REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A269/2015

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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In the matter between:

GERHARDUS STEPHANUS COETZER First Appellant

ERB TECHNOLOGIES Second Appellant

and

ACTOM (PTY) LTD Respondent

APPEAL JUDGMENT

MURPHY J

1. The respondent (Actom) successfully applied as a matter of urgency on 17 December 2014 for an order enforcing certain restraint of trade undertakings. The

order granted by Hughes J on 23 December 2014 interdicted and restrained the first appellant (Coetzer) for a period of 12 months from 1 November 2014 and in South Africa from *inter alia* competing with the signalling business of Actom or from being interested in any business which trades in any field of activity similar to the signalling business of Actom. He was likewise restrained and interdicted from being employed by any entity which carried on such similar business, and was specifically interdicted from being employed by the second appellant, (ERB Technologies). Furthermore, ERB Technologies was interdicted from employing Coetzer for a period of 12 months from 1 November 2014.

2. In her written judgment, the learned judge held that Coetzer was in breach of a restraint of trade agreement he had concluded as an employee of Actom, inter alia on the grounds that he had sought and obtained employment with ERB Technologies, a competitor of Actom, shortly after he resigned. The learned judge further held that the restraint of trade was reasonable and enforceable with the result that Actom was entitled to the interdictory relief it sought.

3. Coetzer and ERB Technologies applied for leave to appeal the order. Hughes J granted leave to appeal to the Supreme Court of Appeal on 2 March 2015.

4. Consequent upon the application for leave to appeal being filed, Actom brought an application in terms of Rule 49(11) and Section 18(1) and (3) of the Superior Courts Act 10 of 2013 (“the Act”) for an order granting Actom leave to execute the order of Hughes J, that is to say an order to the effect that the operation of the order of

Hughes J would not be suspended by the filing of the application for leave to appeal or the granting of such an order.

5. The application for leave to put the order into operation pending the appeal process was heard by Raulinga J who granted the application and ordered that the costs of the application would be costs in the appeal against the order of Hughes J. Although the learned judge's reasoning is in parts sparse, he accepted that Actom would suffer irreparable harm if the order was not granted and that Coetzer would have an appropriate remedy and thus would not suffer irreparable harm if the order were granted and he were to prevail on appeal. He made no explicit finding with regard to any harm that ERB Technologies might suffer. He furthermore agreed with the line of reasoning of Sutherland J in *Incubeta Holdings v Ellis*[1] that in the context of restraint of trade litigation, given the limited duration of such agreements, the time delays in any appeal process, as well as the danger of the order of the court of first instance being rendered a vacuous gesture, constitute exceptional circumstances justifying non-suspension of the order by the noting of an appeal.

6. The appeal before us is the appeal against the order of Raulinga J.

7. Section 18 of the Act reads:

> **"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

[1] 2014 (3) SA 189 (GJ)

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."

8. Section 18(4) of the Act makes it plain that applications and appeals under the section should be dealt with expeditiously and as matters of extreme urgency. That

has not happened in this case. The application was filed in early February 2015, the order was granted in April and this appeal will likely be finalised in early August 2015, with the consequence that any order enforcing the restraint will lose much of its value by virtue of the restraint period expiring in October 2015.

9. Section 18 has been the subject of a deeply considered and lucid analysis by Sutherland J in *Incubeta Holdings v Ellis*[2]. There is no need to repeat his exposition other than to restate the principles that now govern a determination of whether a proper case exists to grant leave to put an order into operation pending an appeal process.

10. At common law, and in terms of the now repealed Rule 49(11), the court to which application for leave to execute is made has a wide general discretion to grant or refuse leave. In exercising the discretion the court had to determine what is just and equitable in all the circumstances having regard to i) the potentiality of irreparable harm being sustained by the loser in the court *a quo* if leave to execute were to be granted; ii) the potentiality of irreparable harm being sustained by the victor in the court *a quo* if leave to execute is refused; iii) the prospects of success on appeal, including whether the appeal may be a stratagem to gain time; and iv) in the case of equal potentiality of irreparable harm, the balance of convenience.[3]

11. The discretion of the court was considered to be a discretion in the wider sense and not one in a strict sense. In an appeal against such a decision, the appellate court is not bound to the conclusions of the lower court and may depart from the

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[2] Footnote 1 above

[33] *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 544-546

lower court's order on any grounds which it feels render this necessary. The appellate court is not limited to an examination of the exercise of the court's discretion on the limited basis applicable in a truly discretionary situation, namely that it has exercised its discretion capriciously or upon a wrong principle, with bias or without substantial reasons. The appellate court may depart from the lower courts order when it considers it to be wrong upon the law or the facts.[4]

