THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 1338/23

In the matter between:

TWENTY FOUR MOTORS CC t/a FORD ERMELO	**Applicant**
and	
ANDRIES JOHANNES JACOBUS VENTER	**First Respondent**
HELGA KEULDER	**Second Respondent**
LUSAPHO ELVIS NQAKWANA	**Third Respondent**
MTHOKOZISI MKHONZA	**Fourth Respondent**
LWANDILE MBANGATHA	**Fifth Respondent**
SHEDRACK SIPHO NZIMANDE	**Sixth Respondent**
MLANDENI NKULULEKO MTHETHWA	**Seventh Respondent**
THE CAR LOUNGE (PTY) LTD	**Eighth Respondent**

Heard: **21 February 2024**

Delivered: **27 February 2024**

This judgment was handed down electronically by consent of the parties' representatives by circulation to them by email. The date for hand-down is deemed to be 27 February 2024.

JUDGMENT

PRINSLOO, J

Background

[1] The Applicant conducts business as a motor vehicle dealership and it sells new and second-hand motor vehicles. The Applicant is the only Ford dealership in Ermelo and it deals with commercial and private customers. There are twenty second-hand car dealerships in Ermelo.

[2] The First to Seventh Respondents (Respondents) were all employed by the Applicant in different capacities. The First Respondent (Mr Venter) was a vehicle sales manager, the Second Respondent (Ms Keulder) was a finance and insurance trainee and the Third to Seventh Respondents were junior vehicle salespersons. They concluded confidentiality and restraint agreements with the Applicant.

[3] The Respondents resigned from the Applicant's employ on 4 September 2023 and they took up employment with the Eighth Respondent, a competitor of the Applicant.

[4] On 11 October 2023, the Applicant approached this Court on an urgent basis to enforce the confidentiality and restraint agreements it had entered into with the Respondents. The urgent application was argued on 17 November 2023 and on 2 February 2024, judgment was handed down. The Court (per Mahalelo AJ) ordered that:

> '1. The applicant's non-compliance with the rules of court pertaining to service and process is condoned and the application is treated as urgent.
>
> 2. It is declared that the first respondent is in breach of the provisions of the restraint of trade agreement contained in the written contract entered into between the applicant and the first respondent on 31 January 2011, together with the addendums thereto entered into on 1 February 2019 and 12 November 2020, respectively, by directly or indirectly competing with the applicant.

3. It is declared that the second respondent is in breach of the provisions of the restraint of trade agreement contained in the written contract entered into between the applicant and the 2nd respondent on 1 August 2014 by directly or indirectly competing with the applicant.

4. It is declared that the third respondent is in breach of the provisions of the restraint of trade agreement contained in the written contract entered into between the applicant and the third respondent on 18 May 2018, together with the addendums thereto entered into on 1 February 2019 and 26 October 2020, respectively, by directly or indirectly competing with the applicant.

5. It is declared that the 4th respondent is in breach of the provisions of the restraint of trade agreement contained in the written contract entered into between the applicant and the 4th respondent on 17 May 2023 by directly or indirectly competing with the applicant.

6. It is declared that the 5th respondent is in breach of the provisions of the restraint of trade agreement contained in the written contract entered into between the applicant and the respondent on 18 May 2021 by directly or indirectly competing with the applicant.

7. It is declared that the 6th respondent is in breach of the provisions of the restraint of trade agreement contained in the written contract entered into between the applicant and the [sixth] respondent on 16 February 2023 by directly or indirectly competing with the applicant.

8. It is declared that the 7th respondent is in breach of the provisions of the restraint of trade agreement contained in the written contract entered into between the applicant and the 7th respondent on 16 February 2023, by directly or indirectly competing with the applicant.

9. The 1st to 7th respondents are interdicted and restrained for a period of 12 months, calculated from 4 September 2023, this being the date on which the 1st to 7th respondents resigned, with immediate, effect from their employ with the applicant from:

   9.1 Starting a business for their own account, which in any way whatsoever, whether directly or indirectly, competes with the applicant's business interests or which does business or trade in matters related to that of the applicant, within a region that is within 300 kilometres (three hundred kilometres) from the applicants main business premises in Ermelo, Mpumalanga, South Africa.

