

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Numbers: 2025/220239

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

31 July 2026

Signed, Wright J _____
SIGNATURE

In the matter between:

F[...] J[...] [...]L

Appellant

and

T[...] G[...] O[...]

Respondent

Coram: WRIGHT, OPPERMAN and MAHOSI JJ

Heard: 12 May 2026

Delivered: 31 July 2026

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 16h00 on 31 July 2026.

Summary:

Appeal – Suspension of decision pending appeal – Section 18(4) of the Superior Courts Act 10 of 2013 – Discussion of.

Judges – Consequences of discrepancies in cited judgments – Acting Judge not properly considering the judgments cited by him – consequences for parties and Acting Judge – correct body to report matter to whether Judicial Conduct Committee (JCC) or the Legal Practice Council (LPC).

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Acting Judge):

The appeal is dismissed with costs, including those of two counsel where so employed. Scale C applies.

JUDGMENT

WRIGHT J (MAHOSI J concurring)

- [1] In this appeal, heard as a matter of extreme urgency, the papers are long and complicated. I shall cut to the chase.
- [2] Mr L and Ms O were married to each other. Two children were born of the marriage, a boy, now 13 and a girl now 10. The couple got divorced in 2019 and a settlement agreement was made an order of court. Mr L had to maintain the

children as provided for in the agreement. This obligation included paying for their education at private schools.

- [3] Mr L has since remarried and has two children with his new wife.
- [4] The two children of the parties are enrolled at a private, upmarket school, as they have been for some years.
- [5] The road since the divorce has been rocky. Mr L has on a number of occasions defaulted on his obligations and Ms O has launched court proceedings to enforce maintenance. Sometimes those proceedings lead to a clearing of arrears to some extent or another, only for the problem to re-occur.
- [6] There is currently a long-ongoing enquiry pending in the Maintenance Court.
- [7] In November 2025, Mr L launched an urgent application in the High Court. He sought effectively that the children be taken out of their present school and enrolled at a less expensive school in 2026.
- [8] Ms O counter-applied, in short, for an order that the children remain at their present school.
- [9] The learned Acting Judge below dismissed Mr L's application and granted Ms O's counter-application.
- [10] Mr L noted an intention to apply for leave to appeal. The order in favour of Ms O would have been suspended pending appeal. Ms O brought an application under section 18(3) of the Superior Courts Act 10 of 2013 to have the judgment, effectively keeping the children in their present school, enforced pending further appeal proceedings by Mr L.
- [11] Mr L's application for leave to appeal was dismissed while Ms O's application to keep the children in their present school was granted. Mr L has launched an application to the SCA for leave to appeal. That application is pending.
- [12] Mr L now invokes his right under section 18(4) to an extremely urgent appeal against the granting of Ms O's section 18(3) application.

- [13] Ms O needed to show exceptional circumstances and that she, in effect, the children, will suffer irreparable harm if they are not kept in their present school and that Mr L will not suffer irreparable harm if the children stay where they are. In my view, she did.
- [14] In my view, the word “*exceptional*” does not qualify the “*circumstances*” only by limiting the circumstances to unusually occurring facts. Another, equally compelling meaning is exceptionally strong. It is not how often or seldom the complaint is heard in our courts that matters here. Sadly, the complaint of Ms O is heard often in our courts. It could not have been the intention of the Legislature to deny Ms O section 18(3) relief because she is in circumstances that occur often.
- [15] I hold, for the purposes of the present case, that the word “*exceptional*” means sufficiently important to the children to require the granting of the relief sought, so that section 28 of the Constitution, which places the children’s interests as paramount, is complied with. The two irreparable harm requirements must, of course, also be met.
- [16] It would be disruptive to yank the children out of their present school at this stage of the school year. It would not be in their best interests as required by section 28 of the Constitution.
- [17] Mr L is a wealthy man who lives an expensive lifestyle. Luxury homes, expensive cars and overseas trips attest to this.
- [18] It was argued for Mr L at the hearing that the learned Acting Judge below made a number of errors in reasoning, including errors possibly caused by a misapplication of AI. In my view, the section 18(3) order granted was correct. I do not find it necessary to enter the lists about AI and I refrain from doing so.
- [19] It was made clear by counsel for Mr L at the hearing that whatever the Acting Judge below did or did not do did not turn his judgment or order into a nullity. Accordingly, so the argument for Mr L went, there is in existence an order made

under section 18(3) and the section 18(4) appeal is properly before us. Counsel for Ms O expressly agreed. So do I.

Order

[20] The appeal is dismissed with costs, including those of two counsel where so employed. Scale C applies.

Signed, Wright J
G WRIGHT
Judge of the High Court,
Johannesburg

Signed, Mahosi J
D MAHOSI
Judge of the High Court,
Johannesburg

OPPERMAN J (separate concurring)

[21] I have read the judgment of my brother Wright J (*first judgment*). I agree with the order he proposes but am unable to agree with the route chosen to reach such order. I unpack my reasons below under what I consider to be appropriate sub-headings.

The relief the appellant sought in the High Court

[22] In Part A of the notice of motion (on an urgent basis), the appellant (the father) sought the enrolment of the two minor children in a specific public school (public school) for the 2026 academic year and that the respondent (the mother) be ordered to sign any and all documentation on written demand in order to have the two minor children so enrolled, failing which, the appellant would be authorised to sign all that is required to effect such enrolment. In Part B (in the ordinary course), the appellant sought relief that the matter be referred to a

previously engaged expert for investigation and reassessment on the issue of residency and the parties' parental rights and responsibilities inclusive of whether or not 'specific or all of the respondent's parental rights and responsibilities should be suspended or terminated'. The two minor children are 13 (a boy) and 11 (a girl) at present.

The relief the respondent sought in the High Court

[23] The respondent filed a counter-application to be heard urgently, seeking that the appellant be found in contempt of the divorce order dated 25 June 2019 which had incorporated a settlement agreement. In addition, she sought an order that the appellant be directed to make payment of the outstanding private school fees in the amount of R 277 078.50 (*the arrear school fees*) and to make payment in respect of the private school fees in advance for the school year of 2026 (*the 2026 school fees*), in the sum of R 379 500,00 directly to the private school.

The relief granted by the High Court

[24] The High Court granted the following order:

1. [enrolled the matter as an urgent application]....
2. The minor children, namely, D, a boy, born on and O, a girl, born on....., shall remain/will be enrolled at R private School.
3. The applicant must ensure that D and O are enrolled into R private School for the 2026 academic year by no later than 10 December 2025 and ensure that the children remain enrolled at R private School.
4. The parties are directed to co-sign the Contract of Enrolment with R private School for the admission of D and O into R private School for the 2026 academic year forthwith, failing which the respondent is authorised to sign the Contract of Enrolment on behalf of the applicant.
5. The applicant is ordered and directed to pay the R private School fees (private school fees) for the 2026 academic year.
6. The applicant shall continue to make payment of the agreed instalment payments pertaining to the arrear school fees due and owing to R private School, in terms of

the signed Acknowledgment of Debt dated and signed on 1 December 2025 between the applicant and R private School, timeously and in full until such time as all the arrears are extinguished and settled in full.

7. The applicant is ordered to continue to make payment of the R private School fees (private school fees) until such time that the court order as referred to paragraph 8 below, may be varied and/or set aside by a competent court.
8. The divorce order (and settlement agreement) dated 25 June 2019, shall remain in full force and effect, until it may be varied/substituted by a competent court.
9. PART B of the main application is postponed *sine die*.
10. The issue of the applicant's contempt of the court order is postponed *sine die* for determination with PART B of the main application.
11. The applicant is ordered to pay the costs of this application on a party and party basis, inclusive of the costs of counsel, on Scale C.

