



Reportable

**In the High Court of South Africa
(Western Cape Division, Cape Town)**

Case No: 16453/2023

In the matter between:

CASH CRUSADERS FRANCHISING (PTY) LTD

Applicant

and

**THE CASH CRUSADERS FRANCHISEES LISTED ON
ANNEXURE 'ADP1' TO THE FOUNDING AFFIDAVIT OF
ANDRIES DANIEL DU PLOOY**

Respondent

Heard: 10 November 2023

Delivered (electronically): 26 January 2024

JUDGMENT

LEKHULENI J

[1] This is an application to enforce compliance with an interim interdict granted by the urgent court on 3 October 2023. This application is necessitated by the respondents' non-compliance with the order, presuming that it is stayed pending their application for leave to appeal to the Supreme Court of Appeal. The applicant seeks a declaratory order confirming that the interdict granted on 3 October 2023 is interim

in nature and not suspended pending an application for leave to appeal or any further appeals. In addition, and in the alternative to the declaratory relief, the applicant seeks an execution order in terms of section 18(1) read with section 18(3) of the Superior Courts Act 10 of 2013 ('Superior Courts Act') directing that this court's order of 03 October 2023, shall operate pending any application for leave to appeal or further appeals.

[2] Meanwhile, the franchisees ('the respondents') filed a counterapplication wherein they aver that in the event that this Court finds that the interdict order of 3 October 2023 is interlocutory and does not have the effect of a final judgment, its operation, in particular, paragraphs 1 and 2 of that order, be suspended in terms of section 18(2) of the Superior Courts Act pending finalisation of the appeal process including any application for leave to appeal to the Supreme Court of Appeal or an application for leave to appeal to the Constitutional Court. The respondents also sought an order that the applicant be ordered to pay the costs of this application, including the costs occasioned by two Counsels.

THE FACTUAL BACKGROUND

[3] The applicant is a franchisor with franchise outlets across South Africa. It specialises in selling an extensive selection of new and pre-owned merchandise. There are currently 250 Cash Crusaders outlets in existence. Of these stores, 145 are being operated by franchisees, and the remainder are corporate owned. When instituting this application, the respondents comprised 78 of the 150 non-corporate-

owned franchisees and represented approximately one-third of the Cash Crusaders franchise footprint.

[4] The franchisees' business operations are made up of three main income streams: Firstly, the sale of new goods. These goods are procured and provided to franchisees by Cash Crusaders Corporate (Pty) Ltd, trading as CCW under brand names exclusive to Cash Crusaders. CCW is an authorised wholesaler of these new goods, which it sells exclusively to franchisees pursuant to orders placed by them. The franchise agreement between the franchisor (Cash Crusaders) and the franchisees prevents Cash Crusaders from selling new products to anyone other than Cash Crusaders franchisees.

[5] Secondly, is the purchase and sale of pre-owned products from and to members of the general public and thirdly, is the suspensive security buy transactions ('SSB transactions') concluded with members of the public. The SSB transactions are commonly known as pawn transactions. The SSB transactions entails customers pledging movable property items as collateral for a loan, which is subsequently granted by the franchisee to the customers for a specified duration, usually thirty days. These transactions are regulated by section 8(4)(a) of the National Credit Act 34 of 2005 ('the NCA').

[6] The dispute between Cash Crusaders ('the applicant') and the respondents has its genesis in the mechanics of the third income stream - the SSB transactions. At the end of the 30-day period, consumers often sought to extend their loan with the franchisees. The extension would be regarded as a new rather than an extended loan,

which entitled the franchisees to charge a further initiation fee on each loan extension. Subsequently, after seeking legal advice, the applicant made a business decision to change its system concerning the SSB transactions. The new system now required the respondents to charge only a single initiation fee as opposed to multiple initiation fees on extensions of SSB transactions. The decision to charge a single initiation fee regarding extensions of SSB transactions did not augur well with some of the franchisees and triggered the current dispute between the parties.

[7] Discontented with the change in the system, in September 2022, the respondents filed an application with this court seeking a declaratory relief regarding the interpretation of the NCA and whether it permitted repetitive charges of initiation fees for extended SSB transactions. The applicant opposed the application, contending that the dispute resolution mechanism contained in the franchise agreement was not complied with. On 18 September 2023, the respondents' legal representatives addressed a demand to the applicant's legal representatives, informing them that the applicant breached the franchised agreement when it introduced the changes to the SSB transactions.

[8] The respondents further averred that the changes the applicant introduced caused them to suffer substantial financial losses. The respondents put the applicant to terms, demanding that the various breaches of the franchise agreement, particularly the change of the SSB transactions, be remedied within 10 days. On 19 September 2023, the applicant's legal representatives responded and denied any breach of the franchise agreement. In addition, the applicant made proposal for the referral of the

dispute to arbitration in terms of the franchise agreement to expedite the resolution of the matter and same were not accepted by the respondents.

