

REPUBLIC OF SOUTH AFRICA

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

CASE NO 2013/30879

IN THE MATTER BETWEEN:

INCUBETA HOLDINGS (Pty) Ltd

First Applicant

INTERFACE HOLDINGS (Pty) Ltd

Second Applicant

and

ELLIS, JOHN ROLAND

First Respondent

GULLAN & GULLAN (Pty) Ltd

Second Respondent

JUDGMENT

PER SUTHERLAND J:

SUMMARY:

Rule 49(11) – scope to grant leave to put into operation an order pending an application for leave to appeal and Impact of Section 18 of Superior Courts Act 10 of 2013 – statutory codification of the common law rule that application for leave to appeal or an appeal suspends a judgment - Rule in *South Cape v Engineering Management Services* overtaken –

New threshold test in section 18 overshadows Rule 49(11) application - test no longer discretionary with eye to balancing harm –

New test requires that ‘exceptional circumstances’ must be proven to justify invoking the relief - what constitutes - test requires a finding of fact not an exercise of discretion – the test must be fact specific - the concept of ‘exceptional’ to be applied in a way functional to objective of the section – section aimed at regulating procedure so as not to prejudice litigants in relation to uncertain outcomes of an appeal

Further, new test creates a hierarchy of irreparable harm –

- (1) If party who seeks leave to appeal will suffer irreparable harm, no relief is possible.
- (2) Where party seeking leave will not suffer irreparable harm, the party seeking to put order into operation must prove irreparable harm to itself, if relief to put the order into operation pending the appeal process is not granted.

Restraint to trade- four months left to run - If not put into operation the appeal process will extend until beyond the period sought to retain the employee – in such case employer suffer irreparable harm as the relief cannot be achieved in any other way – employee, if successful in appeal retains a damages claim for loss of earnings during period of restraint – no irreparable harm to employee

A restraint of trade order is premised on the existence of irreparable harm to applicant – in money orders and other forms of relief it is necessary to show irreparable harm to invoke Rule 49(11)

An order restraining the respondent for four months pending any appeal process granted on basis that exceptional circumstances were established by the relief being rendered useless unless applied to the relevant period of the restraint

1. This case is about the application of Rule 49(11) of the Uniform Rules of Court and the impact upon that Rule by the provisions of Section 18 of the Superior Courts Act 10 of 2013 (SCRT) which came into force on 23 August 2013.

2. The applicant (Incubeta) was the victorious applicant in proceedings to obtain a final interdict against the respondents to restrain the second respondent (Ellis) from breaching his restraint of trade agreement with Incubeta by taking up employment with the second respondent or any other party anywhere in the country, and thus preventing Ellis from threatening Incubeta's confidential information or poaching its customers. Foulkes-Jones AJ, on 16 September 2013, granted the interdict which restrained Ellis, for a period of 6 months calculated from his termination of employment with Incubeta on 8 August 2013. The unsuccessful Ellis noted an application for leave to appeal on 27 September 2013.
3. The Application for leave to appeal has yet to be set down and will not be ripe before the orally delivered judgment of Foulkes -Jones AJ is transcribed, edited by her, made available to the litigants and a commonly convenient date is arranged. It is incontrovertible that none of these happenings will occur rapidly, an observation painfully obvious to Bench and Bar alike, in this Division. It was contended that Ellis has deliberately dragged his feet over the application for leave to appeal to stretch out time to avoid compliance. The suspicion may be plausible but I disregard that aspect of the case as presented, as it plays no useful role in the reasoning I offer for my conclusions.
4. The current application for leave to put the order into operation pending the appeal process was heard on 15 October 2013. At the time this application was heard the restraint period had 4.5 months out of 6 months to run.

5. The crisp question is whether or not a proper case to grant leave to put the order into operation pending the appeal process exists.

6. Rule 49(11) provides:

“ When an appeal has been noted or an application for leave to appeal against or to rescind, correct or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such an appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.”

7. Until recently, this rule was premised on a principle of the common law to the effect that the noting of an application for leave to appeal, suspended the ‘execution’ of the order.