Relief granted by the High Court in paragraph 2 of the order not sought by either party

[25] Prayer 2 of the High Court order, at first glance and read in isolation, appears to provide that the two minor children are to remain at the specific private school until finalisation of their schooling careers. Thus, a final order. However, read in context with the other orders and the judgment as a whole, another interpretation of prayer 2 is that it would be subject to the affordability findings which were pending in the magistrate's court (*the variation proceedings*). Thus, an interim order. This feature relates to the appealability of the order as a whole and whether a section 18(3) application was necessary. If it were an interim order, the filing of the application for leave to appeal would not suspend the operation of the order. It was accepted by the parties that the High Court order was final and that the filing of the application for leave to appeal suspended the operation of such order. In my view, some provisions in the order are final (the order compelling the payment of the arrear school fees) and others (the exact school at which the children were to be enrolled) were interim. I am satisfied, though that it was prudent for the respondent to have launched the section 18(3) application so as to cover those parts of the order suspended by the filing of the application for leave to appeal.

[26] What is clear, is that neither party, certainly not directly nor in a notice of motion, sought relief for the re-enrolment of the children at the specific private school. The dispute which the appellant had brought to the High Court was one where the appellant wanted to change the *status quo*. The consequence of not succeeding with that application would be that the application would be dismissed and that the two children would remain entitled to be schooled at a private school. The appellant would be obliged to continue making payment of private school fees in terms of the existing divorce order.

[27] The High Court did what, in my view, it was obliged to do as the upper guardian as the dismissal of the application in the circumstances of this case would not necessarily have resulted in the children continuing at the previously enrolled private school due to the machinations of the appellant as found by the High Court. It grasped the nettle and ordered in which school the two minor children should be enrolled for at least the 2026 school year or until the affordability issue was resolved. At the core of the High Court's findings lies the conclusion that the appellant had orchestrated the cancellation of the private school contract at that specific school. The High Court ensured that the minor children are enrolled at the school where they were when the application was launched.

[28] The appellant argued that the High Court had misdirected itself in granting such an order as the authorities are clear: courts should confine themselves to the issues before them.¹ This principle is of course based on sound policy considerations. It is fundamental to the adversarial system. I take no issue with the principle relied upon. But this case is distinguishable on at least three bases: a) this type of litigation is not of the ordinary civil kind. It is not adversarial. The litigation really involves a judicial investigation into the best interests of the children² which is exactly what the High Court did; b) the issue of the re-enrolment of the children at the private school was at the centre of the disputes which served before the High Court. At worst, the relief granted in prayer 2 was ancillary to the relief sought and thus contemplated by all, and no prejudice was

¹ *Road Accident Fund v MKM obo KM and Another* [2023] ZASCA 50; 2023 (4) SA 516 (SCA) at para [66].

² *RC v HSC* 2023 (4) SA 231 (GJ).

caused by dealing with the issue in this manner; c) the counterclaim based on contempt of court brought by the respondent included the specific safeguards highlighted in *Fakie NO v CCII Systems (Pty) Ltd*³ relating to declaratory relief and other appropriate remedies. The relief granted in paragraph 2 of the order was thus clearly contemplated, canvassed before the High Court and competent.

Non-joinder of the private school to the proceedings

[29] The appellant argued that the High Court failed to consider that the contractual relationship between the parties and the private school had been terminated and that any enrolment was subject to the discretion of the particular private school not before the court. He also contended that the High Court had impermissibly imposed obligations upon such private school.

[30] I disagree. The High Court did not compel the particular private school to do anything. All obligations for enrolment were placed on the parties. Should the particular private school have refused to enrol the two minor children, this would have, all things being equal, constituted a defence to any contempt proceedings brought against the appellant.

[31] I pause to mention that this type of dispute – one where the choice of school is the issue – is not uncommon. Schools are often at the centre of these disputes. It is not necessary that they be joined in all litigation. It is a fact-specific enquiry. I should mention that this Court was told from the bar that the school is aware of this litigation. If there were something, in addition to the monetary considerations, which posed an impediment to the two minor children being enrolled, I have very little doubt that either the school or the appellant, would have drawn it to the attention of this Court.

³ [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at para [42].

Discrepancies in the judgment of the Acting Judge

[32] Shortly before the matter was heard in this Court, the appellant filed a supplementary note⁴ drawing attention to discrepancies in the judgment of the Acting Judge who delivered the judgments in the High Court. The discrepancies were located in the judgment dealing with the application for leave to appeal and the section 18(3) application (*the judgment*). During the hearing, the Court was advised that a) the respondent's legal team agreed that the 11 discrepancies listed were accurately identified and described; b) the discrepancies had been confirmed to be correctly identified and described by the senior librarian of the Johannesburg Society of Advocates; c) the appellant's legal team agreed that the junior counsel, Ms K Mitchell, who had represented the respondent in the High Court, had not provided the High Court with any such incorrect references despite the judgment recording in some instances, that she had.⁵ The discrepancies are listed hereunder.

	The Incorrect Citation	The Correct Citation
Paragraph 32 of the Judgment		
1.	<i>Myeni v Organisation Undoing Tax Abuse NPC and Others</i> [2020] ZASCA 40; 2020 (5) SA 404 (SCA)	The citation is not of <i>Myeni</i> but of <i>SA Express Ltd v Bagport (Pty) Ltd</i> 2020 (5) SA 404 (SCA). The correct citation for <i>Myeni v Organisation Undoing Tax Abuse NPC and Others</i> is 2019 JDR 2599; (15996/2017) [2020] ZAGPPHC 779 (22 December 2020)

⁴ Upon receipt and prior to the hearing, I had requested a court researcher to verify the correctness of the discrepancies. This was so confirmed before the hearing.

⁵ It was clear that this issue had caused Ms Mitchell much strife. Understandably so. A legal practitioner's reputation is hard earned and both Ms Segal SC and Ms Bezuidenhout SC, without compromising their respective clients' positions, ensured that the correct facts were placed before the court. All of this was done in the highest traditions of the advocates' profession which is committed to avoiding the misleading of the Court.

Paragraph 58 of the Judgment		
2.	<i>S v Smith</i> 2012 (1) SACR 567 (SCA) – The case is cited correctly; however, the quoted paragraph contains matter not in the case.	The sentence that references <i>Mont Chevaux Trust</i> is a quote from another judgment – <i>Seletje Construction & Management CC v City of Ekurhuleni Metropolitan Municipality</i> (2020/44579) [2025] ZAGPJHC 1179 (20 November 2025) para 13. The remainder of the “quote” is from <i>Mont Chevaux</i> at para 6 of that case.
Paragraph 60 of the Judgment		
3.	<i>MEC for Health Eastern Cape v Mkhintha and Another</i> is given two conflicting citations – - the case is referenced as (157/15) [2016] ZASCA 112 - but in the corresponding footnote, it is referred to as <i>MEC for Health, Eastern Cape v Mkhitha and Another</i>, (1221/2015) [2016] ZASCA 176	The first citation is incorrect. It is that of an unrelated case: <i>Notshokovu v S</i> (157/2015) [2016] ZASCA 112. The correct citation of the case is contained in the footnote.
Paragraph 67 of the Judgment		
4.	<i>Premier for the Province of Gauteng and Others v Democratic Alliance and Others</i> [2020] 4 All SA 559 (SCA)	The citation does not exist. The proper citation of this case is (394/2020) [2020] ZASCA 136; alternatively, [2021] 1 All SA 60 (SCA)
Paragraph 68 of the Judgment		
5.	<i>Ntlemeza v Helen Suzman Foundation</i> [2017] (5) SA 402 (SCA)	The referenced case is correct, however, the quote attributed to it is not. It belongs to <i>Incubeta Holdings & Another v Ellis & Another</i> 2014 (3) SA 189 (GJ) and <i>MV Ais Mamas: Seatrans Maritime</i>