[9] Instead, the respondents restated their stance that the applicant was in breach of the agreement and threatened they would cancel the franchise agreements if the applicant failed to remedy the breach. Pursuant thereto, the applicant launched an urgent application on 28 September 2023, seeking an order interdicting and restraining the respondents from cancelling their franchise agreements and compelling them to comply with the obligations under the agreement. The applicant regarded the respondents' threatened cancellation of their respective franchise agreements as unlawful. The applicant sought interim relief pending the determination of the main application by the arbitrator to determine whether the respondents were entitled to cancel their franchise agreement on the basis as threatened in their letter of 18 September 2023.

[10] Notwithstanding that the application was pending before the court and that the ten days stipulated by the respondents in their letter of 18 September 2023 was yet to expire, the respondents cancelled their respective franchise agreement with the applicant on 26 September 2023. In addition, the respondents contended that by cancelling the contract, the horse had bolted, and the interdict application had become moot.

[11] The applicant amended the nature of the relief sought at the hearing of the interdict application by seeking to hold the respondents to the terms of the franchise agreements despite their purported cancellation thereof, pending a determination by

an arbitrator as to their entitlement to cancel the franchise agreement on the basis they had. The application for the interdict was heard on 28 September 2023.

[12] The court delivered a judgment in the interdict application on 3 October 2023. The Court granted the interdict against the respondents pending an arbitrator or the court's final determination of the dispute between the applicant and the respondents. The Court interdicted the respondents from cancelling the franchise agreements and further directed them to abide by and comply with their obligations under the respective franchise agreements. In addition, the court ordered that the interdict shall operate for a period of 60 days from the date of the order. The court directed the applicant to refer the dispute to arbitration within a period of 60 days from the date of the order, failing which the interdict would lapse.

[13] On 4 October 2023, the respondents applied for leave to appeal the court order. The respondents contended that there were compelling reasons why the appeal should be granted and that there are reasonable prospects of success on appeal. The respondents contended, among others, that the court failed to apply and give effect to clauses 25.12 and 25.13 of the franchise agreement, wherein the parties expressly agreed that an interdict should be brought before and adjudicated by an arbitrator. The respondents further contended that the court respectfully failed to appreciate the terms of the franchise agreement and, therefore, exercised its discretion on the wrong basis.

[14] Furthermore, the respondents contended that the order is subject to appeal on the grounds that the court impermissibly exercised jurisdiction over the respondents, thereby rendering the order final in effect. The court heard the application for leave to

appeal on 6 October 2023 and dismissed the application with costs on 25 October 2023. On the said day, the applicant addressed a letter to the respondents' legal representatives seeking an undertaking that there would be compliance with the interim interdict, bearing in mind that the court hearing the application for leave to appeal concluded that the interdict was interim in nature in its judgment refusing leave to appeal.

[15] On 26 October 2023, the respondents launched an application for leave to appeal to the Supreme Court of Appeal. In addition, on the said day, the respondents' legal representatives responded to the applicant's letter. They declined the applicant's request to provide an undertaking that there would be compliance with the interdict because the interim order, in their view, was final and remained suspended pending their application for leave to appeal.

[16] Subsequently, the applicant applied first and foremost for a declaratory relief. As a matter of urgency, the applicant seeks a declaration that section 18(2) of the Superior Courts Act applies to the court order handed down on 3 October 2023. In other words, that the order was interim in nature and that same is not suspended by the lodgement of an application for leave to appeal.

[17] In the alternative to the foregoing, the applicant sought an order under section 18(3) of the Superior Courts Act that the court order of 3 October 2023 is put into effect, notwithstanding the respondents' pending application for leave to appeal to the Supreme Court of Appeal. The applicant sought this alternative relief only if this Court

finds that the order of 3 October 2023 is not an interim order as envisaged in section 18(2), but rather a final order contemplated in section 18(1) of the Superior Courts Act.

SUBMISSIONS BY THE PARTIES

[18] This case pivots on the interpretation of sections 18(1), 18(2) and 18(3) of the Superior Courts Act. The critical question is whether the order granted on 3 October 2023 is an interim order as envisaged in section 18(2) or a final order as envisaged in section 18(1) of the Superior Courts Act. Before I describe the parties' submissions, I deem it expedient to set out verbatim the impugned order of 3 October 2023 and the wording of the relevant statutory provisions of the Superior Courts Act.

[19] The applicant requests this Court to declare that the following parts of the order are immediately executable in terms of section 18 of the Superior Courts Act.

“34.1 Pending the final determination by an arbitrator or by court of the applications pending before court of a dispute between the parties as to the respondents’ entitlement to cancel their respective franchise agreements (“the franchise agreements”) concluded with the applicant on the basis set out in the letters of MacGregor Stanford Kruger of 18 and 26 September 2023, the respondents are interdicted from cancelling the franchise agreements and are directed to abide by and comply fully with their obligations under the respective franchise agreements.

