REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

Case no:17335/2012

16/12/2012

In the matter between:

REUNERT LIMITED **APPLICANT**

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.
10/12/2012 Baqwa
Date Signature

And

HOLDSWORTH JOHN CHARLES **FIRST RESPONDENT**

ALTIVEX 295 (PTY) LTD **SECOND RESPONDENT**

JUDGMENT (Rule 49(11) Application)

BAQWA J,

Introduction

[1] In this application applicant seeks an order directing that pending the determination of the petition to the Supreme Court of Appeal and the final determination of any appeal pursuant thereto against an order by

this court granted on 24 August 2012, the operation and execution thereof not be suspended.

[2] The respondents filed an application for leave to appeal against the said order which was heard on 22 October 2012. The application was dismissed with costs having been opposed by both the first and second respondents.

[3] At the time of the hearing of the application, the applicants in the present matter had already filed papers in terms of Rule 49(11). The application could however not be heard absent a petition for leave to appeal to the Supreme Court of Appeal (SCA).

[4] The respondents filed the petition on 16 November 2012 and the applicant enrolled this matter for hearing.

[5] Prior to bringing this application, the applicant had sought an undertaking from the respondents to abide by the decision of this court pending their petition for leave to appeal and any subsequent appeal thereafter. The respondents were unwilling to give such an undertaking.

[6] Further, the applicant has made a tender to the respondents to the effect that should this application be granted and in the event that the respondents are successful on appeal, the applicant will indemnify them for any proven damages suffered as a result of their having to cease business from date of written acceptance of the tender prior to the hearing of this matter to the date of a successful appeal. The respondents have declined the tender.

[7] On the other hand the first and second respondents have tendered to the applicant that from the date of acceptance of their tender to the date of finalisation of the appeal they:

7.1. Will not launch a Mobile VoIP application;
7.2. Will not approach any of Nashua ECN's employees nor make any of them any employment offers and if the employees approach them, they will not make them any offers of employment nor employ them;
7.3. Will not approach the customers of Nashua ECN, but if any of the customers of Nashua ECN approaches them for any other service than mobile VoIP they will be entitled to accept the business;
7.4. The applicant has not accepted this tender.

[8] It is upon failure to produce a positive outcome by way of settlement between the parties that this matter comes before me.

The law

[9] When an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, an application can be lodged for the suspension of the operation and execution of the order in question pending the decision of such appeal or application. The provisions of Rule 49(11) are applicable in such cases.

[10] As Williamson J stated:

"... the general effect of the noting of an appeal is that thereafter no results can flow from the judgment which would place the parties in a position different from that which they enjoyed immediately before judgment was given."

See Alexander v Joki 1948(3) SA 269(W) at 278

[11] The test to be applied in a Rule 49(11) application was succinctly stated by his lordship Corbett JA in the case of:

South Cape Corp(Pty) Ltd v Engineering Management Services (Pty) Ltd 1977(3) SA 534(A) at 545 D-F when he said:

*"In exercising this discretion the court should, in my view, determine what is just and equitable in all circumstances, and, in doing so, would normally have regard, **inter alia** to the following factors:*

(1) The potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
(2) The potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;
*(3) The prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the **bona fide** intention of seeking to reverse the judgment but for some indirect purpose, e.g to gain time or harass the other party; and*
(4) Where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be."

See also Erasmus: Superior Court Practice at page B1-370A

[12] The common law rule suspending a judgment upon the noting of an appeal is founded on the avoidance of irreparable harm to the intending appellant.
De Villiers JA explains it as follows:

"The foundation of the common law rule as to the suspension of a judgment on the noting of an appeal, is to prevent irreparable damage from being done to the intending appellant, whether such damage be done by a levy under a writ, or by the execution of the judgment in any

other manner appropriate to the nature of the judgment appealed from."

Reid v Godart 1938 AD 511 at 513

[13] Before deciding the main issue, namely, whether or not to suspend the judgment, I need to pronounce on three preliminary issues, that is, the issue of urgency, affidavits that have been filed out of time and an application to strike out what respondents submit is offensive matter in the replying affidavit.