		<i>v Owners, MV Ais Mamas & Another</i> 2002 (6) SA 150 (C) at 156H-157C.
Paragraph 69 of the Judgment		
6.	<i>Knoop NO v Gupta (Execution)</i> 2021 (3) SA 88 (SCA)	There are two <i>Knoop v Gupta</i> judgments. <i>Knoop NO and Another v Gupta (Execution)</i> 2021 (3) SA 135 (SCA) is incorrectly referenced as 2021 (3) SA 88 (SCA). The latter citation exists but does not deal with the matter at hand – “exceptional circumstances”. A discussion on exceptional circumstances is contained in 2021 (3) SA 135 (SCA)
Paragraph 71 of the Judgment		
7.	<i>KGA Life Limited v Multisure Corporation (Pty) Ltd</i> [2021] ZAGPJHC 128; 2021 (6) SA 598 (GJ)	This is an Eastern Cape judgment incorrectly cited as a Johannesburg judgment. The correct reference is <i>KGA Life Limited v Multisure Corporation and Others</i> (CA 157/2022) [2022] ZAECGHC 92 (14 December 2022).
Paragraph 72 of the Judgment		
8.	<i>Tyte Security Services CC v Western Cape Provincial Government and Others</i> [2021] ZASCA 168	The citation is that of – <i>Masako v Masako & Another</i> (Case no 724/20) [2021] ZASCA 168 (3 December 2021). The correct citation is: <i>Tyte Security Services CC v Western Cape Provincial Government and Others</i> (479/2024) [2024] ZASCA

		88; 2024 (6) SA 175 (SCA) (7 June 2024).
Paragraph 73 of the Judgment		
9.	<i>Knoop NO v Gupta (Execution)</i> , 2021 (3) SA 88 (SCA)	This <i>Knoop</i> judgment does not mention prospects of success. The other <i>Knoop</i> case does – <i>Knoop NO and Another v Gupta (Execution)</i> 2021 (3) SA 135 (SCA) discusses prospects of success in several paras, including 49-50 and 53.
Paragraph 74 of the Judgment		
10.	<i>WCJ and Another v PSJ and Others</i> [2021] ZAGPJHC 25	The letters of this case were muddled up in the case of <i>S A H v S B H</i> . The correct citation is <i>C.J.W and Another v S.J.P and Others</i> (88660/2019) [2024] ZAGPPHC 1217 (2 December 2024). The citation belongs to <i>Morula Resources CC v National Urban Reconstruction and Housing Agency NPC</i> [2021] ZAGPJHC 25 (10 February 2021).
Paragraphs 75, 92 & 93 of the Judgment		
11.	<i>Lubbe v Volkswagon SA</i> [2023] 4 All SA 289 (C)	This case does not exist.
Paragraph 76 of the Judgment		
12.	<i>H v Fetal Assessment Centre</i> 2015 (2) SA 193 (CC) at para 64	The High Court writes as though quoting <i>Fetal Assessment</i> without reflecting that the court in <i>Fetal Assessment</i> was quoting another case, <i>Kotze v Kotze</i> , 2003 (3) SA 628 (T) at 630G. The quote is largely correct although one sentence in it does not appear in <i>Kotze</i> .

- [33] As appears from the table above, the Acting Judge in the High Court used, in some instances, the correct name of a case to provide authority for a principle of law being relied on by him, but the citation is wrong. The reader searches in vain for the case in the law report cited, and only by searching more widely can the correct citation be located. In other instances, the correct case name and reference is given, but the passage quoted in the judgment from the case referred to is not an accurate quotation of the original passage; a passage from another, separate, *uncited* case is tacked on to the passage quoted in the judgment. In yet other instances, the case name and citation do not correspond to *any* reported case. The example that stands out is the non-existent case of “*Lubbe v Volkswagon SA* [2023] 4 All SA 289 (C)” cited in paragraphs [75], [92], [93], [108] and [112] of the judgment.
- [34] This Court was told that counsel, Ms Mitchell, was not the source of the reference in par. [92] of the judgment to the non-existent “Lubbe” case and that it does not appear in her heads of argument, nor do any of the other incorrect references. The errors can therefore not be attributed to counsel.
- [35] The most plausible explanation, certainly for the fictitious *Lubbe* reference, is that it is the product of the use of Artificial Intelligence (AI) and what has been dubbed ‘hallucinations’.
- [36] I deal with the errors or discrepancies in the judgment at face value and without discussing them with the Acting Judge because to do so would be improper. The explanations which I am sure exist are to be addressed to the professional body entrusted with the regulation of the conduct of Acting Judges, not in a private discussion in judicial chambers away from the scrutiny of the litigants and representatives.
- [37] I make no finding on whether AI was used for the reasons previously advanced. Nevertheless, it was suggested in these proceedings and I am compelled to explain the implication of the use of AI and its impact on independent judicial

reasoning, or, as it has been termed “the erosion of independent judicial reasoning”.⁶

[38] I have been unable to find any reported authorities in South Africa in which a Judge or Acting Judge has been found to have utilised AI in its reasoning. Cases in which counsel were called out for using AI to source authorities are *Northbound Processing (Pty) Ltd v South African Diamond and Precious Metals Regulator*⁷ as well as *Mavundla v MEC: Department of Co-Operative Government and Traditional Affairs KwaZulu-Natal*.⁸

[39] This Division of the High Court is pro-active in guiding Acting Judges. Much energy and time is invested into an induction programme during which Acting Judges are, among other things, cautioned to use AI with *extreme circumspection* and not to rely on it for citations, summaries of cases or unverified sources. Acting Judges are also invited to consider the UK Guidelines for Judicial Officers and UNESCO’s AI guidelines for the judiciary as South Africa does not, yet, have its own guidelines.

[40] In *Molawa v Matjhabeng Local Municipality*,⁹ a stay of disciplinary proceedings pending the outcome of a review application challenging rulings made by a disciplinary chairperson (not a Judge or Acting Judge) citing case authorities which did not exist, was granted.

[41] I could find no instances in the United Kingdom, Canada, Australia or the United States where a Judge has used AI to reason or determine the outcome of a judicial decision.

[42] The most widely cited example is Lord Justice Birss of the Court of Appeal, who publicly disclosed that he had used ChatGPT to produce a summary of an area of law while drafting a judgment. He described the tool as “jolly useful” and

⁶ Lizelle Cloete “*Artificial intelligence in the South African judiciary: Friend or threat?*”, De Rebus 1 June 2026.

⁷ (2025/072038) [2025] ZAGPJHC 661.

⁸ 2025 (3) SA 534 (KZP).

⁹ (2026/157576) [2026] ZALCD 30.

indicated that it assisted with summarisation rather than decision-making.¹⁰ Importantly, Lord Justice Birss expressly distinguished between using AI as a drafting aid and allowing it to *decide* legal issues. The AI-generated material was treated as a research or summarisation tool and remained subject to judicial verification.¹¹

[43] The Courts in the United Kingdom have issued formal guidance on judicial use of AI. The most recent guidance emphasises: (a) that Judges remain personally responsible for all material issued in their name; (b) AI-generated material may contain inaccuracies; (c) Confidential information should not be entered into public AI systems; and (d) judicial use of AI must preserve the integrity of the administration of justice and the rule of law.¹² The guidance therefore permits carefully supervised use of AI but rejects any suggestion that judicial responsibility can be delegated to AI.¹³ Counsel and their instructing attorneys must of course be all the more astute to avoid misleading the Court, their foremost duty.