9.2 Entering into a partnership, accepting directorship at any group or company, accepting any position or employment at any company or group undertaking or business which in any way whatsoever, whether directly or indirectly competes with the applicants business interests or which does business or trade in matters related to that of the applicant within a region that is within 300 kilometres from the applicants main business premises in Ermelo, Mpumalanga, South Africa.

10. The 1st to 7th respondents are interdicted and restrained not to divulge to any person any of the applicant's confidential information. The aforesaid includes any methods, operations, processes, computer software, documentation, client lists, programmes, trade secrets, technical information, drawings, financial information or any other information which could be damaging to the applicant's operations or which could benefit other persons to the detriment of the applicant.

11. The first to seven respondents are interdicted and prohibited from being engaged in any form of employment or engage in any capacity whatsoever with the eight Respondent that may breach their restraint of trade with the applicant.

12. The 1st to 7th respondents be ordered to pay the costs of this application.'

[5] The effect of the order is *inter alia* that the First to Seventh Respondents are interdicted from being employed by the Eighth Respondent for twelve months from 4 September 2023 in any capacity that may breach their restraint of trade, using confidential information and competing with the Applicant.

[6] Pursuant to receipt of the judgment and on 5 February 2024, the Respondents filed an application for leave to appeal.

[7] The Applicant subsequently (on 13 February 2024) approached this Court on an urgent basis for an order directing that the operation and execution of the orders

granted in the judgment of 2 February 2024 not be suspended pending the application for leave to appeal filed by the Respondents and any subsequent appeal.

[8] The Respondents opposed the application.

Section 18 of the Superior Courts Act: general principles

[9] The default position is that the operation and execution of a decision (other than a decision not having the effect of a final judgment) is suspended pending the outcome of an application for leave to appeal or an appeal. Section 18 of the Superior Courts Act[1] regulates the circumstances under which a party may apply for an order that departs from the ordinary consequence of filing an application for leave to appeal. The court may order otherwise under exceptional circumstances, if it is established on a balance of probabilities that the applicant 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.[2]

[10] Section 18 of the Superior Courts Act provides that:

> '18 Suspension of decision pending appeal
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> (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

[1] Act 10 of 2013.
[2] See: *Luxor Paints (Pty) Ltd v Lloyd and another* (2017) 38 ILJ 1149 (LC).

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.'

[11] The Labour Appeal Court (LAC) in *Road Traffic Management Corporation v Tasima (Pty) Ltd and others* (*Tasima*)[3] considered the provisions of section 18(3) versus the common law position as follows:

> '[43] Prior to the enactment of section 18(3) of the SC Act there was no statutory provision regulating interim execution orders. In terms of the common law, the noting of an appeal automatically suspends execution of the judgment appealed against. Where the successful party wishes to execute upon the judgment, it is required to make an application for leave to do so and bears the onus to show why the judgment should be executed pending the appeal, subject, in appropriate cases to the furnishing of security *de restituendo*. The court had a wide discretion to grant or refuse leave to execute and was required to determine what was just and equitable in all the circumstances having regard to the potentiality of irreparable harm or prejudice to the parties, the balance of convenience and the prospects of success on appeal. At common law, an interim execution order is itself an interlocutory order and was generally not appealable on the grounds that such an order may be varied by the court granting it in the light of changed circumstances.

[3] [2018] ZALAC 47; [2019] 5 BLLR 434 (LAC) at paras 43 – 44.

[44] Section 18 of the SC Act has significantly altered the common law in more than one respect. The court no longer has a wide discretion to do what is just and equitable or to rely exclusively on the balance of convenience or the appeal's prospects of success. Now, before a court may order interim execution, the applicant for that relief must prove three things on a balance of probabilities. Firstly, the applicant must show that exceptional circumstances exist (perhaps including the balance of convenience and prospects of success) justifying the reversal of the ordinary principle of suspension pending appeal. Secondly, it must prove on the probabilities that it will suffer irreparable harm if interim execution is not ordered. Thirdly, it must prove that the other party will not suffer irreparable harm if an order of interim execution is granted. Should the applicant fail to discharge its onus in relation to any one of these requirements, the court may not grant an interim execution order. Additionally, in terms of section 18(4) of the SC Act, where an interim execution order is granted, the aggrieved party has an automatic right of appeal against that order to the next highest court and the order will be automatically suspended, pending the outcome of such appeal.'