34.2 This interdict shall operate for a period of sixty (60) days from day hereof. The applicant is to enroll the applications which are pending before and which have not been enrolled, alternatively, refer the disputes to arbitration, whichever the parties elect to do within the period of sixty (60) days stipulated, supra. The interdict would lapse on the expiry of the sixty (60) days period if there has been no enrolment or referral to arbitration.”

[20] The relevant part of section 18 of the Superior Courts Act provides as follows:

“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.”

[21] At the hearing of this application, the applicant's counsel Mr. Goldberg, submitted that the applicant seeks a declaration that the order of 03 October 2023 granted in the urgent court, was an interim order and therefore not appealable in terms of section 18(2). Mr. Goldberg submitted that the order in the main judgment makes it clear that it is interim in nature. Mr. Goldberg further submitted that no extraneous material is necessary to interpret the order. It clearly provides that the interdict will apply unless there is a failure to enrol or refer a dispute to arbitration. The parties have referred the dispute to arbitration, and the interdict remains in effect until the dispute is resolved.

[22] Counsel referred the court to paragraph 34 of the main judgment in which the urgent court explained that its order is interim in nature and merely serves to preserve the status *quo* pending the final determination of the main dispute between the parties. According to Counsel, the content of the court's judgment and the text of the order removes any doubt about the nature of the order: it is manifestly interim.

[23] It was submitted that the application for leave to appeal to the Supreme Court of Appeal was an abuse of process. Mr. Goldberg submitted that the matter would be heard in March and April 2024 before an arbitrator, and by the time the Supreme Court of Appeal hears the appeal, the matter would be moot. Mr. Goldberg further submitted that the interdict the court granted is not finally determinative of the main dispute between the parties. It is not and can never be dispositive of whether the respondents

established a breach of the franchise agreement by the applicant or whether the respondents are entitled to cancel the franchise agreement. If an interim interdict is appealable, the contention proceeded; it would defeat the very purpose of the interdict.

[24] If the court concludes that the interdictory relief of 3 October 2023 is of an interim nature, Mr. Goldberg submitted that an enforcement order in terms of section 18(1) read with section 18(3) of the Superior Courts Act falls to be granted. Mr. Goldberg further submitted that the respondents have no reasonable prospects of success in the appeal against the interdict.

[25] Regarding jurisdiction, Counsel submitted that the franchise agreement explicitly contemplates that the applicant is entitled to seek interdictory relief from the courts without seeking this relief through arbitration. In any event, Counsel argued that the courts retained a discretion to adjudicate disputes emanating from arbitration agreements. Arbitration agreements do not, and cannot, oust the jurisdiction of a courts. Even if the court erred in determining that it had jurisdiction, argued Mr. Goldberg, the order is not appealable because it does not meet the requirements for a final order under *Zweni v Minister of Law and Order*.¹

[26] Counsel submitted that the urgent court correctly exercised its discretion in granting the interdict after weighing the competing harms between the parties. Mr. Goldberg further submitted that the respondents will not suffer irreparable harm if they are made to comply with their franchise agreements, which they had freely concluded,

¹ 1993 (1) SA 523 (A).

and that the applicant and its employees will be irreparably harmed if the execution order is not granted.

[27] Meanwhile, Counsel for the respondents, Mr. Stelzner, submitted that the applicant wishes to have the immediate benefits of the interdict contained in the court order. Counsel contended that the applicant seeks to ensure the immediate enforcement of the court order, even though there is an application to the Supreme Court of appeal for leave to appeal pending. Mr Stelzner submitted that there is no irreparable harm for the applicant if the court order is not enforced pending the application for leave to appeal. It was submitted that there would be immense irreparable harm to the respondents if the applicant's declaratory order were to be granted. Counsel submitted that the interdict that the court *a quo* granted against the respondents is not pending this court's reconsideration of the matter. It is final in that sense already.

[28] It was further submitted on the respondents' behalf that the applicant seeks to achieve with the present application an *en masse* enforcement of the franchise agreements against all the respondents *en bloc*. The applicant seeks to enforce the specific performance of the franchise agreement without any regard given to the circumstances of each former franchisee person to the court order. That on its own, Counsel submitted, already reveals the final effect of the court order and the severe harm that will be caused to the respondents should the applicant be given the relief it seeks in this application.

[29] Mr. Stelzner submitted that since the cancellation of the franchise agreement with the applicant, the respondents have disenfranchised themselves and are now trading outside and independently of the applicant's franchise under the name, style, and brand of Cash Xchange since 26 September 2023. The applicant seeks to undo that and turn back the clock by more than a month to a situation before the cancellation of the agreement. The respondents' Counsel submitted that in granting the court order, the court *a quo* assumed jurisdiction, a final decision of its own which is appealable, and finally decided the interpretation and effect of clause 25(12) of the parties' franchise agreement.

