terms of the Sheriffs Act,[56] the functions of the Sheriff did not include what the High Court had ordered, i.e. the drawing of the list.[57] He declared this part of the order a nullity.

[49] In *Motala* the North Gauteng High Court – in making an order of judicial management of a company – had also made appointments of judicial managers. On appeal, Ponnan JA held that in terms of the Companies Act[58] the power to appoint judicial managers vests in the Master of the High Court, not the High Court.[59] He held the appointments to be a nullity.

[50] I read both judgments to say that, if on the face of the order, one is able to conclude that what the court has ordered cannot be done under the enabling legislation, the order is a nullity and can be disregarded.[60] These cases are distinguishable from the instant scenario and are not authority for the proposition that the order of 16 May 2013 may suddenly be of no force and effect. On its face, that order is perfectly valid and competent. If there be a need to explain this, the so-called nullity of the settlement order does not – so to speak – jump out of the page, as was

[56] 90 of 1986.

[57] *Changing Tides* above n 53 at para 8.

[58] 61 of 1973.

[59] *Motala* above n 54 at para 6.

[60] *Member of the Executive Council for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) clarifies that the position with court orders is different from that of administrative action:

> "In [*Motala*] the Supreme Court of Appeal, reaffirming a line of cases more than a century old, held that judicial decisions issued without jurisdiction or without the citation of a necessary party are nullities that a later court may refuse to enforce (without the need for a formal setting aside by a court of equal standing). This seems paradoxical but is not. The court, as the font of legality, has the means itself to assert the dividing line between what is lawful and not lawful. For the court itself to disclaim a preceding court order that is a nullity therefore does not risk disorder or self-help."

the case with the nullity of the orders in *Changing Tides* and *Motala*. There has to be an antecedent step: proof of the grounds of review. In any event, it seems to me that the applicants may well not be in a position to prove these grounds. *Eke* stands in their way.[61] If the issues they raise did not form part of the defences to Tsoga's claim before the High Court, they could have. That they were not raised matters not.

[51] In oral argument and in supplementary written submissions the applicants attempted to avoid the effect of *Eke* by relying on paragraph 26 of that judgment:

> "'[T]he agreement must not be objectionable, that is, its terms must be capable, both from a legal and a practical point of view, of being included in a court order'. That means, its terms must accord with both the Constitution and the law."[62] (Footnotes omitted.)

[52] The applicants point to some of the grounds of review that suggest non-compliance with the Constitution and the law[63] and argue that, based on the preceding quote from *Eke*, the settlement order was invalid. This misses the point. First, what *Eke* was dealing with was what the Court had to ascertain before making a settlement agreement an order of court. Second, once the order has been made, it is an order like any other. That means it can only be set aside by means of a legally cognisable process like, for example, rescission.[64] In this instance, rescission was abandoned.

[53] Except for those already dealt with here, no other bases have been suggested for avoiding the effect of the order of 16 May 2013. If any, prospects of success of the PAJA review are minimal.

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[61] *Eke* above n 52.

[62] Id at para 26.

[63] These include the allegation that the settlement agreement violated section 217 of the Constitution as well as various provisions of the Procurement Act.

[64] According to the Supreme Court of Appeal in *Changing Tides* and *Motala* there is the possibility of an order being a nullity. Although I have set out what the two cases were about, it is not necessary for present purposes to pronounce one way or the other on what they held.

[54] On the matter of the stay of execution pending finalisation of the R8.8 million claim, not much more detail was given besides what is set out in paragraph 12 above. It is so that a stay of the execution of a judgment pending the determination of proceedings still to be instituted is legally cognisable. An order of that nature may be granted where real and substantial injustice would otherwise result.[65] It goes without saying that the applicant for the stay of execution must demonstrate that the proposed claim has prospects of success. Otherwise, what would the point of the stay be? In *Cooper*[66] the Court held that the applicant must show a *prima facie* right. The information we have here is so scanty as to come nowhere near demonstrating prospects of success or a *prima facie* right.

Other interests of justice factors

[55] There are other factors that are of specific relevance to this matter. It cannot be gainsaid that the attachment of state monies in a manner that is at variance with the carefully crafted process in the State Liability Act is a serious matter. As indicated above, the attachment implicates the rule of law, a founding value of our Constitution. One cannot make light of it. That said, attachments of State bank accounts are rare. The fear of a flood of attachments should not be overplayed. Also, there is the countervailing consideration of a Court order that stands and remains unsatisfied after an inordinately long time.

[56] Section 165(5) of the Constitution provides that "[a]n order or decision issued by a court binds all persons to whom and organs of state to which it applies". In *Nyathi*[67] this Court held that "deliberate non-compliance with or disobedience of a court order by the State detracts from the 'dignity, accessibility and effectiveness of the courts'".[68] The Court also quoted Jafta J with approval in *Mjeni*:[69]

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[65] *Dumah v Klerksdorp Town Council* 1951 (4) SA 519 (T); *Road Accident Fund v Strydom* 2001 (1) SA 292 (C).

[66] *Cooper v Feinstein* [2005] ZAWCHC at para 28.

[67] *Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another* [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC).

[68] Id at para 43.

> "The constitutional right of access to courts would remain an illusion unless orders made by the courts are capable of being enforced by those in whose favour such orders were made. The process of adjudication and the resolution of disputes in courts of law is not an end in itself but only a means thereto; the end being the enforcement of rights or obligations defined in the court order."[70]

[57] With this in mind, the order of 16 May 2013 stands. Unless set aside by some competent legal process, at some point it will have to be complied with. In the special circumstances of this case, it seems to accord with the interests of justice not to order repayment of the money.

[58] It is particularly disturbing to note that the applicants are not – in the least − prepared to make provision for satisfying the judgment debt; not even as a contingent claim. Their language sounds as though the judgment debt does not exist at all. This comes out where they say, if the amount were not to be paid back to the provincial government, that would constitute a recurring deficit in the budget of the Department of Public Works. That tells us that – in perpetuity – they are not prepared to take the necessary steps to make sure that some future appropriation will make provision for the judgment. That attitude evokes dismay.[71]

Conclusion

[59] Having considered the factors set out in *Informal Traders,*[72] in particular those discussed above, and the additional factors that are of particular relevance to this case discussed in the four preceding paragraphs, I conclude that on balance it is not in the interests of justice to grant leave to appeal. The application must fail.

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[69] *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tk).

[70] Id at para 453C-D.

[71] Unsurprisingly, the High Court observed that the Department of Public Works' budget allocation for the 2014/2015 financial year made no provision for Tsoga's claim (Djaje AJ judgment above n 1 at para 25).

[72] *Informal Traders* above n 29 at para 20.

Costs

[60] As to costs, they must follow the result.

Condonation

[61] The applicants did not file their written submissions timeously. They brought an application for condonation. The first, second, and third respondents did not oppose this application. Viewed cumulatively, the explanation given in the main and supplementary affidavits is satisfactory. Condonation should be granted.

Order

[62] The following order is made:

1. Condonation of the late filing of the applicants' written submissions is granted.
2. Leave to appeal is refused.
3. The applicants must pay the costs of the first and third respondents, including costs of two counsel.

For the Applicants:	T Ngcukaitobi, R Tulk and N Muvangua instructed by Werksmans Attorneys
For the First, Second and Third Respondents:	K J Kemp SC, S Grobler and K Hofmeyr instructed by Peyper Attorneys