[12] In *Incubeta Holdings (Pty) Ltd and another v Ellis and another*[4] *(Incubeta),* the Court held that:

'[16] It seems to me that there is indeed a new dimension introduced to the test by the provisions of s 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/victor, 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.'

[13] In *University of the Free State v Afriforum and another*[5] *(Afriforum),* the Supreme Court of Appeal (SCA) held:

[4] 2014 (3) SA 189 (GJ) at para 16.
[5] [2017] 1 All SA 79 (SCA) at paras 9 – 10.

'[9] What is immediately discernible upon perusing sections 18(1) and (3), is that the Legislature has proceeded from the well-established premise of the common law that the granting of relief of this nature constitutes an extraordinary deviation from the norm that, pending an appeal, a judgment and its attendant orders are suspended. Section 18(1) thus states that an order implementing a judgment pending appeal shall only be granted "under exceptional circumstances". The exceptionality of an order to this effect is underscored by section 18(4), which provides that a court granting the order must immediately record its reasons; that the aggrieved party has an automatic right of appeal; that the appeal must be dealt with as a matter of extreme urgency and that pending the outcome of the appeal the order is automatically suspended.

[10] It is further apparent that the requirements introduced by sections 18(1) and (3) are more onerous than those of the common law. Apart from the requirement of "exceptional circumstances" in section 18(1), section 18(3) requires the applicant "in addition" to prove on a balance of probabilities that he or she "will" suffer irreparable harm if the order is not made, and that the other party "will not" suffer irreparable harm if the order is made. The application of rule 49(11) required a weighing-up of the potentiality of irreparable harm or prejudice being sustained by the respective parties and where there was a potentiality of harm or prejudice to both of the parties, a weighing-up of the balance of hardship or convenience, as the case may be, was required. Section 18(3), however, has introduced a higher threshold, namely proof on a balance of probabilities that the applicant will suffer irreparable harm if the order is not granted and conversely that the respondent will not, if the order is granted.'

[14] The effect in short is this: the Superior Courts Act limits the discretion of a court to grant the relief of interim execution and section 18(3) introduced a higher threshold and more onerous requirements. An applicant must prove three distinct requirements on a balance of probabilities:

1. Exceptional circumstances (including the balance of convenience and prospects of success);
2. That it will suffer irreparable harm if interim execution is not ordered;

3. That the other party will not suffer irreparable harm if an order of interim execution is granted.

[15] Section 18(3) places a heavy onus on an applicant and if an applicant fails to prove any one requirement, the application must fail and be dismissed.

[16] It is in the context of the requirements of section 18(3) that this application is to be decided.

Analysis: The section 18(3) application

Exceptional circumstances

[17] The first issue to be decided is whether there are exceptional circumstances.

[18] What would constitute 'exceptional circumstances' had been considered in *Incubeta* and the Court held that exceptionality must be fact-specific and circumstances which are or may be 'exceptional' must be derived from the actual predicaments in which the given litigants find themselves. The Court held that:

'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.'[6]

[19] *Incubeta* has been quoted with approval by the SCA[7] and it is clear that the determination of whether exceptional circumstances exist, is a fact-specific enquiry and each case has to be decided on its own facts as there is no definition of exceptional circumstances.

[20] In *Incubeta,* it was held that:[8]

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[6] *Incubeta supra* at para 27.
[7] *Ntlemeza v Helen Suzman Foundation and another* 2017 (5) SA 402 (SCA), *Afriforum supra*.
[8] *Incubeta* at para 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.'

[21] In *Afriforum,* with regard to proving exceptional circumstances, it was held that:

'[13] Whether or not "exceptional circumstances" for the purposes of section 18(1) are present, must necessarily depend on the peculiar facts of each case. In *Incubeta Holdings* at paragraph 22 Sutherland J put it as follows:

"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 agree. Furthermore, I think, in evaluating the circumstances relied upon by an applicant, a court should bear in mind that what is sought is an extraordinary deviation from the norm, which, in turn, requires the existence of truly exceptional circumstances to justify the deviation.'[9]

[22] In *L'Oreal South Africa (Pty) Ltd v Kilpatrick and Another*[10] *(L'Oreal),* the Court held that:

'In the case of a restraint of trade interdict, it is the immediate protection of the protectable interest of the applicant that is critical to the application even having any purpose. It is all about the elimination of continued risk, which in the case of a protectable interest relating to confidential information can only be achieved by interdicting employment of the individual respondent with the competitor where such respondent is so employed (which is the case in the current matter). If an applicant manages to pass the quite substantial hurdle of convincing a Judge to exercise the Judge's discretion in the applicant's favour, it is in my view untenable that all this effort and the very objective that needs to be achieved is thwarted by the respondent party simply proceeding with an appeal. It is, in my view, the nature of restraint of trade proceedings that in itself must contemplate 'exceptional circumstances'.'