[44] Canadian AI controversies have overwhelmingly involved lawyers, litigants or tribunal participants relying upon fictitious authorities generated by AI.¹⁴

[45] I have been unable to identify a reported Australian decision in which a judge relied upon AI to determine the outcome of a case. Australian courts appear to have concentrated on regulating the use of generative AI by litigants, lawyers, and court users.¹⁵ Recent practice directions and guidelines contemplate limited uses of AI for efficiency and administrative assistance while insisting that legal reasoning and citation responsibility must remain human functions.¹⁶

¹⁰ See <https://www.theguardian.com/technology/2023/sep/15/court-of-appeal-judge-praises-jolly-useful-chatgpt-after-asking-it-for-legal-summary>.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ See <https://www.law360.ca/ca/articles/2486221/inconsistent-consequences-how-canadian-courts-and-tribunals-respond-to-ai-misuse>.

¹⁵ See <https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-ai>.

¹⁶ *Id.*

- [46] The Federal Court of Australia's 2026 Generative AI Practice Note states that AI may assist legal work but must be used responsibly and consistently with the administration of justice.¹⁷ Similarly, the Supreme Court of Victoria has issued judicial guidelines stressing that court users remain responsible for all content regardless of whether AI was used.¹⁸
- [47] No reported American case has been identified where a judge delegated legal reasoning or the determination of a judgment's outcome to generative AI. American sanctions have largely involved lawyers who submitted fabricated AI-generated authorities. Numerous courts have imposed sanctions, costs orders, and disciplinary referrals in such circumstances.¹⁹
- [48] The key distinction emerging across all four jurisdictions²⁰ is between AI as an assistant and AI as a decision-maker or verifier of last instance. As an assistant, the permitted uses include: (a) summarisation; (b) research assistance; (c) editing; (d) administrative efficiency; and (e) drafting support. These uses appear to be generally accepted provided the judge verifies the output and remains responsible for the final judgment.²¹ Responsibility for accuracy in all respects rests with the author.
- [49] I was unable to find any case where AI as a *decision-maker* was acknowledged or countenanced. I have been unable to identify any reported cases from the UK, Canada, Australia or the US in which a judge expressly delegated legal reasoning or the determination of the outcome of a case to generative AI. Judicial guidance in each jurisdiction strongly suggests that such conduct would be unacceptable because: (a) judicial power is vested in human Judges; (b) Judges have a non-delegable duty to reason and decide cases; (c) litigants are entitled

¹⁷ *Id.*

¹⁸ See <https://www.supremecourt.vic.gov.au/news/new-practice-note-and-judicial-guidelines-on-the-use-of-artificial-intelligence>.

¹⁹ *Id.*

²⁰ United Kingdom, Canada, Australia and the United States

²¹ See <https://www.judiciary.uk/guidance-and-resources/artificial-intelligence-ai-judicial-guidance-october-2025/>.

to human adjudication; and (d) judicial accountability would be undermined if reasoning were outsourced to AI.²²

- [50] At the 2026 South African Judiciary Conference, drawing on the considerable learning and experience shared from jurisdictions across the African continent, and in particular from Nigeria, we recognised that digital modernisation and AI present both significant opportunities and risks for the administration of justice. We further recognised that the development and use of AI should be governed by the Judiciary to safeguard judicial independence, uphold constitutional values and maintain public confidence in the administration of justice.
- [51] We resolved to expedite the modernisation of court infrastructure and digital court systems to enhance access to justice. This includes the implementation of integrated case management and electronic filing systems, supported by the necessary ICT infrastructure, cybersecurity measures and human resources. We further resolved that the Judiciary Administration and Information Technology Steering Committee would finalise a draft AI Policy, informed by the benefits and risks arising from the use of AI, for adoption by the Judiciary.
- [52] It was further resolved that the draft AI Policy should clearly define the distinction between administrative and adjudicative functions by articulating, with specificity, the permissible and prohibited uses of AI. The Policy should safeguard confidentiality, preserve the integrity of the administration of justice, and provide certainty to judicial officers.
- [53] The Judiciary resolved further to retain ownership and governance over the development, procurement and use of AI systems to ensure that human oversight, judicial reasoning and judicial determination remain central to their deployment. It was further recognised that training data and data inputs underpinning such systems should reflect South Africa's constitutional values and transformative jurisprudence.
- [54] It was recorded that the Judiciary would leverage AI through customised and secure platforms, initially focusing on efficiency tools, including court recording

²² Id.

and transcription, translation, case management and document summarisation, to reduce delays and enhance access to justice.

[55] The Judiciary further committed to providing ongoing education on the responsible use of AI, including prompt design and verification of AI-generated outputs, while ensuring the continued development and maintenance of the critical legal research, analytical, reasoning and judgment-writing skills that underpin judicial decision-making.

[56] The Judiciary also resolved to develop coordinated and innovative public communication strategies, including judgment summaries, digital platforms and official social media channels, to improve public understanding of the work of the courts, counter misinformation and strengthen public confidence in the administration of justice.

[57] As things stand though, two issues need to be resolved in this case: what consequences should flow from the discrepancies identified in the judgment for a) the appellant/parties and b) the Acting Judge.

Consequences for the parties

[58] The Supreme Court of India, in the matter of *Singh*²³ had no hesitation in setting aside the judgment and orders passed by the National Company Law Tribunal, Mumbai (the Tribunal) and subsequently confirmed by the Appellate Tribunal. It commented as follows:

“It is necessary for Courts to adopt a zero-tolerance mode for producing, citing or using AI-generated precedents without verification. It is a misconduct on the part of an advocate to cite such judgments without verification. Equally, *it is a serious lapse if a judge relies on such a fake or hallucinated AI-generated material as precedents in support of the determination. We have no hesitation in declaring that such a decision is no decision in the eyes of the law, irrespective of whether such material had a direct or indirect bearing on the decision-making.* Such decisions are to be set aside even if an iota of fake or hallucinated material enters the decision-making process, as it would

²³ *Pooja Ramesh Singh v Jammu and Kashmir Bank Ltd*, 2026 INSC 668 (New Delhi, 2 July 2026).

violate the sanctity of adjudication. It is absolutely necessary to maintain integrity in decision-making, and we reiterate and declare zero tolerance for the Bar as well as the Bench to cite, refer to, or rely on such material. It is also clarified that our judgment shall have no bearing on the rightful use of AI, but on the presentation or reliance on fake or hallucinated material as if it were a court precedent.”²⁴ (emphasis provided)

[59] It remitted the matter for adjudication afresh commenting that:

“A decision of a Court or an adjudicating authority based on material which is fake and hallucinated is no decision at all, and it amounts to subversion of the rule of law. Such a decision is unsustainable and has to be set aside at the earliest.”²⁵

[60] Confidence in the judiciary is implicated, and with it the rule of law. Ms Bezuidenhout SC, representing the appellant, argued that whatever the reason for the discrepancies, it is clear that the Acting Judge did not properly consider the judgments cited by him and misapplied the law to the facts. She argued that there is no justification in the law he quoted to the findings he made. At best, she argued, he gave improper and inadequate consideration to the authorities and this Court is entitled, and indeed obliged, to consider the section 18(3) application afresh.

[61] The Constitution provides in section 34 that:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

[62] Names of non-existent cases are not law. Jumbled together quotes from cases, some identified, some not, are not law. An essential quality of law is its verifiability; others must be able to find it and check it. In this sense it is academic and scientific, the result of a given process using the same ingredients should be reproducible by peers. Universities prescribe referencing methods for the purpose of ensuring that their scholarship is reliable. Confidence in the academic

²⁴ Id at para [7].