[14] The applicant submits that should the respondents be permitted to impede their progress in the development of a new product, the applicant suffers prejudice. Applicant submits that for everyday that the respondents are able to target and solicit the customers of the applicant and solicit and make use of the applicant's ex-employees the applicant suffers prejudice. This submission is made on the basis of first respondent's stated intention to continue with the business of second respondent notwithstanding the terms of the order granted by this court on 24 August 2012.

[15] Respondents deny that this application is urgent and point out that the applicant cannot point to any instance where the said order has been breached. In the papers before me the respondents have stated that they have no intention of breaching the order.

[16] What has to be borne in mind however is the manner in which a breach of a court order is dealt with as against the nature of Rule 49(11) proceedings. A breach would in all probability result in a contempt of court application which is retrospective or backward looking in nature as against a Rule 49(11) application which is prospective or forward looking. This means that in such an application the court looks at the probability of a breach occurring and after weighing all the circumstances, decides what is just and equitable.

[17] I have considered the circumstances of this matter and come to the conclusion there is urgency. The urgency stems from the need for protection which led to the granting of an interdict in the main application. Circumstances between parties presently are not significantly different than they were as at 24 August 2012. I have accordingly allowed the matter to go forward on the basis that it is urgent.

This determination also leads me to deciding the second issue regarding the propriety of the filing of the fourth and fifth affidavits by the respondents and the applicant respectively. The filing of those affidavits is allowed in terms of Rule 6(12)(a) of the rules of this court.

[18] Regarding the application to strike out certain portions of the applicant's replying affidavit the material presented in the offending paragraphs (as per respondents' application to strike out) is in my view not new material but an elaboration on an earlier contention by the applicant regarding new products. Whilst matters relating to spending by applicant in the main application for an interdict were raised between the parties, they were dealt with by applicant by reference to documentation such as invoices. There was no 'budget' document annexed to applicant's papers in this regard. When evidence in a 'budget' format is now presented it should not be considered as new evidence. Further, these portions relate to the information which applicant sought to make available to the respondents on condition that the respondents made a confidentiality agreement before receiving same. This request was made due to the commercially sensitive nature of the information. The undertaking was not made and the respondents now seek to bar that information from coming before this court by means of an application to strike out. Since the respondents had an opportunity to consider the issue before the matter came to court, and because the matter was dealt with in the main application I do not

consider it appropriate to strike out the matter as requested and that application is refused.

The facts

[19] This application is made pursuant to an order of this court granted on 24 August 2012. In summary, the order:

19.1. Interdicts and restrains the first respondent until 30 August 2012 and in the Republic of South Africa from

19.1.1. Being engaged with the second respondent; and/or

18.1.2. An entity which competes with the applicants' ECN division; and/or

19.1.3. any entity engaged in the development of Voice Over the Internet Protocol;

19.1.4. canvassing the customers of the applicant's Nashua ECN division;

19.1.5. causing prejudice to the applicant's ECN division in the Republic of South Africa by any lawful competition;

19.2. Interdicts and restrains the first respondent from soliciting the employees of the applicant ;

19.3. Interdicts and restrains the first respondent from divulging the applicant's confidential information.

19.4. Interdicts and restrains the first respondent from diverting or usurping for himself or any other entity in which he is involved, including the second respondent, the maturing corporate opportunities of the applicant;

19.5. Interdicts and restrains the first and second respondents from competing unlawfully with the applicant's Nashua ECN division and/or engaging in any form of corporate sabotage against the applicant's Nashua ECN division including the unlawful use of the applicant's confidential information, the soliciting of employees and/or its customers;

19.6. Ordering the first and second respondents to pay the costs of the application (including the costs associated with the hearing on 17 Aril 2012) jointly and severally the one paying, the other being absolved.

[20] The respondents lodged an application for leave to appeal to the Full Bench of the North Gauteng High Court alternatively to the SCA against whole judgment and order granted.

[21] The applicant sought undertakings from the respondents that they would abide by the terms of the order pending the finalisation of the application for leave to appeal but these were not given, hence this application in terms of Rule 49(11).