[9] *Afriforum* at para 13.
[10] (2015) 36 ILJ 2617 (LC) at para 49.

[23] Exceptionality is fact-specific and exceptional circumstances cannot be assumed or accepted merely because the matter involves a restraint of trade. Each case must be decided on its own merits and *L'Oreal* is not authority for a position that when the matter involves a restraint of trade, the existence of exceptional circumstances follows as a matter of fact.

[24] The LAC confirmed in *Tasima* that the applicant must show that exceptional circumstances exist, including the balance of convenience and prospects of success, justifying the reversal of the ordinary principle of suspension pending appeal.

[25] The question is thus whether the circumstances *in casu* are truly exceptional and whether an extraordinary deviation from the normal position is justified. This question is to be answered by considering the facts and the circumstances relied upon by the Applicant.

[26] The Applicant's pleaded case in respect of exceptional circumstances is that the duration of the restraint is 12 months, expiring on 3 September 2024 and approximately five months of the restraint period has already expired. By the time the appeal is finalised, the restraint period or a substantial portion thereof would have expired and it would render the relief granted futile and the Applicant would derive no benefit from its successful litigation. If the relief sought is not granted, the Respondents would remain in the employ of the Eighth Respondent under the same conditions and circumstances that gave rise to the urgent application to enforce the restraint of trade and the Applicant would continue to suffer irreparable harm.

[27] On the issue of prospects of success, the Applicant submitted that the Respondents' application for leave to appeal is frivolous and vexatious and has been launched for the purpose of defeating the Court order and is not *bona fide.* It was filed merely to gain time for the Respondents to continue to solicit the Applicant's clients.

[28] The Respondents dispute that there are any truly exceptional circumstances and that any deviation from the normal position that the judgment is suspended pending an application for leave to appeal, will not be justified.

[29] The Respondents' case is that the Applicant is the only car dealership in Ermelo that sells new Ford vehicles, but there are multiple businesses in Ermelo, including the Eighth Respondent, that sells second-hand vehicles, including Ford vehicles. The Eighth Respondent is only a direct competitor of the Applicant insofar as they both sell second-hand vehicles. The Eighth Respondent is not a Ford dealership and does not sell new vehicles as only the Applicant sells new Ford vehicles in Ermelo.

[30] The Respondents' case is that they have good prospects of success on appeal *inter alia* because the Court incorrectly applied the test as to whether the Applicant has a protectable interest. The Court found a protectable interest by virtue of the fact that the Respondents had close contact with the Applicant's customers and the Respondents submit that the Court should have enquired whether the Respondents had such a grip on or influence over the customers that they could carry them away to another employer and the answer to this question is no. The Respondents submit that Ms Keulder did not sell vehicles as she was a finance and insurance trainee, under the supervision of the 'finance and insurance lady' employed by the Applicant and apart from Mr Venter, the other Respondents were employed in junior positions and they did not have such an influence over the customers. Furthermore, most customers were single transaction customers and they do not necessarily return to the same dealership to buy another vehicle and in the event that they do, the probability is that the salesperson the customer previously dealt with is no longer employed at the same dealership as salespersons come and go.

[31] Furthermore, the price a dealership will pay for a vehicle and for which it will sell a vehicle is determined by means of the 'book value' of the vehicle, which is not a formula unique to the Applicant but is used by all car dealers.

[32] The other main issue raised as one of the Respondents' grounds for appeal, is that the Court enforced the restraint of trade for a radius of 300 kilometres, calculated from Ermelo. The Court held that the Respondents could "*work for any employer anywhere, provided they do not breach the restraint clauses for a period of 12 months*". The Respondents submitted that the Court erred in this regard because the Applicant made out no case as to why the restraint of trade should be enforced for an area that is 600 kilometres in diameter. The Applicant sells vehicles in Ermelo, Mpumalanga and it operates only in Ermelo. No case was made out for it to be granted protection for the wide radius of the restraint. By granting a restraint of trade with a radius of 300 kilometres, the Respondents cannot work for any dealership in the entire Gauteng, the majority of Limpopo and Mpumalanga and a substantial part of the Free State and KwaZulu-Natal. The Respondents' case is that the Court did not take into account the stifling and unfair effect that such enforcement will have on the Respondents' ability to engage in their profession and it should have found that it was not in the public interest to enforce a restraint for such an unnecessary wide area.