The decision in *South Cape Corporation (Pty) Ltd v Engineering Management*

Services (Pty) Ltd 1977 (3) SA 534 (AD) by Corbett JA (as he then was) has been the leading judicial authority for that proposition which has its roots in the writings of Voet.

8. The old Supreme Court Act 59 of 1959, did not address this exact issue. The SCRT does.

Section 18 provides as follows:

“18. 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 of

probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

(4) 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.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.

9. Sections 18(4) and (5) are brand new and have no precedent in the law prior to their enactment. The implications of these new provisions are irrelevant to this judgment, save that their very existence emphasises the exceptionality required of the relief of putting into operation and executing an order that is subject to a pending application for leave to appeal or an appeal. The section does not address the implications of an application to rescind or correct or vary an order.

10. It is argued on behalf of the respondents that Section 18 introduces a fresh test for leave to put into operation and execute an order pending the appeal processes and that judicial authority that predates the section has been overtaken by its enactment. It is that proposition which calls for interrogation.

11. Hitherto, the test applied has been that captured in *South Cape* at 544H – 546B:

“..Whatever the true position may have been in the Dutch Courts, and more particularly the Court of Holland (as to which see *Ruby's Cash Store (Pty.) Ltd. v Estate Marks and Another*, 1961 (2) SA 118 (T) at pp. 120 - 3), it is today the accepted common law rule of practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the Court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make special application. (See generally *Olifants Tin "B" Syndicate v De Jager*, 1912 AD 377 at p. 481; *Reid and Another v Godart and Another*, 1938 AD 511 at p. 513; *Gentiruco A.G. v Firestone SA (Pty.) Ltd.*, 1972 (1) SA 589 (AD) at p. 667; *Standard Bank of SA Ltd. v Stama (Pty.) Ltd.*, 1975 (1) SA 730 (AD) at p. 746.) The purpose of this 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, either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from (*Reid's case*, supra at p. 513). *The Court to which application for leave to execute is made has 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 (see Voet, 49.7.3; Ruby's Cash Store (Pty.) Ltd. v Estate Marks and Another, supra at p. 127). This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments (cf. Fismer v Thornton, 1929 AD 17 at p. 19). In exercising this discretion the Court should, in my view, determine what is just and equitable in all the 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 in this connection *Ruby's case*, supra at pp. 127-8; also *Rood v Wallach*, 1904 T.S. 257 at p. 259; *Weber v Spira*, 1912 G.T.P.D. 331 at pp. 334-4; *Rand Daily Mails Ltd. v Johnston*, 1928 W.L.D. 85; *Frankel v Pirie*, 1936 E.D.L. 106 at pp. 114-6; *Leask v French and Others*, 1949 (4) SA 887 (C) at pp. 892-4; *Ismail v Keshavjee*, 1957 (1) SA 684 (T) at pp. 688-9; *Du H. Plessis v Van der Merwe*, 1960 (2) SA 319 (O).) Although most of the

cases just cited dealt with the exercise of the Court's discretion under a statutory provision or Rule of Court, the statute or Rule concerned did not prescribe the nature of the discretion except in broad general terms (e.g. secs. 36 and 39 of Proc. 14 of 1902 (T) empower the Court to give directions as "may in each case appear to be most consistent with real and substantial justice") and the same general approach would be appropriate to the exercise of a discretion under the aforementioned rule of practice.

Where the Court has acceded to an application for leave to execute, it has generally stipulated for the provision of security *de restituendo* by the applicant (respondent on appeal) in order to ensure that no prejudice will be suffered by the respondent (appellant on appeal) in the event of the appeal succeeding and the order of the Court *a quo* being set aside. In the case of appeals to the Appellate Division AD Rule 6 (1) itself makes provision for the furnishing of such security. Similarly, if ordering execution to be stayed, the Courts have required security for the amount of the judgment to be furnished by the appellant (see e.g., *Rand Daily Mails case*, *supra*). On occasion other conditions have been attached to an order allowing execution to issue pending the appeal (see, e.g., *S.A. Breweries v Solomon*, 1924 OPD 76; *Ismail v Keshavjee*, *supra*).”

(Emphasis supplied)

12. The critical component of that approach is a judicial discretion, derived from the inherent jurisdiction of the court, to rule in accordance with the equities present in the given case.

