Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER 12808/2017

In the matter between

LATERAL DYNAMICS (PTY) LTD	Applicant
vs	
WONGA FINANCE SA (PTY) LTD	First Respondent
LAURENS STRYDOM	Second Respondent
RUWALD LICHTENSTEIN	Third Respondent
JACOBUS CORNELIS KOORNHOF	Fourth Respondent

JUDGMENT 24 JANUARY 2018

KUSEVITSKY AJ

[1] There are three applications before the court. The first is an application for leave to appeal against a judgment delivered by this court on 3 November 2017, where the court upheld a restraint clause contained in a Service Level Agreement ("SLA") concluded between the applicant and the first respondent on the one hand and restraint of trade provisions concluded between the Applicant and third and fourth respondents (also referred to as "the developers") as contained in their employment contracts, on the other. In terms of the order granted, amongst other things, the following order was made:

1. *"The First Respondent is interdicted from employing, or continuing to employ, directly or indirectly, the third and fourth respondents, for a*

period of 12 months subsequent to the expiration of the contract on 30 September 2017.

2. *The Third and Fourth Respondents are interdicted and restrained from being employed, directly or indirectly by the First Respondent, or continued to be employed by the First Respondent, directly or indirectly, for a period of twelve months subsequent to their resignation on 30 June 2017.*

3. *The First Respondent is ordered to pay the costs of this application on a scale as between attorney and client.*

[2] Also before the court is an application in terms of Section 18 of the Superior Court Act 10 of 2013 for an order that the operation and execution of the judgment shall not be suspended pending the application for leave to appeal and if leave is refused, pending any further petition or application for leave to appeal. Applicant further requests that the First, Third and Fourth Respondents be ordered to comply with the Order of 3 November 2017 within 24 hours of the order granted. The third application is an application in terms of rule 6(15) to strike out certain portions of the replying affidavit in the section 18 application. For convenience, I refer to the parties as they are cited in the main application and as argued before me.

[3] The material facts are recorded in the judgment that is the subject of the present application. It is apposite however to reiterate that the first respondent was

found to have breached clause 27 of the SLA and interdicted from employing the third and fourth respondents (also referred to as 'developers' herein) for a period of 12 months from the date of their resignation which restraint, according to the papers, would terminate on 30 June 2018 and 30 September 2018 respectively. The developers left the employ of the first respondent and returned immediately after the application for leave to appeal was filed.

[4] I deal first with the application for leave to appeal. The test to be applied in an application such as the present is that referred to in s 17 of the Superior Courts Act, 10 of 2013. Section 17(1) provides:

> "Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
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> (a) (i) the appeal would have a reasonable prospect of success; or
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> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
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> (b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and
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> (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

[5] The traditional formulation of the test that is applicable in an application such

as the present requires the court to determine whether there is a reasonable prospect that another court may come to a different conclusion to that reached in the judgment that is sought to be taken on appeal. This is not a test to be applied lightly. *Erasmus* refers to the case of THE ACTING NATIONAL DIRECTOR OF PP v DEMOCRATIC ALLIANCE (GP case no. 19577/09 dated 24 June 2016) which holds that the wording of subsection 1(a)(i) raised the bar of the test that has now to be applied to the merits of the proposed appeal before leave should be granted.

[6] The respondents have raised various grounds in their application for leave to appeal. Having considered each of the grounds raised, I am unable to find any ground upon which another court may reasonably arrive at a different conclusion. For this reason the application for leave to appeal is dismissed.

[7] Before turning to the section 18 application, it is necessary for me to deal with the striking out application pursuant to the filing of that application.

[8] Rule 6(15) of the uniform rules of court provides that

> "The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the applications unless it is satisfied that the applicant will be prejudiced if the application is not granted."

[9] It is also well established, as confirmed by *Erasmus*, that this sub-rule is not exhaustive of the grounds of striking out and that new matter may be struck out if the affidavit in question is a replying affidavit. The Respondents aver that the paragraphs sought to have struck out is precisely such matter. They argue that the paragraphs all refer for the first time to an allegation that the relevant developers (the third and fourth respondents) possess knowledge, later characterized as '*trade secrets etc*' , obtained from the applicant which they are purportedly imparting to the first respondent. They argue that no such allegations were made in the founding affidavit. The applicant on the other hand argued that these allegations were indeed made in the founding affidavit and referred me to paragraphs 56 and 57 of the founding affidavit in the main application. I have read these paragraphs and other than asserting that the developers have been employed by the applicant for a considerable period of time and have been exposed to unique projects and have acquired skill sets as a result, there are no allegations at all which suggest a fear that these developers are now imparting this information to the first respondent. I am therefore satisfied that this constitutes new matter which ought to be struck out.