[33] I accept that litigation which concerns the enforcement of a restraint of trade is *sui generis* in the sense that the period of the restraint is limited and that enforcement of the terms of the restraint agreement has to happen within the limited period of the duration of the restraint of trade. It certainly renders the enforcement urgent and an appeal process will no doubt delay the enforcement of the restraint of trade. However, I am not convinced that it is sufficient *per se* to constitute exceptional circumstances. The LAC has on a number of occasions dealt with appeals concerning a restraint of trade on an urgent, expedited basis and there is no reason why the same cannot happen *in casu.*

[34] In *Afriforum*, the SCA held that the prospect of success in the appeal is a valid consideration when determining whether exceptional circumstances have been established by an applicant seeking leave to execute pending appeal.

[35] The prospects of success in the appeal is a relevant factor in the consideration of the application, as was held in *Minister of Social Development,*

Western Cape and others v Justice Alliance of South Africa and another[11], where the court said that:

> 'It follows that the less sanguine a court seized of an application in terms of section 18(3) is about the prospects of the judgment at first instance being upheld on appeal, the less inclined it will be to grant the exceptional remedy of execution of that judgment pending the appeal. The same quite obviously applies in respect of a court dealing with an appeal against an order granted in terms of section 18(3). The position is very much akin to that which pertains when interim interdictory relief pending a judicial review is being considered.'

[36] Prospects of success are to be considered as a factor in deciding whether or not to grant the exceptional remedy of execution of a judgment pending appeal. In my view, considering what I alluded to *supra,* more specifically the findings on the existence of a protectable interest and the wide area of the restraint, it is likely that leave to appeal will be granted in due course and that the LAC will reach a different finding on appeal.

[37] *In casu,* no facts placed before this Court are sufficient to constitute exceptional circumstances.

Irreparable harm

[38] The second leg of the enquiry is 'irreparable harm'.

[39] The Applicant must prove, on a balance of probabilities, that it would suffer irreparable harm should the order for leave to execute or enforce not be granted pending the appeal and that the Respondents, on the other hand, will not suffer irreparable harm if leave to execute is granted pending appeal.

<u>The Applicant's case</u>

[11] [2016] JOL 35612 (WCC) at para 27.

[40] The Applicant's case is that since the urgent application was argued in November 2023, it continues to suffer losses and the total unit sales on used vehicles decreased by more than 50% since the Respondents took up employment with the Eighth Respondent. From September 2023 until January 2024, the Applicant's used vehicle division has suffered a financial loss of approximately R1,5 million.

[41] The Applicant submitted that if the relief sought is not granted, the Respondents will be allowed to continue to make use of its confidential information to springboard off the Applicant's intellectual property and confidential information to assist the Eighth Respondent to unlawfully compete with the Applicant and to provide the Eighth Respondent with a new client base, to the financial and reputational detriment of the Applicant. The harm suffered by the Applicant will continue.

[42] The Applicant suffers substantial harm as its clients are solicited away in favour of the Eighth Respondent and there is a risk of further disclosure of confidential information, trade secrets and trade connections.

[43] A claim for damages will not give the Applicant the required and necessary relief as the Applicant is at risk of permanently losing clients and will be subjected to unfair and unlawful competition by the Respondents. A damages claim in due course is cold comfort and does not protect the Applicant's rights. The Applicant requires that the Court order be put into immediate operation in order to limit the damages that it continues to suffer.

[44] The Applicant has no alternative remedy as it is extremely difficult to calculate the exact damages already suffered and still to be suffered as a result of the Respondents' employ with the Eighth Respondent.

[45] The Respondents, on the other hand, might suffer hardship if the interdict is enforced, but if they are ultimately successful with their appeal, such harm will not be irreparable as they would be able to sue for loss of earnings, the quantum of which could be easily calculated. The only possible harm the Respondents could suffer is

that they would have lost out on income from their employment with the Eighth Respondent or any other establishment conducting the same or similar business as the Applicant. The Respondents can also be gainfully employed in any other position that does not directly or indirectly compete with the Applicant. The Respondents should have foreseen this at the time of agreeing to the restraint of trade provisions.