²⁵ Id at para [17].

and the legal system is built this way, predictability and verifiability are the foundations of trust. The sources of law, the authority for legal principle, which is what the present case touches on, must be checked before they can be used and adopted into judicial reasoning. The lawyers for the parties to a case must do this and the public must be able to trust the court to do this if there is to be any confidence in the judicial system. The Constitution guarantees this to the parties to a case and to the public at large by embodying these properties in the Bill of Rights.

[63] In *Lesapo v North West Agricultural Bank and Another*,²⁶ Mokgoro J on behalf of a unanimous Court reflected on section 34 as follows:

“An important purpose of section 34 is to guarantee the protection of the judicial process to persons who have disputes that can be resolved by law.”²⁷

[64] In *Stuttafords Stores (Pty) Ltd and Others v Salt of the Earth Creations (Pty) Ltd*²⁸ the Constitutional Court, referencing its earlier judgment in *Mphahlele v First National Bank of SA Ltd*,²⁹ dealt with the furnishing of reasons in a judgment and reconfirmed that a judgment:

“explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions.”³⁰

[65] A judgment must reflect the Judge’s considered view, rather than the output of a process that lacks transparency and in which the genesis of the conclusion remains concealed or obscure. Judicial authority must remain human, accountable and transparent. In addition, legal certainty runs the risk of being

²⁶ *Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420.

²⁷ *Id* at para [13].

²⁸ *Stuttafords Stores (Pty)Ltd v Salt of the Earth* [2010] ZACC 14; 2011 (1) SA 267 (CC); 2010 (11) BCLR 1134 (CC) (*‘Stuttafords’*).

²⁹ [1999] ZACC 1; 1999 (2) SA 667 (CC); (1999 (3) BCLR 253.

³⁰ *Stuttafords* above n 28 at para [10]. See too *Vodacom (Pty) Limited v Makate* [2025] ZACC 13; 2025 (6) SA 352 (CC); 2025 (10) BCLR 1174 (CC) at paras [43], [63] and [64]

undermined. As has been pointed out in the Constitutional Court in a different context:

‘..[T]he principles of legal certainty and finality of judgments are the oxygen without which the rule of law languishes, suffocates and perishes.’³¹

[66] Had I been able to conclude that the reasoning in the judgment under consideration was AI-generated and the true decision maker was a machine, I would not have hesitated to conclude that the appellant’s section 34 rights were infringed. To divest the decision-making responsibility to a robot, breaches not only the oath of office, which Acting Judges take,³² but it also denies a party the right to be heard *by a Court* as intended in terms of section 34.

[67] The Acting Judge has to be heard and due process is to be followed in this regard. At present and with the limited information at my disposal, I will take it no further than what was argued by Ms Bezuidenhout SC. She submitted that it is clear that non-existent law or incorrect cases were used and applied to the facts of the case. The appellant is entitled to have the law applied as it ought to have been found to exist. This Court is empowered to re-assess the section 18(3) decision afresh with reference to existing law. I now embark on this exercise.

Section 18(3) analysis

[68] The relevant legal principles were summarised very concisely and usefully in the judgment of *Maritz v Truworths Ltd*.³³

[69] Exceptionality is fact specific. It is not a decision which depends upon the exercise of judicial discretion.³⁴

³¹ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) at para [1].

³² Section 6 of Schedule 2 of the Constitution.

³³ *Maritz v Truworths Ltd* [2025] ZAWCHC 508 at para [8].

³⁴ *SAH v SBH* 2025 JDR 2778 (GJ) at para [23].

[70] A consideration of the three requirements in sections 18(1) and (3) of the Act³⁵ is not a hermetically sealed enquiry and can hardly be approached in a compartmentalised ('a tick-box') fashion. Rather, the overarching enquiry has to be whether or not exceptional circumstances exist and, to that end, that the presence or absence of irreparable harm in a given case may well be subsumed under the overarching exceptional circumstances enquiry.³⁶

[71] I therefore turn to the facts: The parties' divorce was formalised in an agreement which was made an order of court on 25 June 2019 (*divorce order*). The appellant remarried, and from this marriage relationship, two children were born, now aged 4 and 7. The 7-year-old daughter was born with severe disability and requires special care, provided by the appellant and his wife. The appellant's current wife has a 10-year-old son from a previous relationship.

[72] The divorce order provided that the appellant would be responsible for his and the respondent's two children's educational expenses including private school fees.

[73] The appellant started breaching the terms of the divorce order as early as 6 months after it was granted by making partial payments of his monthly maintenance obligations in amounts determined by him. In September 2022, the

³⁵ Section 18 of the Act provides:

"Suspension of decision pending appeal

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

(2) 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 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

(4) (a) If a court orders otherwise, as contemplated in subsection (1) –

(i) the court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal.

³⁶ *Tyte Security Services CC v Western Cape Provincial Government* [2024] ZASCA 88; 2024 (6) SA 175 (SCA) at paras [10] and [14] ('Tyte').

respondent caused a writ of execution to be issued for arrears of R 91 747.80, which, after the Sheriff made an attachment, was settled.

[74] In July 2022, the parties agreed to the appointment of a psychologist, Dr Lynette Roux (*Dr Roux*) to conduct a comprehensive psycho-legal assessment with the aim of recommending what residency and contact arrangements would be in the two minor children's best interests. Dr Roux's investigation spanned over a 9-month period. On 14 April 2023, Dr Roux published her report and recommended a schedule of contact which closely resembles a shared residency arrangement, and which has been implemented since. It was further recommended that the schedule be reassessed in 2025 to determine whether a 50/50 shared residency arrangement should be implemented.

[75] In September 2023, the appellant had again fallen into arrears in an amount of R 162 252.52. Again, the High Court was approached for a writ. One month later, in October 2023, the appellant requested the respondent's written consent to take the children on a 5-day trip to Europe to enjoy the Rugby World Cup and Disneyland. The business class flights alone for this trip amounted to R 623 237.15.

[76] In July 2024, the respondent contended that the appellant had fallen into arrears in respect of maintenance payments in an amount of R 170 940.78. The respondent proceeded with an application in terms of section 31 of the Maintenance Act³⁷, in the Magistrate's Court for an order that the appellant be convicted for being in contempt of the divorce order (*the criminal arrears matter*).

[77] On 7 October 2024, the appellant launched an application in the Maintenance Court for a variation of the divorce order for a reduction in his maintenance obligations (*the variation application*). The variation application has been pending for more than 18 months. The respondent contends that the reason the variation application has been delayed and has not progressed is because of the appellant's refusal to make a full and frank disclosure of his financial affairs. The

³⁷ 99 of 1998.

respondent contends that because it has not progressed to trial, the matter is under case management as directed by the presiding magistrate.

[78] The appellant appears to live an opulent and extravagant lifestyle, including holding valuable assets, enjoying international travel several times a year, frequently visiting luxury game reserves and resorts, driving luxury vehicles, boats, jet skis, frequenting his holiday home in Sodwana (often by helicopter and private jet), purchasing Louis Vuitton handbags for his current wife and enjoying the benefits of an expansive staff compliment including a chef, domestic workers, nannies and drivers. The opulence and extravagance of the appellant's lifestyle is not disputed on the papers. To the contrary, the appellant's ability to pay any amount of maintenance was confirmed on 10 January 2025 when the appellant's erstwhile attorney addressed correspondence to the respondent's attorney in which she recorded that *'affordability in this matter is not in dispute. The pro rata maintenance contribution in respect of the expenses of the minor children is in dispute...'*. The so-called 'millionaire's defence'.

[79] On 13 February 2025 and as part of the criminal arrears matter, the parties concluded a settlement agreement in terms of which the appellant agreed to make payment of the arrear maintenance then due in the sum of R 271 787 in instalments of R 45 297 per month. The appellant agreed that such settlement agreement did not substitute the provisions of the divorce order. Whilst the appellant paid the agreed instalments in respect of the arrears, he again defaulted in respect of his existing maintenance obligations per the divorce order, and the criminal arrears matter was reinstated.