[10] A further paragraph which refers to the purported financial deterioration of the applicant is sought to be struck out. Paragraph 4 of the application seeks to strike out the entirety of paragraph 21 of the replying affidavit which reads as follows:

> *"The financial deterioration and harm caused by the Respondents respective breached is also the main reason why the Applicant is not in a position to fund protracted litigation"*

[11] In the founding affidavit in the main application, the applicant makes the following allegations at paragraph 58:

> *"As mentioned previously, the applicant's assets predominately consist of its human capital, the applicant not being in the business of trade or retail, but service delivery. The developers are responsible for generation of approximately 40% of the applicant's total revenue, and it is therefore detrimental to the applicant's business if it had to lose 75% of its development team in one go."*

[12] I am therefore of the view that the aspect of the financial impact of the applicant has been dealt with in the main application and that the content in paragraph 21 of the replying affidavit in the section 18 application does not constitute new material.

[13] Turning next to the application for leave to execute the judgment and order pending appeal. Section 18 of that Act regulates the circumstances under which a party may apply for an order that departs from the ordinary consequence of filing an application for leave to appeal, i.e. that the operation and execution of the judgment and order appealed against is suspended. The approach established by s 18 requires an applicant in an application for leave to execute to show that the facts and circumstances of the particular application are exceptional and warrant a deviation from the normal rule. This has been referred to as a 'threshold factual test' (see *Incubeta Holdings (Pty) Ltd and another v Ellis and another* 2014 (3) SA 189 (GJ)) and requires the applicant to show that the facts and circumstances of its particular case are uncommon, unusual and\or out of the ordinary to the extent that a departure from the ordinary rule that an appeal suspends the operation of the judgment in order

appealed against should not apply. Further, the applicant is required to prove on a balance of probabilities that it will suffer irreparable harm should the order for leave to execute not be granted pending the appeal. Finally, the applicant must prove on a balance of probabilities that the respondent in the application for leave to execute will not suffer irreparable harm if leave to execute is granted pending appeal.

[14] With regard to the requirement "exceptional circumstances", it was held in the matter of **University of the Free State v Afriforum and Another [2017] 1 All SA 79 (SCA) at p194, para 16** that whether "exceptional circumstances" for the purposes of section 18(1) of the Act existed would necessarily depend on the peculiar facts of each case, the Court citing Incubeta Holdings with approval where that Court held that:

"[n]eccessarily, in my view, exceptionality must be fact specific. The circumstances which are or may be 'exceptional' must be derived from the actual predicaments in which the given litigants find themselves.".

[15] The courts have also in applications for leave to execute on an interdict enforcing a restraint of trade agreement given considerable weight to the fact that if the order was not put into operation, the relief would be forfeited by the applicant because of the short duration of the restraint which would inevitably expire before exhaustion of the appeal process. In this instance, the restraint has between five and nine months to run. The limited duration of the balance of the restraint period and the prospect of the order granted on 3 November 2017 being rendered nugatory, and the enforcement of the restraint undertakings, are sufficient in my view to constitute

exceptional circumstances for the purposes of Section 18.

[16] With regard to the second leg of the enquiry, i.e. the presence or absence of irreparable harm to either party, the full bench in **Mogale City Municipality and Others v Fidelity Security Services 2017 (4) SA 516 (GJ)** held as follows:

> "The discernment of 'irreparable harm' by a court is a factual finding. It was stated in *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* 2014 (3) SA 189 (GJ) para 24:
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> > 'The second leg of the s 18 test [ie the presence or absence of irreparable harm to either party], in my view, does introduce a novel dimension. D On the *South Cape* test, No 4[*South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A)] . . . an even-handed balance is aimed for, best expressed as a balance of convenience or of hardship. In blunt terms, it is asked: who will be worse off if the order is put into operation or is stayed. But s 18(3) seems to require a different approach. The proper meaning of that subsection is that if the loser, who seeks leave to appeal, will suffer irreparable harm, the order must remain stayed, even if the stay will cause the victor irreparable harm too. In addition, if the loser will not suffer irreparable harm, the victor must nevertheless show irreparable harm to itself. A hierarchy of entitlement has been created, absent from the *South Cape* test. Two distinct findings of fact must now be made, rather than a weighing-up to discern a preponderance of equities. The discretion is indeed absent, in the sense articulated in *South Cape*. What remains intriguing, however, is the extent to which even a finding of fact as to irreparable harm is a qualitative decision admitting of some scope for reasonable people to disagree about the presence of the so-called fact of irreparability.'