The Respondents' case

[46] The Respondents submitted that they would suffer irreparable harm if the relief sought by the Applicant is granted. This is so because the effect of the Court order is that they must resign from their employment and cannot be employed by any other motor vehicle dealership within a radius of 300 kilometres of Ermelo.

[47] The Respondents explained that they have been working in the motor industry for different periods of time and their skills and experience pertain to the motor industry and specifically to selling motor vehicles and performing the duties associated therewith. Ms Keulder's skills and experience pertain to the motor industry and motor vehicle dealerships. The skills and experience they have, are within the motor industry.

[48] The Respondents further explained that the nett effect of the judgment is that they either have to find work at a motor vehicle dealership beyond the wide area of the restraint or be unemployed until 3 September 2024. They all reside in Ermelo, they own or rent properties they stay in and their families are settled there. It would be impossible to relocate to an area outside of the restraint area as many of them have children attending schools in Ermelo or spouses also employed in Ermelo. It would disrupt their entire families to relocate. Furthermore, the Respondents are breadwinners and they have families who depend on them for their livelihood and they cannot be unemployed until September 2024.

[49] The enforcement of the restraint judgment will render the Respondents economically inactive and unproductive in respect of their chosen professions and will have a devastating effect on the Respondents and their families. The Respondents referred to the high unemployment rate in South Africa and submitted

that there is no guarantee that they would find another job, for which they are qualified outside of the restraint area, alternatively, a non-competing job for which they are not qualified in Ermelo.

[50] The Respondents denied that the Applicant would suffer irreparable harm as a period of five months had passed since they commenced to work for the Eighth Respondent. Furthermore, the Applicant was able to quantify the damages it allegedly suffered and two of the Respondents (Messrs Mbangatha and Mkhonza) as well as Mr Nkosi, who worked for the Eighth Respondent, had resigned from the Eight Respondent and (again) took up employment with the Applicant.

[51] In the replying affidavit, the Applicant did no more than to deny that the Respondents' only skill and experience pertain to the motor industry and specifically the selling of motor vehicles. The Applicant's response is that the Respondents would be able to apply their knowledge and skills in any other sales role and that the Respondents should have foreseen the consequences of their resignation from the Applicant and their subsequent employment by a direct competitor and they now seek to escape the consequences of the risk they took.

[52] Considering the facts, set out in this application, the Applicant has not made out a case for irreparable harm and did not establish on a balance of probabilities that the Respondents will not suffer irreparable harm if the judgment is to be enforced pending the appeal.

<u>Conclusion</u>

[53] The Applicant must prove the existence of exceptional circumstances and that, on a balance of probabilities, it will suffer irreparable harm should the order for leave to execute or enforce not be granted pending the appeal and that the Respondents, who seek leave to appeal, will not suffer irreparable harm if leave to execute is granted pending appeal.

[54] In *Afriforum,* the SCA confirmed that section 18(3) is a novel provision and places a heavy onus on the applicant. Section 18 does not merely purport to codify the common-law practice, but introduces more onerous requirements.

[55] It has been accepted and confirmed by the courts that the prospects of success of the proposed appeal remain a relevant factor for purposes of considering whether the court should grant an order pursuant to section 18(3).

[56] In *Knoop NO and another v Gupta (Execution)*[12], the SCA held that courts ought not to be too eager to enforce judgments pending an appeal:

> 'The immediate execution of a court order, when an appeal is pending and the outcome of the case may change as a result of the appeal, has the potential to cause enormous harm to the party that is ultimately successful.'

[57] I found that the Applicant was unable to show 'something that is sufficiently out of the ordinary and of an unusual nature'[13] that would constitute exceptional circumstances and which would warrant a departure from the ordinary rule.

[58] Notwithstanding Ms Lancaster's argument that this Court should not concern itself with the Respondents' prospects of success, the prospects of success in the appeal are relevant in deciding whether or not to grant the exceptional relief sought by the Applicant in terms of section 18(3). I am satisfied that the Respondents have prospects of success in their application for leave to appeal, more specifically in relation to the question of whether the Applicant has a protectable interest and the reasonableness of the area of the restraint.