[80] In March 2025, the appellant stopped making payment of the private school fees. Unbeknownst to the respondent, the private school terminated the children's Contract of Enrolment (COE) with the private school during October 2025. As at 14 November 2025, the accumulated arrear school fees was R 277 078.50 which is when the appellant launched his urgent application.

[81] On 2 December 2025 the appellant and the private school signed an acknowledgement of debt (AOD) for the arrear school fees. The appellant argued that this had purged any alleged contempt that could have existed.

[82] The High Court granted its order on 4 December 2025. The appellant requested reasons on 5 December 2025 and on 9 December 2025 filed an application for leave to appeal. The date is telling, as paragraph 3 of the order provided that the two children were to be enrolled by no later than 10 December 2025.

[83] This left the children not being enrolled in any school for the 2026 academic school year. The respondent's attorney requested a formal undertaking to be given by no later than 15 December 2025 that the children could be enrolled for the 2026 academic year at the particular private school and that the appellant would co-sign the COE pending the adjudication of the leave to appeal and any subsequent appeal which may arise. The request was ignored and no formal undertaking was provided. The respondent launched an application in terms of section 18(3) on 23 December 2025 and enrolled the application on an urgent basis to be adjudicated on 13 January 2026, prior to the children commencing their academic school year on 14 January 2026. On 11 January 2026, the High Court delivered its written reasons for the 4 December 2025 order. On 24 March 2026 the High Court dismissed the application for leave to appeal and lifted the suspension of the order in terms of section 18(3).

Evaluation

[84] I do not agree with the first judgment in its view that:

“.... the word “*exceptional*” does not qualify the “*circumstances*” by limiting the circumstances to unusually occurring facts. It is not how often or seldom the complaint is heard in our courts that matters here. Sadly, the complaint of Ms O is heard often in our courts. It could not have been the intention of the Legislature to deny Ms O section 18(3) relief because she is in circumstances that occur often.”

[85] This pronouncement of the concept appears to be at odds with what the Supreme Court of Appeal³⁸ held it to be:

“The concept of ‘exceptional circumstances’ is not defined in the Act. In my view the concept is sufficiently flexible to be considered on a case-by-case basis, since circumstances that may be regarded as ‘ordinary’ in one case, may be treated as ‘exceptional’ in another. This may explain the reason for the reluctance by the courts to lay down a general rule. In *Liesching and Others v The State* [2018] ZACC 25; 2019 (4) SA 219 (CC) the Constitutional Court in considering the concept of ‘exceptional circumstances’ within the context of s 17(2)(f) of the Act referred to *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas and Another* 2002 (6) SA 150 (C) in which Thring J distilled the principles that emerged from the survey of case law relating to the meaning of the concept of ‘exceptional circumstances’ at 156E-157C:

1. ‘What is ordinarily contemplated by the words “exceptional circumstances” is something out of the ordinary and of an unusual nature; something which is exceptional in the sense that the general rule does not apply to it; something uncommon, rare or different: “besonder”, “seldsaam”, “uisonderlik”, or “in hoë mate ongewoon”.
2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.
3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.
4. Depending on the context in which it is used, the word “exceptional” has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.
5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a literal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.”

[86] In my view the High Court correctly concluded that exceptional circumstances existed on the basis that the appellant had orchestrated a crisis by ceasing payment of school fees, permitting the enrolment to lapse and thereby placing the minor children’s schooling in jeopardy. This was done whilst the variation application in the maintenance court was pending. All that was (and remains)

³⁸ *Premier for the Province of Gauteng v Democratic Alliance*, [2020] ZASCA 136; [2021] 1 All SA 60 (SCA) at para [14].

needed for that matter to progress to trial is for the appellant to make a full and frank disclosure of his financial affairs.

[87] The High Court further considered the cumulative effect of not only permitting the enrolment to lapse but the subsequent filing of the application for leave to appeal, which triggered the suspension of the order and therefore compounded the problems of the children's schooling, as cumulatively constituting exceptional circumstances.

[88] The appellant argued that the respondent:

'in deliberate disregard of the suspensive effect of the appeal process, unilaterally returned [the children] to [the private] School, where they have remained. This occurred prior to the institution of her application in terms of section 18(3) of the Act and before any order authorising such execution had been granted. The respondent has thus taken the law into her own hands and has acted without lawful authority and in breach of the statutory scheme governing execution pending appeal. It is anticipated that the respondent will contend that the children are now settled and that the order granted in terms of section 18(3) of the Act ought to remain in force. That contention falls to be rejected. The present position was deliberately created by the respondent through unlawful self-help, in disregard of the suspensive effect of the appeal. A litigant cannot rely on circumstances of her own making, brought about in breach of the statutory scheme, to establish "exceptional circumstances" under section 18(3). To permit such reliance would undermine the very protection afforded by section 18 and erode the integrity of the appellate process. The respondent's case must therefore be approached with considerable caution, as the current position of the children is the product of unauthorised execution and cannot, in law, satisfy the requirements of section 18(3).'

[89] The position prior to the appellant's urgent approach to the High Court was that the children were enrolled at the private school. The appellant's application for their enrolment in a public school was dismissed. The consequence of this was that the obligations as they existed prior to the dismissal of such amended relief, continued. The relevant obligation was one in which he was liable to pay for private school fees. The filing of the application for leave to appeal did not suspend such obligation. I therefore fail to see how the respondent took 'the law

into her own hands'. The appellant approached the court. He lost. Life for these parties should thus have continued the way it was before he lost his urgent application. The High Court's order that the children be enrolled at the particular private school was essentially a restatement of the position which existed prior to the launching of the urgent application. The status *quo* was restored. The conduct complained of is not unlawful, and I fail to see how the respondent took the law into her own hands as argued on behalf of the appellant.

[90] It was, according to the High Court, the appellant who had orchestrated the termination of the COE and if it had not ordered the re-enrolment it would, effectively, have facilitated the appellant from achieving that which he had sought to achieve through his machinations and which result, the High Court had concluded, was not in the best interests of the minor children.

[91] The appellant, in effect, sought a variation of the divorce order through a different forum, thereby undermining the variation application he himself had initiated but which was seemingly not going his way as it had ground to a halt due to inadequate financial disclosure on his part. I agree with the proposition advanced in the respondent's heads of argument that '[t]he appellant studiously avoids taking the court into his confidence and explaining why he has not made a proper disclosure to enable the case in the maintenance court to proceed.'

[92] This case demonstrates how the issues of irreparable harm are subsumed under the overarching exceptional circumstances enquiry.³⁹

[93] The harm to the appellant is confined to potential financial hardship. There appears to be many assets which can be liquidated to ensure compliance with the order pending the variation application's finalisation. On the papers before this Court, there is no dispute of fact on the appellant's ability to afford to continue to pay the private school fees, at least until the finalisation of the variation application. The probabilities weigh heavily against the appellant of any harm befalling him, let alone irreparable, should the order be enforced pending a determination of the appellant's petition to the Supreme Court of Appeal and, if

³⁹ *Tyte* above fn 36 at paras [10] and [14].

granted, the appeal itself. In support of this conclusion, it bears mentioning that at the time the appellant launched the urgent application in November 2025, he was boarding a business class flight to Europe to watch the Springboks play rugby against Ireland.

[94] The real harm lies in the effect a change of schools would have on the minor children. The particular private school is one which the children have attended since they were approximately 3 and 4 years old. This is a school at which the children have developed long-lasting friendships, relationships with teachers, and feel safe and comfortable. Importantly, the children are educated in English. The public school the appellant had identified is one where they would be educated in the Afrikaans stream – a language in which they have never been instructed.