12. As Sutherland J pointed out in *Incubeta Holdings v Ellis*[5], section 18 of the Act has introduced a new dimension to this scheme by requiring first that the discretion may be exercised only if the conditions precedent of "exceptional circumstances" and actual (more than a potentiality) irreparable harm to one party and no harm to the other are proven. Now it is incumbent upon the applicant seeking leave to execute pending an appeal to prove on a balance of probabilities that it will suffer irreparable harm if leave to execute is not granted, *and* that the other party will not suffer irreparable harm if the court so orders. The onus of proof is on the applicant throughout. The requirement is no longer potentiality of irreparable harm and a balancing of convenience by the court; rather the court must be satisfied factually that there will be irreparable harm to the victor and no irreparable harm to the loser.[6] Once these jurisdictional facts are established, and the court is satisfied that the circumstances are exceptional, it may exercise its wide discretion to grant leave to execute or not to grant leave.

13. The requirement of exceptionality adds nothing new to the prior practice or jurisprudence. An order granting leave to execute pending an appeal is a deviation

[4] *Ndlovu v Ngcobo; Bekker v Jika* 2003(1) SA 113 (SCA) at 124.
[5] At 194C
[6] *Liviero Wilge Joint Venture v Eskom Holdings Ltd* 2014 JDR 1611 (GJ) paras 23-25

from the norm that noting an appeal has a suspensive effect. Deviation from the normal consequences of noting an appeal has always required justification in light of fact and context specific exceptional circumstances.[7] However, section 18(3) of the Act introduces novelty in that the balance of convenience will no longer be the principle of last resort where the potentiality or probability for irreparable harm to the parties is equipoised. If the applicant despite showing the probability of irreparable harm to itself is unable to prove that the other party will not suffer irreparable harm, the order must remain stayed and leave to execute be refused. But even more, it will not be enough for the applicant to establish that the other party will not suffer irreparable harm, it must still in addition prove that it will probably suffer irreparable harm itself if leave to execute is not granted.

14. The facts in *Incubeta Holdings v Ellis*[8] are not dissimilar to the facts in the present case. There too the applicant sought leave to execute on an interdict enforcing a restraint of trade that had been suspended by virtue of the noting of an appeal. In concluding that exceptionality had been established, Sutherland J considered most relevant the weighty consideration that if the order was not put into operation, the relief would be forfeited by the applicant because the short duration of the restraint would expire before exhaustion of the appeal process. The learned judge elucidated the position as follows:

> "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

[7] *Incubeta Holdings v Ellis* 2014 (3) SA 189 (GJ) at 195G.
[8] 2014 (3) SA 189 (GJ)

> not protracted in bad faith by a litigant, ought to be sufficient to cross the threshold of exceptional circumstances.
>
> 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." [9]

15. In his judgment in this matter, Raulinga J made it clear that he agreed with these *dicta* of Sutherland J and that the limited duration of the restraint period and the prospect of the order being rendered nugatory, and the contractual undertakings futile, were sufficient to constitute exceptional circumstances, being the first condition precedent to the exercise of the discretion to grant leave to execute.

16. On appeal before us, the appellants submitted that procedural delay and the reducing of time under the restraint of trade are not sufficient to constitute exceptional circumstances. Mr Wagenaar SC, counsel for the first appellant, contended that something more than a loss of remedy through procedural delay is required before there can be exceptional circumstances; otherwise exceptionality would arise automatically in all restraint of trade cases and that this could not have been the intention of the legislature. He submitted that if the legislature had wanted non-suspension to apply in the case of appeals of all court orders enforcing restraints of trade it would have provided for such as it did with interlocutory orders in section 18(2) of the Act. That need not be so. Not all restraints of trade are for such short periods. Moreover, it is desirable from a policy perspective, and in the interests of the proper administration of justice, that interlocutory orders should be appealed

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[9] At 1961-197A

sparingly and ought not to be allowed to delay the adjudication of the main suit or application. A final interdict enforcing a restraint of trade is different, and there is no reason why the normal rule of suspension should not apply unless the victor can show exceptionality and meet the requirements of prejudice and non-prejudice. If restraint of trade enforcement proceedings give rise to exceptionality in many cases, then the condition precedent for the exercise of the discretion will exist in many cases. So be it. A high prevalence of exceptional circumstances in cases involving the enforcement of restraints of trade cannot of itself be sufficient basis to regard such circumstances otherwise.