[30] In Counsel's view, the order (Counsel referred to it as a hybrid order) that the court *a quo* granted was also a final decision of the court. Counsel contended that the court *a quo*'s finding concerning the respondents' cancellation of the franchise agreement was a final one. According to Mr. Stelzner, no other court will be called on or can set aside this part of the order. In granting the interdict, Counsel argued, the urgent court, effectively set aside the cancellation and ordered specific performance of all the franchise agreements from thence onwards. That, according to Mr. Stelzner, has a final effect.

[31] In the light of recent trends towards flexibility and the interest of justice test, as determined recently by the Constitutional Court in the *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others*,² ('*Lebashe Investment*') Mr. Stelzner submitted that the order of the court *a quo* in this matter is in principle not only appealable, given its final effect, but also does not meet the

² 2023 (1) SA 353 (CC).

requirements of section 18(2) (interim order). On the contrary, it is an order provided for in section 18(1) (final order), the execution of which has been suspended by bringing the application for leave to appeal to the SCA. Mr. Stelzner submitted that the court order is therefore one to which section 18(1) applies, and the applicant's application for declaration that section 18(2) applies to the court order should be dismissed.

ISSUES TO BE DECIDED

[32] From the discussion above, this Court is enjoined to determine whether the interdict granted on 3 October 2023 is interim in nature and effect. If it is not, whether the court should grant an execution order in terms of section 18(1) read with section 18(3) of the Superior Courts Act.

THE APPLICABLE LEGAL PRINCIPLES AND DISCUSSION

[33] For convenience, I propose to deal with the disputed issues raised above sequentially.

Is the order granted on 3 October 2023 interlocutory in effect as envisaged in section 18(2) of the Superior Courts Act?

[34] The applicant applied for declaratory relief. As a matter of urgency, the applicant seeks a declaration that section 18(2) applies to the court order granted on 3 October 2023. The applicant contends that that order was an interim order and is

not suspended by the respondents' filing of their application for leave to appeal against it. In the alternative, the applicant contends that should the court find that this interim order is final in effect, the court should direct that this order be put into effect notwithstanding the respondents' pending application to the Supreme Court of Appeal for leave to appeal.

[35] It is essential to remind ourselves that before the advent of section 18, the prevailing common law position was that a court had a broad general discretion to grant or refuse an execution order based on what was just and equitable whilst appreciating that the remedy was one beyond the norm.³

[36] The current legal position regarding the suspension of decisions pending appeals is regulated by section 18 of the Superior Courts Act. Sections 18(1) and (2) envisages two situations. First, a judgment (the principal order) that is final in effect, as contemplated in section 18(1): in such a case, the default position is that the operation and execution of the principal order are suspended pending the decision of the application for leave to appeal or appeal. Second, in terms of section 18(2), an interlocutory order that does not have the effect of a final judgment: The default position (a diametrically opposite one to that contemplated in s 18(1)) is that the principal order is not suspended pending the decision of the application for leave to appeal or appeal.⁴

³ *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) at para 25.

⁴ *Ntlemeza v Helen Suzman Foundation and Another (supra)* at para 25.

[37] Meanwhile, section 18(3) requires an applicant for an execution order to prove on a balance of probabilities that he or she will suffer irreparable harm if the order is not granted and that the other party will not suffer such harm.

[38] In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*,⁵ the Court observed that in a wide and general sense, the term 'interlocutory' refers to all orders pronounced by the Court upon matters incidental to the main dispute, preparatory to, or during the progress of the litigation. However, orders of this kind are divided into two classes: (i) those which have a final and definitive effect on the main action; and (ii) those known as 'simple (or purely) interlocutory orders' or 'interlocutory orders proper', which do not.

[39] The court held that statutes relating to the appealability of judgments or orders that use the word 'interlocutory' or other words of similar import refer to simple interlocutory orders. In other words, it is only in the case of simple interlocutory orders that the statute is read as prohibiting an appeal or, making it subject to the limitation of requiring leave. Final orders, including interlocutory orders having a final and definitive effect, are regarded as falling outside the purview of the prohibition or limitation.

[40] Importantly, the court observed that at common law, a purely interlocutory order may be corrected, altered, or set aside by the Judge who granted it at any time prior to final judgment. In contrast, an order with final and definitive effect, even though it

⁵ 1977 (3) SA 534 (AD) at 549F– 551H.

may be interlocutory in the wide sense, is *res judicata*. Meanwhile, in *Zweni v Minister of Law and Order of the Republic of South Africa (supra)*, it was held that for an interdictory order or relief to be appealable, it must: (a) be final in effect and not susceptible to alteration by the court of first instance; (b) be definitive of the rights of the parties, in other words, it must grant definite and distinct relief, and (c) have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

[41] It is well established that an interim order may be appealed against if the interests of justice so dictate. An interim order may be appealable even if it does not possess all three attributes but has final effect or is such as to dispose of any issue or portion of the issue in the main action or suit, or if the order irreparably anticipates or precludes some of the relief which would or might be given at the hearing, or if the appeal would lead to a just and reasonable prompt resolution of the real issues between the parties.⁶ Thus, even if an order is cast as being interlocutory in form, or for a limited period, the court must also consider what the order's effect is on the parties involved.