An earlier decision, often quoted, is *Leask v French & Others 1949(4) SA 887 (C) at 893*, where after addressing the dilemma of reconciling contending interests Searle J concluded with this poignant observation:

“ In the circumstances the court can only reduce to a minimum the possibilities of prejudice by granting or refusing the application in accordance with the preponderance of equities..”

13. There is a single case reported about a restraint interdict being put into operation pending a bona fide appeal: *Fox & Carney (Pvt) Ltd v Carthew- Gabriel (2) 1977 (4) SA 970 (R)*. In that case Smith J applied the reasoning from *Leask v French*. Interestingly, this case also involved a restraint of short duration of 4 months protecting the customer connections of an estate agent from a breach by its employee who sought to set up in business as an estate agent in competition.

14. There are several other examples where orders *ad factum praestandum* have been put into operation pending an appeal. Among them are these:

14.1. In *Chaimowitz v Chaimowitz 1960 (4) SA 829 (C)* an interim custody order in favour of the mother pending a divorce action was put into operation despite an appeal being noted. The current Rule 43 regime makes this sort of issue now redundant.

14.2. In *Kalahari Salt Works (Pty) Ltd & Others v Bonne Fortune Beleggings Bpk 1973 (4) SA 471 (NC)*, an order was obtained to eject tenants and take possession of certain movables. The tenants noted an appeal. The order of ejectment and for the seizure of movables was put into operation together with the provision of security by the victor, as contemplated in Rule 49(11). At issue had been the existence of a debt pursuant to a lien, a point upon which the tenant had lost and now sought to reverse on appeal. The rationale for the order being put into operation was that the tenant's prejudice was resolved by the security.

15. The thesis advanced on behalf of the Respondent is that the discretion hitherto exercised by the court is history and that one must now look exclusively to the text of Section 18. Emphasis was placed on the heavy onus on the litigant who seeks to execute on an order, pending an appeal, as formulated in the Sections 18(1) and (3).

16. It seems to me that there is indeed a new dimension introduced to the test by the provisions of Section 18. The test is twofold; the requirements are:

16.1. First, whether or not 'exceptional circumstances' exist, and

16.2. Second, proof on a balance of probabilities by the applicant of-

16.2.1. the presence of irreparable harm to the applicant/victim, who wants to put into operation and execute the order, and,

16.2.2. the absence of irreparable harm to the respondent/loser, who seeks leave to appeal.

17. What constitutes "exceptional circumstances" has been addressed by Thring J in *MV Ais Mamas 2002 (6) SA 150 (C)*, where a summation of the meaning of the phrase is given as follows at 156I – 157C:

"What does emerge from an examination of the authorities, however, seems to be the following:

1. What is ordinarily contemplated by the words 'exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; 'besonder', 'seldsaam', 'uitsonderlik', 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 liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional."

18. Significantly, although it is accepted in that Judgment that what is cognisable as

'exceptional circumstances' may be indefinable and difficult to articulate, the conclusion that such circumstances exist in a given case, is not a product of a discretion, but a finding of fact.

19. The survey of the authorities addressed by Thring J included a broad range of

circumstances, and his summation or compendium appears to be of universal application.

Nevertheless, it seems to me, to be necessary to express caution about importing from one kind of enquiry into another kind of enquiry, an *understanding* of a familiar phrase. It is important to appreciate that Thring J was not addressing the phrase in Section 18 of the SCRT but in the provisions of Section 5(a)(iv) the Admiralty Regulation Act 105 of 1983 which confers a power upon a competent court to direct an examination of various things in order to procure evidence.