[59] The Applicant must prove, on a balance of probabilities, that the Respondents will not suffer irreparable harm if leave to execute is granted pending appeal.

[60] The Respondents dealt in detail with the harm they stand to suffer if the order was executed and enforced pending their application for leave to appeal. The Applicant, who has the onus to show that the Respondents would not suffer

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[12] 2021 (3) SA 135 (SCA) at para 1.
[13] *Ibid* at para 46.

irreparable harm, simply contended in its replying affidavit that as the First, Third, Sixth and Seventh Respondents are excellent vehicle salespersons they will be able to sell any item and as such they will be able to find employment within the interdicted area. If they remain unemployed and are ultimately successful in their appeal, they can sue for damages for the salaries they did not earn until September 2024. The Applicant's proposition is not only unrealistic and far-fetched, it also lost sight of the Respondents' version that they have no skills and experience in selling other items and that they cannot compete with other candidates in a non-competing business when such other candidates have relevant skills and experience pertaining to their relevant industries. The Respondents rely on their monthly remuneration to support themselves and their families and their income on a monthly basis is critical.

[61] The Applicant must also prove, on a balance of probabilities, that it would suffer irreparable harm should the order for leave to execute or enforce not be granted pending the appeal.

[62] This Court should come to the assistance of an applicant faced with the predicament of being left with no relief, regardless of the outcome of an appeal. That is not the case for the Applicant. The Applicant informed this Court in its founding affidavit that it has quantified its alleged losses as a result of the Respondents and the Eighth Respondent unlawfully competing with it.

[63] Although the Applicant submitted that a claim for damages will not give the Applicant the required and necessary relief, the Applicant is able to quantify its damages and can institute proceedings to sue for damages.

[64] In *Incubeta,* the Court held:

> '... 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.'[14]

[14] *Incubeta supra* at para 24.

[65] The Applicant operates the only dealership selling new Ford vehicles in Ermelo and the Respondents can in no way compete with this part of the Applicant's business. It is only the second-hand car sales part of the Applicant's business that is affected, wherefore the Applicant can still trade and, to the extent that it suffered damages relating to the sale of second-hand vehicles, it can sue for damages.

[66] It is true that the Respondents are not prohibited from working or being employed, but the issue is the area of the restraint. The Respondents cannot be employed by any car dealership within a radius of 300 kilometres from Ermelo, and if they want to pursue their professions, they have to relocate and disturb their entire family, alternatively remain unemployed until September 2024, both scenarios will cause harm far greater than the harm to be suffered by the Applicant. The harm to be suffered by the Respondents is not merely financial and would indeed be irreparable.

[67] What is telling is that in its replying affidavit, the Applicant admitted that Mr Venter was hired by the Applicant because of his robust approach and his likeable personality which connects easily with customers, Ms Keulder was hired because of her technical knowledge and experience in respect of structuring deals and assisting customers in obtaining finance, Mr Nqakwana was hired because of his robust approach and his extrovert personality which connects easily with customers and Mr Mthethwa was hired because of his robust approach, technical knowledge and experience and his likeable personality which connects easily with customers. It is evident that the Respondents possessed skills, experience, technical knowledge and personality traits which made them attractive and suitable for the positions they occupied, even prior to being employed by the Applicant and they should be free to use those in their chosen profession.

[68] During argument, the parties expressed a willingness for the appeal in this matter to be dealt with on an expedited basis. The parties are encouraged to approach the Judge President in this regard. If the appeal is expedited, it will alleviate any prejudice to a great extent.

[69] The Applicant failed on all three substantive requirements for departing from the default position that an appeal suspends execution of the order appealed against. It follows that all the requirements under sections 18(1) and (3) of the Superior Courts Act have not been satisfied and that this application must fail.

Costs

[70] The last issue to be decided is the issue of costs.

[71] Insofar as costs are concerned, this Court has a broad discretion in terms of section 162 of LRA to make orders for costs according to the requirements of the law and fairness. Both Ms Lancaster and Mr Ebersöhn argued for costs, but ultimately left it in the hands of this Court.

[72] In my view, this is a matter where the interest of justice will be best served by making no order as to costs.

[73] Accordingly, I make an order as follows:

Order

1. The application is dismissed;
2. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms S Lancaster from Lancaster Kungoane Attorneys

For the Respondents: Mr G Ebersöhn from Gerrie Ebersöhn Attorneys