[42] In the present matter, it is common cause that the respondents have applied for leave to appeal the interim interdict with the Supreme Court of Appeal. The filing of the application for leave to appeal would suspend the order if it were a section 18(1) type order, that is, if it is a final order or an interim order which is final in effect. If the interim order is the one envisaged in section 18(2), there would be no automatic

⁶ *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* 2023 (1) SA 353 (CC) at para 42.

suspension of the order pending an appeal. In that event, the respondent would need to bring an application for the suspension of the execution of the order.

[43] The interdict that was granted in this matter compels the respondents to comply with the agreements which the respondents had not only cancelled at the time the court order was made but which cancelation was already put into effect. In granting the interdict, the court order sought to address in part past harm, rather than to avert an imminent or threatened cancelation. The court, in effect, sought to restore an earlier state of affairs and not to preserve the *status quo*, as the cancelation had already been implemented when the court order was granted.

[44] Significantly, I find the decision of the Constitutional Court in *Lebashe Investment* particularly pertinent to the disputed issues in this matter. In that matter, the High Court granted an interim interdict against the applicants for allegedly publishing defamatory statements on social media against the respondents. Fearing that irreparable harm would be caused to their dignity and reputation, the respondents approached the High Court for an interdict restraining the applicants from making or repeating any defamatory allegations defaming or injuring their dignity pending the institution of an action for damages for defamation and injuria.

[45] Upon the conclusion of the motion proceedings, the High Court granted the respondents an interim interdict pending the determination of an action for damages for defamation. The High Court ordered the applicants to forthwith cease from making or repeating the allegations against the respondents or from defaming or injuring the respondents' dignity and to remove and delete the defamatory letter from the UDM's

website and from the applicant's Twitter account pending a defamation action that was to be instituted by the respondents against the applicants.

[46] The applicants complained that such order had restrained and prohibited them from exercising their right to freedom of expression and from performing their duties as political actors in terms of the Constitution. The applicants sought leave to appeal against the interim interdict to the Supreme Court of Appeal on the grounds that the contents of the letter were not defamatory, that the allegations were true, and that the publication thereof was in the public interest.

[47] The applicants argued that despite the interim nature of the interdict, its consequences were final and definitive in effect as it directed them to remove the contents of the letter from their website and social media accounts and platforms. The applicants, therefore, argued that it was in the interests of justice to grant them leave to appeal. The High Court granted leave to appeal to the Supreme Court of Appeal. When the matter came before the Supreme Court of Appeal, the application was struck off the roll in a three-two split on the grounds that the interdict was interim in nature and, therefore, unappealable.

[48] On appeal to the Constitutional Court, the Court was required to deal with an interdict which, although interim in form, was final and definitive in effect as it directed the applicants for leave to appeal to remove the contents of a certain defamatory letter from their website and social media accounts. The court found that an interdict restricting free speech constitutes a grave intrusion on a constitutional right. Additionally, the court noted that since there was a likelihood that the life of the

impugned interim interdict, granted pending the outcome of the defamation trial, might be extended even further than it had already existed, it was sufficiently invasive and far-reaching that it was in the interests of justice for the grant of the impugned interim order to be treated as a 'decision.'

[49] By parity of reasoning, in the present matter, the effect of the court's order granted against the respondents directs the respondents to comply with the franchise agreement until the pending application before the High Court, which has yet to be allocated a date to have it decided finally. Additionally, it was also granted pending the ultimate resolution of the arbitration proceedings concerning the cancellation of the franchise agreement. Furthermore, the interim interdict was to operate for 60 days from the date of order. The interdict was scheduled to lapse on the expiration of the sixty (60) days if there had been no enrolment or referral to arbitration.

[50] The court was notified during the hearing of this application that the matter had previously been referred for arbitration. Despite the passage of the 60-day period, the interdict is still in effect. It is apparent that there is a possibility that the duration of the contested interim interdict, which was issued pending the conclusion of the arbitration or court proceedings, could be further prolonged than was expected. As the Constitutional Court found in *Lebashe Investment*, I believe this is invasive and far-reaching, especially considering the breakdown of trust and confidence in the relationship between the parties. I am further of the view that it is in the interests of justice for the impugned interim order to be treated as a final decision.⁷

⁷ *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others (supra)* para 46; *Cipla Agrimed (Pty) Ltd Merc Sharp Dohme Corp* 2018 (6) SA 440 (SCA).