17. The reasons given by Sutherland J, and as agreed with by Raulinga J, are of equal applicability and relevance in this case. They are compelling and logically persuasive. The Supreme Court of Appeal (SCA) will not hear the appeal on the merits before the expiry of the restraint period on 31 October 2015. The effect of the appeal against the judgment of Hughes J will be that even without any consideration of the merits of the appeal, Coetzer and ERB Technologies will have achieved the rendering of the order nugatory and the enforcement of the restraint of trade undertakings futile. As both Raulinga J and Sutherland J appreciated, damages for breaches of a restraint of trade are difficult to prove or collect, and will mostly not advance the purpose of the contractual undertaking. The party in whose favour the restraint operates has contracted explicitly for a restraint as the preferred effective remedy. The loss of that remedy solely because of the effluxion of time in litigation should be avoided where possible. And, hence, the finding by Raulinga J that such a prospect constituted exceptional circumstances cannot be faulted.

18. The remaining enquiry is whether Actom discharged its onus in relation to the two distinct requirements of irreparable harm.

19. The harm which Actom will suffer if leave to execute is not granted is self-evident and derives from the exceptional nature of the relief sought by it. If leave to execute is refused, the contractual undertaking and the interdict granted by Hughes J will be worthless. The nature of the harm overlaps and equates with what exceptionally justifies deviating from the norm in the circumstances. Actom will suffer a loss of its contractual and delictual entitlements to restrain Coetzer and ERB Technologies for the restraint period. Actom does not seek or even want damages. It wants to hold Coetzer to a contractual undertaking not to obtain employment or to have any association with a competitor in South Africa for a limited duration of 12 months. Its protectable interest is the right to prevent the association with a competitor. It saw obvious advantages in having such an entitlement and paid consideration to Coetzer for the benefit of it. Coetzer allegedly received a *quid pro quo* in the form of shares in exchange for agreeing to the restraint. On the assumptions that there is a protectable interest and the restraint of trade is reasonable and enforceable, as Hughes J found, the loss of any such entitlement by Actom means that it will suffer harm in the form of that loss. The question arising is whether that harm is irreparable. Can the harm suffered by the loss of entitlement to restrain be repaired in any way? The only possible reparation will be damages which may well prove illusory.

20. Raulinga J understood as much. He again accepted the line of reasoning of Sutherland J in *Incubeta Holdings* that the only value in the relief of a restraint

interdict is to stop the breach and protect legitimate interests during the period of the restraint. Damages are not an appropriate alternative remedy precisely because the relief sought aims to compensate for the ineffectiveness of damages as a remedy in such circumstances. The protectable interest consists of the right to prevent an association between a former employee and a competitor in the immediate aftermath of a resignation from employment for a reasonable but limited period of time. In the premises, the loss of the entitlement to restrain is indeed irreparable and consequently the finding of Raulinga J that Actom would suffer irreparable harm if leave to execute against both appellants were not granted is sustainable and correct.

21. That leaves only the issue of whether the appellants would suffer irreparable harm if the leave to execute were granted. The harm Coetzer and ERB Technologies will suffer is that they will be denied the opportunity to be in an employment relationship for the next three months. Coetzer has set out in some detail the financial difficulties he finds himself in as a result of his divorce which was finalised round about the same time as he resigned from Actom. He claims he resigned from Actom because he wanted to retire but then faced the devastating consequences of his divorce from his spouse and sought and obtained employment with ERB Technologies, an acknowledged competitor of Actom, within days of his resignation. He does not explain why he did not endeavour to ameliorate his position by seeking re-employment with Actom, who had accepted his resignation with reluctance. His explanation for taking employment with ERB Technologies is thus open to question. But there is no need to resolve this issue of credibility. The fact of the matter is that any harm that Coetzer may suffer by being out of employment for a few months can be mitigated and withstood. He is a man of some means, owns immovable property

and other assets. He had planned to retire at the age of 63 and thus no doubt made provision for at least 15 years of pensioned unemployment. His affidavit does not disclose the nature and full extent of all his assets. That he may have been divested of a substantial portion of them by divorce does not mean that he has been rendered destitute. Nevertheless, he will certainly suffer harm in that if the order is executed he will lose his employment with ERB Technologies, and perhaps may not regain it. Is that harm irreparable?