[22] The petition was lodged with the SCA on 20 November 2012. Applicant has indicated its intention to oppose the respondent's petition. Barring any unforeseen event, a decision to grant or refuse the respondent's leave to appeal to the SCA will in all probability be taken during March 2013. Should leave be granted, the appeal would probably be heard in the last term of 2013 or in the first term of 2014 and in the latter instance judgment would be given at the end of March 2014.

[23] The attitude of the respondents to the judgment against which leave is sought is summarised in the report published in a report on 5 September 2012 on the website www.itweb.co.za where the first respondent indicates that despite that judgment he *"is still allowed to compete, as long as he does not do so in an anti-competitive manner by soliciting customers, which he has no intention of doing."*

[24] In my judgment of 24 August 2012 I deal with the contractual undertakings which were given by the first respondent which were not adhered to and I do not wish to reiterate them but merely make reference thereto. Further, whilst it is true that part of that order (relating to prayer 1 of part B of the Notice of Motion) has expired as it was only effective until 30 August 2012, the rest of the order was not

time bound. The order that would still be effective would be that relating for example, to applicant's confidential information, maturing business opportunities and soliciting of customers of the applicant.

[25] Absent any protection in the form of execution of the order, the respondent would be at liberty to approach the customers of the applicant and utilise confidential information of applicant. They would be able to do so precisely because there would be nothing to restrain them from taking that line of action.
In my **ex tempore** judgment dismissing the application for leave I expressed the view that it is unlikely that another reasonable court would reach a different conclusion to the one I came to.

[26] Given the time it would take to finalise the petition for leave to appeal and the appeal if leave is granted, I am of the view that this would result in immense hardship to the applicant. Put it in another way, the balance of convenience favours the applicant.

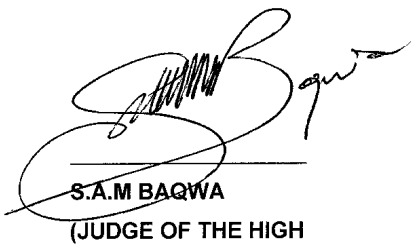
[27] Applicant indicates that it has signed a pilot project with a large logistics company with regard to the mobile VoIP application. The pilot project is to commence in January 2013 with a view to a full commercial launch of its mobile application in March of 2013.

[28] The hardship which the respondents indicate they will suffer is a consequence of the judgment and order of 24 August 2012. That is what the petition to the SCA is about and that matter would be dealt with by that court.

[29] In the result, having read the documents filed, having listened to Counsel and having considered the matter, I make the following order:

29.1. The application in terms of Rule 49(11) is granted with costs which will include the cost of two counsel.

29.2. The draft order handed into court is marked "X" and made an order of court.



S.A.M BAQWA
(JUDGE OF THE HIGH COURT)

Applicant's attorneys:	Norton Rose South Africa
Applicant's counsel:	Adv A.R Bhana S.C
	Adv P Bosman
Respondents' attorneys:	Knowles Hussain Lindsay Inc
Respondents' counsel:	Adv E.L Theron
	Adv S.C Vivian

"XII"

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO 17335/12

Order of Baqwa, J granted on 4 December 2012

In the matter between:

REUNERT LIMITED	Applicant
and	
HOLDSWORTH, JOHN CHARLES	First Respondent
ALTIVEX 295 (PTY) LIMITED	Second Respondent

DRAFT ORDER

Having heard Counsel for the parties and having read the papers filed of record and having considered the matter, an order in the following terms -

1. pending the determination of the respondents' application to the Supreme Court of Appeal delivered on 16 November 2012 for leave to appeal against the judgment of Baqwa, J dated 24 August 2012 ("the Judgment") and the finalisation of any subsequent appeal by the respondents which may follow from the granting of the application, the operation and execution of the terms of the order set out in paragraph 26 of the Judgment are not suspended;

2. the tender made by the applicant at paragraph 92 of its founding affidavit (page 40 of the papers) is made a condition of this order;

3 the respondents are ordered to pay the costs of this application, jointly and severally, the one paying the others to be absolved, which costs are to include the costs occasioned by the employment of two counsel.

REGISTRAR

BY ORDER OF COURT