[51] Crucially, the Supreme Court of Appeal in *Health Professions Council of South Africa*,⁸ held that, where a litigant may suffer prejudice or even injustice if an order or judgment is left to stand, leave to appeal against orders or judgments rendered during the course of the proceedings should be granted. In my view, that consideration apply with equal force in this matter. I am further of the opinion that this order, though cast as an interlocutory one, has a final effect on the parties. Furthermore, it is in the interests of justice that the impugned interim interdict be treated as a decision having a definitive and final effect.⁹

[52] Furthermore, the court *a quo* made factual determinations during the interdict application hearing that the applicant had not violated or breached the franchise agreement in any manner. The court expressed its prima facie view as to the validity of the cancelation of the franchise agreements. Pursuant to this finding, the court granted the interim order. In my opinion, this is not a decision which another court is able to reconsider. It is an issue central to the *lis* and goes to the heart of the dispute between the parties. Importantly, it is an issue which must be considered at the arbitration hearing in due course. Mr. Goldberg submitted at the hearing of this application that the applicant did not intend to enforce the court's finding that the applicant did not breach the franchise agreement. Whilst I note Mr. Goldberg's submission, I am of the view that this finding rendered the interim court order appealable.

⁸ 2010 (6) SA 469 (SCA) at para 25.

⁹ *Government of the Republic of South Africa and Other v Von Abo* 2011 (5) SA 262 (SCA) at para 17.

[53] Furthermore, the respondents challenged the jurisdiction of the court to hear the interdict application and relied on clause 25 of the franchise agreement as the basis for their objection. In addition, the respondents argued that clause 25.13 allows the applicant to approach the courts in other circumstances that do not find application in the present matter. The court *a quo* dismissed this ground, finding that clause 25.13 of the franchise agreement cloaks the applicant with a discretion to either refer a dispute to arbitration or, to approach the court to seek an interdict against the franchisee for breach of the terms of the franchise agreement, particularly where such breach involves an alleged impairment of the goodwill of the franchisor.

[54] The respondents' preliminary defence raising lack of jurisdiction in the present matter was a defence that existed independently of the respondents' case. The order of the court *a quo* dismissing the respondents' defence about jurisdiction had the effect of finally and irreversibly disposing of a self-contained defence which existed independently from and outside of the respondents' substantive defences.¹⁰ In my view, such an order would patently have the effect of a final judgment and is therefore subject to appeal in terms of section 18(1) of the Superior Courts Act. More so, at common law, a purely interlocutory order may be corrected, altered, or set aside by the Judge who granted it at any time prior to a final judgment, whereas an order which has final and definitive effect, even though it may be interlocutory in the wide sense, is *res judicata*.¹¹

¹⁰ *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA) at 992J-993A; *Labuschagne v Labuschagne*; *Labuschagne v Minister van Justisie* 1967 (2) SA 575 (A) at 583E-F.

¹¹ *Ndlovu v Santam Ltd* 2006 (2) SA 239 (SCA) at paras 9 and 10.

[55] Given all these considerations, I am of the view that section 18(2) of the Superior Courts Act does not apply to the impugned court order. While the order is interim in form, it is an order envisaged in section 18(1) of the Superior Courts Act, the execution of which is suspended by the lodgment of the application for leave to appeal to the Supreme Court of Appeal. I repeat, the court order is one to which section 18(1) applies, and the applicant's application for a declaration that section 18(2) applies to the court order falls to be dismissed. This leads me to the alternative remedy the applicant seeks in this Court.

The enforcement order in terms of section 18(1) read with section 18(3) of the Superior Courts Act.

[56] The applicant contended that if this Court concludes that the interdictory relief of 3 October 2023 is final in nature, then the applicant submitted that an enforcement order in terms of section 18(1) read with section 18(3) of the Superior Courts Act falls to be granted.

[57] It is an established 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. 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 a

special application.¹² This common law rule has been codified and incorporated in section 18 of the Superior Courts Act.

[58] The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable harm 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.¹³ It is trite that the court to which an 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.¹⁴

[59] Section 18 stipulates three prerequisites for an enforcement order which must be established on a balance of probabilities. Firstly, exceptional circumstances must exist for an execution order to be granted. Secondly, the applicant must show that it would suffer irreparable harm if the order granted, in this case, the interdict is not enforced, and thirdly, that the respondent will not suffer any irreparable harm if the enforcement order is granted. An applicant for an execution order must prove all three requirements. In other words, all these three requirements must be fulfilled for an execution order to be granted. I propose to deal with these requirements in turn *ad seriatim*.

¹² *Gentiruco A.G. v Firestone SA (Pty.) Ltd* 1972 (1) SA 589 (AD) at 667; *Standard Bank of SA Ltd. v Stama (Pty) Ltd* 1975 (1) SA 730 (AD) at 746).

¹³ *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545A-C.

¹⁴ *South Cape Corporation (Pty) Ltd v Engineering Management Services (supra)* at 545B-C.