22. Should Coetzer prevail on appeal he will be able to successfully sue Actom for any lost earnings resulting from the termination of his contract of employment with ERB Technologies. The quantum will be easy to compute. He will have a delictual cause of action against Actom for the losses incurred by him as a result of its wrongful interference in his contract of employment with ERB Technologies. Mr Wagenaar SC contended the right is hollow because Actom in such a suit will be able to rely on the order to execute as a defence to wrongfulness and that Coetzer ultimately would be non-suited. I doubt that is correct. If Actom has negligently asserted a claim which it does not lawfully have and thereby causes damage to Coetzer it cannot avoid the charge of wrongfulness solely on the ground that it was able to execute a court order in terms of section 18 of the Act. The adjudication of the application for leave to execute does not involve the adjudication of the lawfulness of the restraint of trade. That is now a matter for the SCA. No *res judicata* or issue estoppel arises and the order granting leave to execute is unlikely to serve as a sufficient defence to the issue of wrongfulness in any delictual claim which Coetzer may acquire.

23. Actom further argued that Coetzer’s harm is in any event not irreparable in that on the probabilities he could easily find alternative employment for the short duration of the restraint of trade. In his answering affidavit, Coetzer stated that he is in effect unemployable, given his age, gender and race, and that he had made efforts after the order handed down by Hughes J to obtain employment but was unsuccessful. In reply, Actom complained that the allegations were bald and unsubstantiated. Coetzer, in a duplicating affidavit, mentioned the names of four companies which he had approached, but did not substantiate the allegation with details of the reasons for his lack of success, nor did he file confirmatory affidavits from them. Mr Hollander, counsel for Actom, submitted these allegations should have been made in the answering affidavits, and hence must be disregarded or struck out. I am persuaded that the allegations made by Coetzer are in any event untenable. He has a lengthy and successful record as a skilled contracts manager in the industry. His probable employability is amply demonstrated by the fact that within days of his resignation from Actom he was able to obtain employment from ERB Technologies, who is prepared to put itself at considerable financial risk by joining this litigation in order to retain his services. It is common cause that ERB Technologies regard him as a valuable employee and that they intend to keep him. The allegation in its opposing affidavit that it is not in a position to reserve his employment until 31 October 2015, is accordingly unconvincing.

24. In the premises the court *a quo* was in the final analysis correct in its finding that any harm suffered by Coetzer in the event of leave to execute being granted was not irreparable.

25. ERB Technologies in its opposing affidavit conceded that it would not suffer actual harm but only inconvenience and possibly potential harm were it obliged to terminate Coetzer's contract of employment. That being so, it is common cause that ERB Technologies will not suffer actual irreparable harm if leave to execute is granted.

26. In their heads of argument, counsel for the appellants laboured the merits of the main application in the hope of persuading us that the appeal to the SCA had excellent prospects of success, and was thus a compelling factor in favour of upholding the appeal against the leave for execution. Such an approach in effect would have us decide both the appeal on execution and the appeal on the merits pending before the SCA. There is admittedly an element of logic in the submission that if the merits of Actom's case are questionable, it arguably should have an adverse effect on the application. By the same token, it might be argued, were we to disagree with Hughes J's finding that the appellants have reasonable prospects of success on appeal before the SCA, such should strengthen our resolve to dismiss the appeal and to order execution. Be that all as it may, there are sound reasons why the merits of the main application should not come into consideration. It would simply not be proper for this court to pronounce on the merits of issues that are pending before a higher court of appeal. For that reason, counsel wisely did not press the issue in argument before us. Nonetheless, it is worth recalling what Sutherland J stated in this regard in *Incubeta Holdings v Ellis*:[10]

> "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 presuppose

[10] 2014 (3) SA 189 (GJ) at para 26

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

27. In the result I am persuaded that the respondent, Actom, proved on a balance of probabilities that it would suffer irreparable harm if the order of Hughes J was not given immediate operation and execution and that Coetzer and ERB Technologies would not suffer irreparable harm if leave to execute was granted. Moreover, the court *a quo*'s finding that there were exceptional circumstances justifying the non-suspension of the order of Hughes J is correct and hence there is no basis for interfering with its order.

28. The appeal must therefore fail and I would make an order that the appeal be dismissed with costs.

JR MURPHY
JUDGE OF THE HIGH COURT

I agree

LM MOLOPA-SETHOSA
JUDGE OF THE HIGH COURT

I agree

VV TLHAPI
JUDGE OF THE HIGH COURT

Date Heard:	29 July 2015
For the First Appellant	Adv SD Wagener SC
Instructed By:	Coetzer & Partners
For the Second Appellant:	Adv WF Pienaar
Instructed By:	Coetzer & Partners
For the Respondent:	Adv L Hollander
Instructed By:	Fluxmans Inc.