[17] The essence of the applicant's argument is that the harm suffered would be the efficacy of the relief initially obtained. They also argued that the harm that they will suffer is the efficacy of the very purpose of the restraint clauses in the relevant

agreements. I infer from this argument that the purpose of these clauses is to prevent other employees from soliciting employment from the Applicant's customers which might cause it irreparable harm. On the other hand, Applicant's customers might think that it is acceptable to offer employment to the Applicant's employees in contravention of the prohibition clause which would cause them further irreparable harm. It was further argued that First Respondent on the other hand will suffer no irreparable harm as the second respondent is still in its employ and could assist in the training of substitute employees and any in event, any harm suffered by first respondent would be easily quantifiable and could be recovered by way of an action for damages. As regards the developers, the Applicant argued that they are highly skilled individuals who possess scarce skills, which was common cause in the main application. They could easily secure alternative employment.

[18] The Respondents on the other contend that they also face substantive harm as the developers have already lost two weeks of salary and two weeks of the use of their employee developers. If the application is granted, the developers will have to leave the employ of the first respondent again.

[19] In **The Minister of Social Development Western Cape v Justice Alliance of South Africa**[1] the court made it clear that notwithstanding the introduction of an absolute threshold, the provisions of s 18 do not result in the exercise of judicial discretion in the wide sense being excluded in the determination of applications for leave to execute of for *orders ad factum praestandum* to operate pending an appeal. It stated that even if the double-edged requirements on irreparable harm and that of

[1] WCC case no. 20806/2013 dated 1 April 2016

exceptionality are satisfied, the court retains 'a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised'. Considerations of what is just and equitable in the peculiar circumstances remain relevant in that context.[2]

[20] That court also disagreed with an argument that *'the requirements of s 18(3) set a higher standard for what needs to be proved in respect of irreparable harm than the 'the potentiality of irreparable harm or prejudice'* referred to by Corbett JA in **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd**[3], holding that 'the provisions does not require proof that there is a certainty that irreparable harm will be suffered. Proof of a balance of probabilities that there is a likelihood that such harm will be suffered will suffice. That is indistinguishable from establishing 'the potentiality' of such harm.

[21] I am of the view that the harm that the applicant will suffer if leave to execute is not granted is self-evident, since if leave to execute is refused, the first respondent's contractual undertakings and the interdict granted by the court will be worthless. The prospect of any reparation of harm by way of damages is remote given the potential disastrous consequences that might flow as I have alluded to above. Damages would be difficult to quantify and prove in an instance where what is sought to be protected is an investment in customer and employee relationships.

[22] With regard to the third and fourth respondents, they would be denied the opportunity to be in an employment relationship in breach of the restraint, for the

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[2] At para 26
[3] 1977 (3) SA 534 (A)

duration of the restraint period but, as stated above, they are highly skilled and sought after in their field of information Technology and it was conceded during argument that if the application for leave to appeal was refused, then they would seek work elsewhere. The third and fourth respondents also elected to resign from the applicant to work for the first respondent, and it would therefore not be unreasonable to conclude that they would be in a position to find alternative employment. I therefore do not find that third and fourth respondents will suffer irreparable prejudice if the application is granted. On the other hand, as I have indicated, for as long as the first respondent employs the third and fourth respondents and they remain employed with the first respondent in breach of the restraint agreement, the applicant's legitimate protectable interests which it is shown to exist and has no other means to protect, would continue to be eroded and prejudiced.

[23] For the above reasons, I am satisfied that the applicant has proven on balance of probabilities that it will suffer irreparable harm if this court does not grant an order for leave to execute their order as prayed.

[24] Finally, there is no reason why the first respondent ought not to pay the costs of both the application for leave to appeal and the application to execute.

In the result, I make the following order::

1. Leave to appeal against the judgment delivered by this court on 3 November 2017 is refused.

2. In the application to Strike out:

    2.1 The portions as contained in paragraphs 1,2,3 and 5 are struck out.

2.2 The entire portion as contained in paragraph 4 of the application to strike out remains.

3. The operation and execution of the order granted on 3 November 2017 shall not be suspended pending any petition for leave to appeal or appeal or any application to appeal that might be filed consequent to any successful petition.

4. The First, Third and Fourth Respondents are ordered to comply with the order handed down on 3 November 2017 within 24 hours of this order being granted.

5. The first respondent (the applicant in the application for leave to appeal) is to pay the costs of the application for leave to appeal, in addition to the costs of the application for an order to execute the judgment brought on 15 January 2018.

KUSEVITSKY AJ