Exceptional Circumstances

[60] Courts have always eschewed any attempt to lay down a general rule as to what constitutes and qualifies as exceptional circumstances.¹⁵ The reasons being that the enquiry is factual in nature. As astutely pointed out by Mr. Goldberg, an exceptional circumstance pertains to a fact that gives rise to a deviation or, departure from the general rule that final orders are suspended pending appeal. The standard is flexible and depends on the facts of each case.¹⁶ Exceptional circumstances must arise from the facts and circumstances of the case.

[61] In the context of this matter, I hold the view that there are exceptional circumstances. It is common cause that the applicant and the respondents have submitted themselves for a hearing before an arbitrator notwithstanding the application for leave to appeal to the Supreme Court of Appeal. The final determination of the dispute between the parties, including the issues raised in the application for leave to appeal, will take place through a mutually agreed arbitration process scheduled for March and April 2024. In other words, the dispute between the parties will be ventilated in due course.

[62] The purpose of the arbitration proceedings is intended to resolve all the disputed issues between the parties. During the hearing of the interdict application, the respondents objected to the court's jurisdiction. They argued that the dispute between the parties falls within the purview of clause 25 of the franchise agreement

¹⁵ *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and Another* 2002 (6) SA 150 (C) at 156H – 157C; *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* 2014 (3) SA 189 (GJ) para 16.

¹⁶ *Ntlemeza v Helen Suzman Foundation* 2017 (5) SA 402 (SCA) at paras 37-39. *Seatrans Maritime v Owners, MV AIS MAMAS, and Another* 2002 (6) SA 150 (C) at 156F.

and must be arbitrated by an arbitrator. Consistent with the franchise agreement, the parties have voluntarily submitted themselves for a hearing before the arbitrator. The constitutional rights of both the applicant and the respondents in terms of section 34 of the Constitution would be properly vindicated at that mutually agreed upon forum.

[63] In addition, in the heads of argument, the respondents' Counsel notes that the arbitration proceedings may extend to well over six months or so. Mr. Goldberg submitted that from the objective facts, even if leave to appeal is granted, it is not practically possible for the Supreme Court of Appeal to hear the appeal within the first two terms of 2024. Furthermore, Counsel submitted that it is likely that an appeal will only be heard towards the end of 2024 or the beginning of 2025. Mr. Goldberg pointed out, that by that time, the actual dispute between the parties would have already been determined through arbitration before the Supreme Court of Appeal considers whether the interdict was correctly granted. According to him, the appeal to the Supreme Court of Appeal will be moot when it is ripe for appellate consideration.

[64] Whilst I appreciate this argument, in my view, what is critical and exceptional in this matter is that despite the respondents' applying for leave to appeal the cancellation of the franchise agreement, the parties have agreed to have the very same dispute (issue) decided on arbitration. The speedy resolution of the dispute through arbitration in due course will ameliorate any irreparable harm that may be suffered by both parties, if any.

[65] I have noted the argument raised by the respondents' Counsel in his heads of argument that the arbitration proceedings may take longer than envisaged. I am also

mindful of the question Counsel raised about what would happen if the arbitrator ruled that the cancelation was valid. In my view, it is not open for this court to second-guess the arbitrator's decision at this stage. All the disputed issues between the parties are expected to be fittingly ventilated before the arbitrator, the forum chosen by the parties in the franchise agreement. Clause 25.4 explicitly enjoins the parties to refer any dispute arising out of their agreement, or its interpretation thereof for determination by arbitration in accordance with the commercial arbitration Rules of the Arbitration Foundation of South Africa, as amended.

[66] In my view, the cumulative effect of all these circumstances above gives rise to the exceptionality contemplated in section 18(1) of the Act. It would have been a different case if the parties did not agree to go to arbitration. Importantly, the hearing of the matter is a month away. In my opinion, this requirement has been satisfied.

Has the applicant shown that it will suffer irreparable harm without the execution order and that the respondents won't suffer harm if it is granted?

[67] Section 18(3) requires the applicant for an execution order to establish that it will suffer irreparable harm if the order is not granted and that the respondents will not suffer irreparable harm if the order is granted. The judgment of *University of the Free State v Afriforum and Another*,¹⁷ indicates that the requirement of irreparable harm to the applicant and no irreparable harm to the respondent, unlike the common law position, do not involve a balancing exercise between the two but must both be established on the balance of probabilities.¹⁸ In *Knoop NO and Others v Gupta and*

¹⁷ 2018 (3) SA 428 (SCA) at para 18.

¹⁸ *Knoop v Gupta (Execution)* 2021 (3) SA 135 at para 48.

*Others*¹⁹, the Court noted that if the applicant cannot show that the respondent will not suffer irreparable harm by the grant of the execution order, that is fatal.