[95] Both children have expressed their desire to remain at their current private school. The respondent has taken their views and wishes into account, whereas the appellant has disregarded them.

[96] The boy child would be particularly affected by a change in schools, given that he is currently in grade 7. If the appellant had his way, he would be required to transfer to a new school for his final year of primary school in 2026, only to transition again to a different school for High School in 2027. By contrast, if the court order of the court *a quo* is put into operation and not suspended, he would remain at the particular private school for his final year of primary school, thereby avoiding the disruption of two successive school transitions in as many years.

[97] In stark contradiction to his argument of unaffordability, the appellant seeks to place the boy into St John's College for his High School education. Notably, St John's College is a more expensive school than the current private school.

[98] On a conspectus of the facts and considered cumulatively, the conclusion is ineluctable that exceptional circumstances were shown to exist for the enforcement of the order. The facts include: a) the orchestration of the crisis by unilaterally stopping payment of the private school fees in the face of a variation application; b) the timing of the conduct which brought this to the eve of the

school year with no certainty as to the children's enrolment; c) the abuse of the court processes by not progressing the very process the appellant initiated to decide his alleged inability to continue making payment as per the agreement of settlement.

[99] I conclude that the exceptionality does not exist in the changing of schools, as that happens every day, but rather in the manner in which this was created. The circumstances are far from ordinary. Moreover, the harm is compounded by the fact that the children are now settled at school. To disrupt this would no doubt cause harm. This harm is irreparable and cannot be compensated by any later court order. The harm includes time lost in a child's education, emotional distress suffered and relationships with friends and teachers disrupted. We do not know how proficient the children are in the Afrikaans language but a change so radical and the resultant harm, will undoubtedly not be inconsequential.

[100] In *Zero Azania (Pty) Ltd v Caterpillar Financial Services SA (Pty) Ltd*,⁴⁰ I concluded that it is presently unclear in our law whether a court has retained a discretion to be exercised and what factors are to be considered in exercising it. It is also unclear whether prospects of success can only be considered at such stage, i.e. after the 3 requirements have been met. I opined that the *University of the Free State*^{41,42} decision suggests (in contrast to the *Knoop*⁴³ judgment) and following *Justice Alliance*⁴⁴ and not *Incubeta Holdings*,⁴⁵ that prospects of success are to be taken into account to decide whether the matter is exceptional. I considered myself bound by both the *University of Free State* decision and *Knoop*. I reasoned that assuming section 18 has not expunged the court's common law discretion, there appears to be no reason, certainly in principle, why prospects of success should not be taken into account both to determine exceptionality and as a factor to be considered in exercising the discretion to

⁴⁰ 2024 (2) SA 574 (GJ).

⁴¹ Id at para [40].

⁴² *University of the Free State v Afriforum and Another* [2016] ZASCA 165; 2018 (3) SA 428 (SCA).

⁴³ *Knoop and Another NNO v Gupta (Tayob intervening)* [2020] ZASCA 163; 2021 (3) SA 135 (SCA).

⁴⁴ *Minister of Social Development Western Cape and Others v Justice Alliance of South Africa and Another* [2016] ZAWCHC 34.

⁴⁵ *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another*, 2024 (3) SA 189 (GJ).

enforce a court order pending an application to the Supreme Court of Appeal for leave to appeal.

[101] In my view, the prospects of success in this matter are not good for all the reasons advanced herein. If such view is added to the exceptionality considerations, the jurisdictional requirements are cemented.

[102] The issue of whether there is a discretion once the requirements are met was not dealt with in the Supreme Court of Appeal judgment *Zuma v Downer and Another*,⁴⁶ on section 18(4). In the full court (in the court *a quo*), it was stated that the discretion '*in the sense articulated in South Cape... is now absent*'.⁴⁷ This view has also been held in a number of other judgments.⁴⁸ In my view, *Knoop* has left the door open for an argument to retain the discretion as articulated in *South Cape* after a finding that the 3 jurisdictional requirements have been met. In *Tyte*,⁴⁹ the Supreme Court of Appeal, without acknowledging the controversy surrounding the existence of such a discretion, stated that the existence of exceptional circumstances is a necessary prerequisite for the exercise of the court's discretion under section 18.

[103] Assuming I have such a discretion, I would not hesitate to exercise it in favour of enforcing the order. The children are settled in a school they have known for years. It would not be in their best interests to disrupt this now – to require them to leave the school they have attended their entire lives against their express wishes, after they have already commenced the academic year would not be in their best interests. There are proceedings pending to determine the appellant's ability to meet his obligations which proceedings can be expedited should the appellant make full disclosure of his financial position. The current order does little more than preserve the status *quo*.

⁴⁶ *Zuma v Downer and Another*, [2023] ZASCA 132; 2024 (2) SA 356 (SCA).

⁴⁷ *Maughan v Zuma and Another; Downer v Zuma and Another* [2023] ZAKZPHC 75 at para [15].

⁴⁸ *Chairperson of the Western Cape Gambling and Racing Board and Others v Goldrush Group Management (Pty) Ltd and Another* [2022] ZAWCHC 223. Also see *Road Accident Fund and Others v Mabunda and Others*, [2021] 1 All SA 255 (GP).

⁴⁹ *Tyte* above fn 36 at para [11].

[104] In applying the law as I have found it, I conclude that the section 18(3) order falls to be confirmed.

The referral of the Acting Judge

[105] I hold the view that the discrepancies listed and identified in the judgment constitutes a *prima facie* case of professional misconduct which is to be answered by the Acting Judge. The question arises to which body this referral should occur: the Judicial Conduct Committee (JCC) established under the Judicial Service Commission Act⁵⁰ (JSC Act), or the Legal Practice Council (LPC) established under the Legal Practice Act⁵¹ (LPA).

[106] Section 14(4) of the JSC Act provides that a judge may be found guilty of misconduct on any of the following grounds: (i) incapacity (s 14(4)(a)); (ii) gross incompetence (s 14(4)(a)); (iii) gross misconduct (s 14(4)(b)); (iv) breach of the Code of Judicial Conduct (s 14(4)(b)); or (v) any wilful or grossly negligent conduct that is incompatible with or unbecoming of the holding of judicial office (s 14(4)(e)).

[107] The definition of ‘judge’ in the JSC Act includes “*any person... performing judicial duties in an acting capacity.*”⁵²

[108] The Code of Judicial Conduct (the Code), adopted in terms of section 12 of the JSC Act and which provides the legal framework governing judicial conduct to which judicial officers must adhere, extends its application to acting judges (Article 2). It goes without saying that acting judges are held to substantially the same ethical, professional and constitutional standards as permanently appointed judges. On a literal reading of the above, acting judges are therefore within the JSC’s jurisdiction.

[109] The exclusion of the JSC from the acting judge appointment process is not an oversight, it is seemingly, a deliberate constitutional design feature. In *In re: Certification of the Constitution of the Republic of South Africa, 1996 (First*

⁵⁰ 9 of 1994.

⁵¹ 28 of 2014.

⁵² Section 7(g).

Certification judgment),⁵³ the Constitutional Court directly considered objections that the provisions governing acting judges omitted ‘safeguards such as tenure, an open process and involvement of the JSC’.⁵⁴ The Court dismissed those objections, but crucially, it did so only in relation to the appointment process and political independence. The Court’s reasoning is instructive:

‘Acting appointments often have to be made urgently and unexpectedly. The JSC is a large body and there are practical reasons why a meeting of the JSC cannot be convened whenever the need arises for such an appointment to be made’.⁵⁵

[110] The ‘adequate safeguards’ the Constitutional Court identified⁵⁶ being the oath of office, the protection of section 165 of the Constitution, and the Minister’s lack of control over which cases an acting judge hears, address judicial independence from the Executive. They do not address accountability for misconduct once the appointment has been made. The Court was answering a different question, and the misconduct accountability gap was simply not before it. This leaves a structural *lacuna* that has never been resolved by legislation or authoritative judicial decision.

