REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

10/4/2015

CASE NO: 85563/14

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

10.4.2015

DATE SIGNATURE

In the matter between:

ACTOM (PTY) LIMITED Applicant

and

GERHARDUS STEPHANUS COETZER First Respondent

ERB TECHNOLOGIES (PTY) LTD Second Respondent

JUDGMENT

RAULINGA J

[1] The Applicant seeks by way of an urgent application, the following relief:-

1.1 Directing that the Respondents' application for leave to appeal dated 16 January 2015, as well as any application by the Respondents to the Supreme

Court of Appeal for leave to appeal, shall not suspend the operation or execution of the order granted by Hughes J on 23 December 2014.

1.2 The order of 23 December 2014 of Hughes J shall be given immediate effect and shall remain in force pending the outcome of any appeal by the Respondents against the order of Hughes J.

1.3 The costs of this application are to be paid by the First and Second Respondents, alternatively the costs of this application be costs in any appeal against the order of 23 December 2014 of Hughes J.

[2] On 23 December 2014, my sister Hughes J granted an order against the First and Second Respondents as follows:-

2.1 Interdicting and restraining the First Respondent for a period of 12 months from 1 November 2014 and in South Africa from:-

2.1.1 directing or indirectly competing with the Signalling Business of the Applicant or being interested in any business which trades in a field of activity which is similar to Signalling Business of the Applicant;

2.1.2 becoming engaged or interested, whether directly or indirectly, and whether as an employee, proprietor, partner, shareholder, agent, consultant, financier or otherwise, in any company, firm business or undertaking which carries on business in any field of activity which is similar to the Signalling Business of the Applicant;

2.1.3 soliciting any business relating to the Signalling Business of the Applicant;

2.1.4 enticing away from the Applicant, any customer or prospective customer of the Applicant in regard to Signalling Business of the Applicant;

2.1.5 persuading, inducing, encouraging or procuring any employee of the Applicant at any time during the previous 12 months, to become employed by or interested in any competing business or to terminate his or her employment with the Applicant;

2.2 Interdicting and restraining the First Respondent, for a period of 12 months from 1 November 2014, from being employed by the Second Respondent.

2.3 Interdicting and restraining the Second Respondent for a period of 12 months from 1 November 2014, from employing the First Respondent;

2.4 The First and Second Respondents are to pay the costs of this application jointly and severally.

[3] The Respondents contend that the matter is not urgent on the basis that the Applicant did not act reasonably in bringing the matter to Court. However, one must be alive to the fact that the order was granted on the 23 December 2014 and the application for leave to appeal was delivered on 16 January 2015. The Applicant launched the urgent application on the 5 February 2015 for hearing on the 3 Mach 2015. In my view, the 15 Court days allowed to the Respondents for delivery of the application is reasonable. The restraint order expires on 31 October 2015. I don't intend to belabour the matter, and my ruling is that the matter is urgent.

[4] The Respondents sought leave to appeal against the judgment and order of Hughes J granted on 23 December 2014. The Respondents' application for leave to appeal was heard on 27 February 2015 and on 2 March 2015 Hughes J granted the Respondents leave to appeal to the Supreme Court of Appeal. Consequent upon the Respondents having brought an application for leave to appeal, the Applicant has brought an application in terms of Rule 49(11) as read with Section 18(1) and (3) of the Superior Courts Act 10 of 2013 ("the

Superior Courts Act") for an order granting the Applicant leave to execute the order of 23 December 2014 (an order that the operation of the order is not suspended).

[5] Section 18 of the Superior Courts Act states as follows:

"18 **Suspension of decision pending appeal**

(1) Subject to subsection (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

(2) Subject to subsection (3), unless the court under exceptional circumstance's 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 ordr 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 immeciately 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 purpose of subsection (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."