[68] The applicant avers that unless the interdictory relief is enforced, the applicant will suffer irreparable harm in five broad respects. First, it will experience mass retrenchments. To this end, the applicant contended that more than 150 employees stand to lose their employment because of the reduction in royalties. The applicant notes that the urgent court that granted the interdict has already recognised the devastating consequences of mass retrenchments on employees and their families who all depend on them for a living. Secondly, the applicant contended that if execution is not granted, it will lose valuable skills as the employees that may be lost range from the CEO to trainers and operational managers. The skills and competencies possessed by these employees have been generated over an extended period, and their loss will detrimentally affect the applicant's business in future.

[69] Thirdly, the applicant notes that it will be losing more than forty percent of its royalty and marketing income if the order is not granted, and this is a staggering loss. Unless the respondents comply with the franchise agreements and honour the royalty commitment, it is contended that the applicant is likely to go insolvent soon. Fourthly, the respondents' de-identification process exposes the applicant to reputational harm and brand damage. The applicant contended that the respondents sought to exploit the good name of the applicant generated over decades by misleading the public that the stores are merely undergoing a rebranding with a new name and look while

¹⁹ (115/2020) ZASCA 149 (19 November 2020) at para 48.

knowing that this is untrue. It is incorrect that the respondents are rebranding as they have sought to insinuate.

[70] Fifthly, it was submitted that the applicant is exposed to serious legal liability pursuant to the respondents' conduct. The applicant contended that the respondents continued to use the applicant's intellectual property, including the use of its payment system. Tax invoices are done in the applicant's name by the respondents, thus triggering the general warranties of the applicant for items sold by the respondents' stores. To this end, the applicant submits that consumers may have a legitimate expectation that the applicant will honour the warranty on these goods because the invoices are drawn in its name.

Irreparable harm to the Respondents

[71] The applicant submitted that the respondents will not suffer irreparable harm if they are made to comply with the franchise agreements as ordered by the court. The applicant contends that most of the respondents' stores are profitable despite a volatile economy with high interest rates, inflation and load-shedding. Despite the general decline in the retail market, most of the respondents remain profitable.

[72] While I note the alleged harm that the applicant has highlighted, I am of the view that the applicant has not established that the respondents will not suffer harm if the execution order is granted. Instead, I am of the view that what has been established on the papers is that the respondents will suffer irreparable harm if the

order is executed. In the answering affidavits, the respondents averred that implementing the court order would detrimentally affect third parties.

[73] Among others, the respondents averred that they have already placed orders with third party suppliers as part of the de-identification process. The stock is in the shops already or, is in the process of being delivered. The respondents are liable for the payment of that stock to the parties. Importantly, the fact that the respondents have purchased stock from third-party suppliers means that they have committed capital to this and won't be able to expand additional capital in purchasing stock from the applicant, which will be required in terms of the franchise agreement if it is executed.

[74] Moreover, apart from the stock that the respondents have purchased from third-party suppliers, if the order is executed, the respondents would invariably not be able to sell the stock to customers, as the stock from third party suppliers does not conform to the applicant's requirements and those set out in the franchise agreement and manual. The stock will then simply sit in the warehouse or a store once again to the irremediable detriment of the respondents.

[75] In addition, in terms of the franchise agreement, the applicant dictates the prescribed stock to be placed on its franchisees' shelves, thereby precluding third-party stock from being placed on the shelves in the shops of its franchisees. Invariably, if execution is granted, the current stock from the third-party suppliers will not be sold which will result in severe cash flow constraints to the respondents. The cumulative effect is that there will be no funds to purchase stock from the applicant, and the respondent will be in breach of the franchise agreement. The respondents would be

stuck with stock from third-party suppliers, which they've already paid for, or need to pay for, which they cannot sell because they do not meet the requirements of the franchise agreement. This in my view, would result in irreparable harm to the respondents if execution of the interdict is granted.

[76] In the light of the entire body of evidence placed before this Court, I am of the view that the harm that the respondents will suffer is overwhelming. The applicant has not discharged the onus of showing that the respondents would not suffer irreparable harm if the execution order is granted. The harm that the applicant will suffer is ameliorated by the fact that this matter will be heard in due course before the arbitrator. It is also mitigated by the fact that the respondents have committed to buying stock from the applicant. In any event, rule 18(3) requires a different approach. The proper meaning of that subsection, as correctly pointed out by Mr. Stelzner, is that if the loser, in this case, the respondents, seeks leave to appeal, will suffer irreparable harm, the order must remain stayed, even if the stay will cause the victor irreparable harm.

[77] In view of all these considerations, my conclusion is that the order granted on 3 October 2023 falls under section 18(1) and is appealable. I am further of the opinion that the applicant's application for an execution order must fail. Furthermore, nothing was presented to warrant a departure from the norm that costs follow the event.

ORDER

[78] In the result, the following order is granted:

78.1 The applicant's application for a declaratory order and the alternative application in terms of section 18(3) are hereby dismissed. The applicant is ordered to pay the costs of this application as well as the costs of two Counsels.

LEKHULENI JD

JUDGE OF THE HIGH COURT

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