[111] The JSC Act’s theoretical reach is far outpaced by its practical limitations in the acting judge context. Weinkove, writing for Judges Matter, notes the following critical structural deficiency:

‘The appointment of acting judges under section 175(2) of the Constitution requires only that the Minister of Justice consult the senior judge of the court, no JSC involvement is contemplated. This leaves a potential accountability gap, especially if an acting judge is appointed repeatedly and has no intention of appearing before the JSC to seek permanent appointment. This issue might well need to be resolved by litigation.’⁵⁷

⁵³ [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

⁵⁴ *Id* at para [125(c)].

⁵⁵ *Id* at para [129].

⁵⁶ *Id* at para [132].

⁵⁷ Weinkove ‘Role of the JSC In Complaints About Acting Judges’, *Judges Matter*, available at: <https://www.judgesmatter.co.za/opinions/the-role-of-the-jsc-in-complaints-about-acting-judges/> accessed on 20.05.2026.

[112] The practical reality is that the ‘easy answer’ to misconduct by an acting judge is simply not to renew their appointment. However, this is not a formal accountability mechanism. It does not impose a sanction, does not place findings on the public record, and offers no protection to the public against a practitioner who continues in legal practice, with full enrolment, after the acting appointment lapses. Moreover, section 177 of the Constitution, the removal mechanism for judges, was designed exclusively for judges holding permanent appointments. No equivalent removal mechanism was created for acting judges, leaving a gap in the constitutional accountability architecture that has never been resolved by legislation or authoritative judicial decision.

[113] Notwithstanding the structural gap, the JCC has entertained complaints directly against acting judges in practice.⁵⁸ The JSC’s jurisdiction over acting judges is therefore not entirely dormant. The gap is a practical one; it is most acute where the acting term has expired, rather than a purely jurisdictional one.

[114] The LPA establishes the LPC as the national statutory body with jurisdiction over all legal practitioners, attorneys and advocates, admitted and enrolled in terms of the LPA. The LPC’s disciplinary jurisdiction extends to any conduct by an enrolled practitioner, whether that conduct arises in private legal practice or in another capacity in which the practitioner is functioning. The critical point for acting judges is that enrolment with the LPC is never suspended during an acting appointment. An advocate or attorney who is appointed as an acting judge does not cease to be an enrolled practitioner. Their LPC obligations run concurrently with their judicial functions. This means that the LPC’s disciplinary jurisdiction over them never lapses; it is available before, during, and after the acting appointment.

[115] *Mpumalanga Society of Advocates v JSC*⁵⁹ demonstrates the concurrent nature of these jurisdictions. The court in that matter explicitly noted that ‘the absence

⁵⁸ See in this regard *Mbusisiwe Ngcobo v Acting Judge Pitman* JSC/31/04/24 [30 October 2025]; see also *Sicengu v Acting Judge Nongogo* JSC/49/06/24 [12 February 2025]; and *Phumla Sihlali v Acting Judge Saunders* JSC/1160/23 [13 November 2024].

⁵⁹ (2021/55663) [2024] ZAGPJHC 1267.

of formal complaints to the LPC was a relevant factor'⁶⁰ in assessing an acting judge's fitness, and that extended periods of acting service 'afforded plentiful opportunities for engagement with the legal profession to yield complaints, had certain encounters with the legal profession caused grievances serious enough to warrant lodging complaints.'⁶¹ The clear implication is that the LPC remains a live accountability mechanism during, not merely after, acting service.

[116] In the *First Certification* judgment a foundational basis was provided. The Constitutional Court identified the oath of office as one of the primary substantive constraints on an acting judge's conduct:

'An acting judge is obliged by NT sch 2 s 6 to take an oath or to make a solemn affirmation to uphold the Constitution and "administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law".'⁶²

[117] This oath was presented as a key safeguard, one of the three grounds on which the Constitutional Court found adequate protection against the risks of the acting judge system. Its importance cannot therefore be understated: it is the foundational obligation the acting judge undertakes, and the Constitutional Court treated it as constitutively significant. A judgment resting on fabricated authorities is not administering justice 'in accordance with the Constitution and the law.' It is administering justice in accordance with invented law.

[118] Because the oath is taken in a judicial capacity by a person who remains an enrolled legal practitioner throughout, a breach of it is cognisable both under the Code (in respect of the judicial function) and as conduct unbecoming of an officer of the court under the LPA (in respect of the professional obligation). The oath therefore provides a textual bridge between the two accountability frameworks.

[119] The Code sets out the conduct standards applicable to all judges, including acting judges. Several provisions are directly engaged:

⁶⁰ Id at para [43].

⁶¹ Id at para [43.6].

⁶² *First Certification* judgment above n 52 at para [131].

(i) Article 4(a) - Integrity: A judge shall uphold and exemplify judicial integrity in all judicial activities. The incorporation of unverified, fabricated authorities into a judgment is self-evidently incompatible with this standard.

(ii) Article 5(1) - Honourable conduct: A judge shall not engage in conduct that is dishonourable. Even where deliberate fabrication is not alleged, delivering a judgment containing false authorities is conduct incompatible with the honour of judicial office.

(iii) Article 9 - Diligence: A judge shall perform all judicial duties efficiently, fairly, and with reasonable promptness. Diligence in the preparation of judgments includes verification of the authorities relied upon.

(iv) Article 16(1) - Referral obligation: A judge who becomes aware of clear evidence of professional misconduct by a legal practitioner shall inform the relevant professional body. This provision is not discretionary. It obligates a judge who discovers AI-hallucinated citations in pleadings or heads of argument to refer the matter to the LPC.

[120] Legal practitioners, whether acting as advocates, attorneys, or in a judicial capacity, are officers of the court and owe a special ethical duty to the court and to the administration of justice. The introduction of fabricated legal authorities into any court process corrupts the integrity of that process. Where the author of those fabrications is the judge, the breach is more serious, not less: the judge is not subject to the adversarial scrutiny that would ordinarily expose fictitious citations in the submissions of a legal practitioner.

[121] As a matter of constitutional principle, an acting judge exercising judicial authority ought to be accountable to the JSC and it should have clear and express jurisdiction over acting judges with a formal sanction mechanism that survives the expiry of the acting term. That is the law as it should be. The *First Certification* judgment confirms, however, that the absence of JSC involvement in the acting judge process is a deliberate constitutional design feature, not an oversight, and Parliament has not corrected it in the accountability context. Within the law as it stands, the LPC is the most effective available forum: its jurisdiction is continuous and survives the lapse of the acting appointment. I do not suggest that acting judges answer exclusively to the LPC nor that once the LPC has completed its

investigations, it would be precluded from referring the matter to the JCC. In my view, the LPC's jurisdiction runs concurrently with that of the JSC.

[122] The conduct described herein, could lead to, among others, a conclusion of unprofessional conduct. I intend forwarding this judgment to the Chairperson of the Legal Practice Council for an investigation. I thus leave this in the hands of the Legal Practice Council, which has the legislated obligation to conduct an appropriate investigation on receipt of a complaint, which this judgment is. That which is recorded herein does not constitute findings by this Court but are observations to be investigated.

[123] These then are my reasons for agreeing with the order of Wright J.

Signed, Opperman J

I OPPERMAN

Judge of the High Court,
Johannesburg

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