[6] I am with the Applicant that the facts in this matter are similar to those dealt with by Sutherland J in *Incubeta Holdings (PTY) Ltd and Another v Ellis and Another* *2014 (3) SA 189 (SGJ).* I also agree that the test for determining whether leave to execute is no longer as per *South Cape Corporation (PTY) Ltd v Engineering Management Services (PTY) Ltd 1977 (3) SA 534(A)* and it follows that I will base the test as decided in Incubeta.

[7] Section 18(1) and (3) has introduced a new text. The test is twofold. The requirements are:-

7.1 first, whether or not "exceptional circumstances" exist; and

7.2 second, proof on a balance of probabilities by the Applicant that:-

7.2.1 the Applicant will suffer irreparable harm; and

7.2.2 the Respondent will not suffer any irreparable harm – See *Incubeta Supra.*

[8] In regard to section 18(3) the court has to make a determination of a balance of convenience or a weighing-up to discern a preponderance of equities. The discretion is absent - *Incubeta Supra.*

[9] In Incubeta Sutherland J found as follows on facts similar to the facts of this matter:

> "[25] Turning to the circumstances of these litigants, what is relevant, in my view, is the following:
>
> - 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.
> - The only value in the relief is to stop the breach and protect legitimate interests during the precise period of the next four and a half months. Unrebutted evidence in the affidavits alleges a breach is taking place at this very time.
> - 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.
> - Ellis will, on the probabilities, be without work for four and a half months and without pay. This will be financially detrimental.
> - Significantly, no allegation is made that Ellis or his family will endure true hardship during this short period.
> - If the appeal is won, Ellis 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.
> - Moreover, security under rule 48(12) is available."
>
> ...
>
> [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 of procedural delays, even if not

protracted in bad faith by 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 to undermine the role of courts in the ordering of social relations.

[29] Furthermore, it is plain form 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 s18 test is met on both counts of the second leg."

I agree with the finding of Sutherland J.

[10] The Applicant contends that there are exceptional circumstances and that it will suffer irreparable harm, and on the other hand the Respondents will suffer no irreparable harm. The Respondents aver that this contention is wrong.

[11] I am enclined to support the submissions by the Applicant that there is a short duration between the launching of the appeal and the restraint period which is until 31 October 2015.

There is no doubt that the Respondents' appeal against the judgment and order of 23 December 2014 will not be heard prior to the expiry of the restraint period on 31 December 2015. This means that if the urgent application is not granted the Respondents will have achieved what they have been prohibited to do by the order of the 23 December 2014. This will render the said order nugatory and the enforcement by the Applicant undertakings futile.

[12] The First Respondent is aminable to disclosing to the Second Respondent the Applicant's confidential information which can cause potential harm to the Applicant. In Incubeta it was held that damages are not an appropriate remedy. It does not seem to me that both the Respondents are in a position to satisfy any damages - although the 2 Respondent has intimated that it may pay damages. Their problem with this promise is that no security has been tendered. It is my view that the irreparable harm must be measured by a balance between the two probabilities. It seems to me that the Applicant will be in a position to satisfy whatever damages the First Respondent may suffer. There is no guarantee that both Respondents will satisfy the damages which will be incurred by the Applicant. The balance of probabilities favour the Applicant.

[13] As an experienced contracts manager for the last 43 years, the First Respondent is still employable - on his own version he has skills and experience to can procure employment other than with the Second Respondent. Further to that, the First Respondent does not give details in regard to seeking employment. The allegations of prejudice are not supported by confirmatory affidavits by his relatives.

[14] In the result, I find that there is a short duration of restraint period until 31 October 2015. As a consequence the appeal will not be heard prior to the expiry of the restraint period on 31 October 2015 – these are exceptional circumstances which exist in this case. I also find that the Applicant will suffer irreparable harm if the application is not granted.

[15] In the circumstances:

(a) The application is granted.

(b) The costs of this application are costs in any appeal against the order of the 23 December 2014 of Hughes J.

T J RAULINGA

JUDGE: GAUTENG DIVISION, PRETORIA