20. A given phrase in any statutory provision has a function specific to that provision and to that specific statute and the primary aim of the interpreter is to discover the function it performs in that specific context. It may perform a different function in another statute and one must avoid being seduced by beguiling similarities.
21. The context relevant to Section 18 of SCRT is the set of considerations pertinent to a threshold test to deviate from a default position; ie the appeal stays the operation and execution of the order. The realm is that of procedural laws whose policy objectives are to prevent avoidable harm to litigants. The primary rationale for the default position is that finality must await the last court's decision, in case the last court decides differently, the reasonable prospect of such an outcome, being an essential ingredient of the decision to grant leave in the first place. Where the pending happening is the application for leave itself, the potential outcome in that proceeding, although conceptually distinct from the position after leave is granted, ought for policy reasons, to rest on the same footing.
22. Necessarily, 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. I am not of the view that one can be sure that any true novelty has been invented by Section 18 by the use of the phrase. Although that phrase may not have been employed in the judgments, conceptually, the practice as exemplified by the text of Rule 49(11), makes the notion of the putting into operation an order in the face of appeal process a matter which requires particular *ad hoc* sanction from a court. It is expressly recognised, therefore, as a deviation from the norm, ie an outcome warranted only 'exceptionality'.

23. I address the relevant circumstances of these litigants below as to the presence of ‘exceptional circumstances’.

24. The second leg of the Section 18 test, in my view, does introduce a novel dimension. On the *South Cape* test, number 4, (cited *supra*) 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 Section 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’.

25. Turning to the circumstances of these litigants, what is relevant, in my view, is the following:

25.1. If the order is not put into operation, the relief will, regardless of the outcome of the application for leave to appeal, be forfeited by Incubeta because the short duration of the restraint will expire before exhaustion of the appeal processes.

25.2. The only value in the relief is to stop the breach and protect legitimate interests during the precise period of the next 4.5 months. Unrebutted evidence in the affidavits allege a breach is taking place at this very time.

25.3. Damages are not an appropriate alternative remedy precisely because the very relief obtained is posited on the absence of such a remedy being available. This places a restraint interdict in a different position to other forms of relief, such as money claims, where the aspect of irreparable harm is a factor extraneous to the substantive relief procured.

25.4. Ellis will, on the probabilities, be without work for 4.5 months and without pay. This will be financially detrimental.

25.5. Significantly, no allegation is made that Ellis or his family will endure true hardship during this short period.

25.6. If the appeal is won, Ellis's loss of earnings can be sued for and the quantum is feasible to compute, including the loss of interest or lost opportunity cost of being out of funds and any such interest expended on borrowing for living expenses, if necessary.

25.7. Moreover, Security under Rule 48 (12) is available.

26. I have made no reference to the 'merits' of the case which resulted in the interdict. In my view they are not pertinent to this kind of enquiry. The considerations that are valuable

pre-suppose a bona fide application for leave to appeal or an actual appeal. No second guessing about the judgment *per se* comes into reckoning.

27. Do these circumstances give rise to 'exceptionality' as contemplated? In my view the predicament of being left with no relief, regardless of the outcome of an appeal, constitutes exceptional circumstances which warrant a consideration of putting the order into operation. The forfeiture of substantive relief because of procedural delays, even if not protracted in bad faith by a litigant, ought to be sufficient to cross the threshold of 'exceptional circumstances'
28. The plight of the victor alone is probably all that is required to pass muster. Nonetheless, I am not unconscious of the undesirable outcome that relief granted by the court becomes a vacuous gesture. A court order ought not to be lightly allowed to evaporate, a fate, which seems to me, would tend undermine the role of courts in the ordering of social relations.
29. Furthermore, it is plain from the summary of circumstances given above, that the applicants would indeed suffer irreparable harm if the order is not put into operation. Moreover, it is plain that Ellis will not suffer irreparable harm if the order is put into operation. Although Ellis in his answering affidavit complains that putting the order into operation will render his right of appeal meaningless, this is incorrect for the reasons mentioned above; he cannot be without practical relief. The Section 18 test is met on both counts of the second leg.

30. Accordingly, I make an order as follows:

- 30.1. The order of Foulkes-Jones AJ of 19 September 2013 shall operate pending the outcome of the appeal process, including the application for leave to appeal and any appeal noted, if at all.
- 30.2. The parties are directed to take the steps contemplated in Rule 49 (12) in respect of security.
- 30.3. The First respondent shall pay the applicant's costs in these proceedings.

ROLAND SUTHERLAND
Judge

Hearing: 5 October 2013

Judgment: 16 October 2013

For applicants:

Adv M Nowitz
Instructed by Larry Dave Attorneys
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For Respondents:

Adv R Stockwell SC
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