



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J 1947/2015

In the matter between:

E-MERGE IT RECRUITMENT CC

Applicant

and

BRITS, MIGNON

First Respondent

SHIRLEY JACKSON RECRUITMENT (PTY) LTD

Second Respondent

Heard: 10 December 2015

Delivered: 14 December 2015

Summary: Urgent application - enforcement of a restraint of trade order pending finalisation of appeal - no need to consider the merits since it as would amount to second-guessing about the judgment.

JUDGMENT

Nkutha-Nkontwana AJ

Introduction

- [1] This is an urgent application in terms of which the applicant seeks, by way of interim interdict, to put in force restraint order of 22 October 2015 by Boyce AJ which provides that:

- “2. *The First Respondent is interdicted and restrained for period of 12 months from 31 August 2015 and throughout Pretoria, Johannesburg, Midrand, Cape Town and Durban, from, whether as a proprietor, principal, member, agent, partner, representative, shareholder, director, manager, employee, consultant, advisor, financier, administrator, and/or in any other like capacity, bring directly or indirectly associated and/or concerned with, interested and/or engaged in any business, firm undertaking, corporation or company, directly or indirectly in completion with the Applicant;*
3. *The First Respondent is interdicted and restrained for a period of 12 months from 31 August 2015 from being employed by the second Respondent;*
4. *The Second Respondent is interdicted and restrained for a period of 12 months from 31 August 2015 from employing by the First Respondent;...”*

[2] Unlike previous applications of this nature which had been brought in terms of High Court Rule 49(11) read with Labour Court Rule 11(3), the Applicant specifically relies on section 18 of the Superior Court Act 10 of 2013 (“The SC Act”)¹ which also deals with suspension of court orders pending appeal.

The legal principles

[3] In *L’Oreal South Africa (Pty) Ltd v Kilpatrick and Another*² Snyman AJ dealt studiously with a novel question regarding suspension of orders pending appeals subsequent to the coming into effect of the SC Act,³ in particular the new dimension introduced by the provisions of section 18 and whether this section is applicable in the Labour Court. I fully endorse court’s analysis and findings in *L’Oreal* on the applicability of section 18 of the SC Act in this court.

[4] However, in *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another*,⁴ extensively referred to in *L’Oreal*, the court held that ‘...despite section 18, the provisions of Rule 49(11) still found application’. In *South Cape Corporation*

¹ This Act became operational on 23 August 2013.

² (C788/2011) [2013] ZALCCT 16. 1962 (4) SA 531 (A)

³ This Act became operational on 23 August 2013.

⁴ 2014 (3) SA 189 (GJ).

(Pty) Ltd v Engineering Management Services (Pty) Ltd,⁵ dealing with Rule 49(11), the court stated that:

“The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised (see Voet, 49.7.3; Ruby's Cash Store (Pty) Ltd v Estate Marks and Another supra at p 127). This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments (cf Fisser v Thornton 1929 AD 17 at p 19). In exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances and, in doing so, would normally have regard, inter alia, to the following factors:

- (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;*
- (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;*
- (3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, eg, to gain time or harass the other party; and*
- (4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.”*

[5] The above principles have been endorsed and applied by this court to stay the interim enforcement of a judgment pending an appeal.⁶ However, as stated in *L’Oreal*, the provisions of section 18 of the SC Act stand to be adopted since they also specifically deal with the issue of suspension of orders pending appeal. section 18 reads as follows:

⁵ 1977 930 SA 534 (A) at 544H – 546B.

⁶ *Solidarity v Department of Correctional Services and Others: In re Solidarity and Others v Department of Correctional Services and Others; Solidarity and Others v Department of Correctional Services and Others* (2014) 35 ILJ 1647 (LC) at para 16.

- (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."*

[6] In *Incubeta*, the court, dealing with above provisions of section 18(1) and (3), concluded as follows:⁷

"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:

- First, whether or not 'exceptional circumstances' exist; and
- Second, proof on a balance of probabilities by the applicant of —
 - o the presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order; and
 - o the absence of irreparable harm to the respondent/loser, who seeks leave to appeal."

[7] Indeed, I agree with Snyman AJ in *L'Oréal* that 'section 18 appears to now specifically determine the concept of 'irreparable harm' as part of the test already enunciated in *South Cape Corporation (Pty) Ltd*, and certainly specifically places an onus on the applicant for relief in this regard...And

⁷ Above note 5 at para 16.

further, it appears that a new requirement of 'exceptional circumstances' has been added.'

Exceptional circumstances

- [8] The Applicant asserts in its affidavit that given the fact that the Respondents have noted their leave to appeal in the normal course, that process on its own may take some time. The Respondents have not sought an urgent hearing of the leave to appeal or filed submissions in thereof Rule 30(3A) of the Rules of Court. Therefore, it is most likely that the whole appeal process may take some time.
- [9] The duration of the restraint is 12 months commencing from 31 August 2015 and 2½ months of the restraint period has already expired. Given the fact that the Respondents have not launched the appeal process on urgent basis, the restraint period would have lapsed or, at the very least, a substantial portion thereof would have expired by the time the appeal is finalised. That would, consequently, render the relief granted in the restraint order futile. The Applicant would derive no benefit from its successful litigation.
- [10] If the relief sought by the Applicant in these proceedings is refused, the First Respondent would remain employed by the Second Respondent under the same conditions that gave rise to the restraint application in the first place.
- [11] Therefore, the forfeiture of the relief granted in the restraint order, regardless of the outcome of the appeal, constitutes exceptional circumstances which warrant the granting of the relief sought.
- [12] The Respondents, on the other hand, assert in their answering affidavit that, given their prospects of success in the leave to appeal, the application lacks factual basis for exceptional circumstances. Also, the Applicant and the Second Respondent are not in competition since the Applicant has several recruitment divisions but the IT sales division was started by the First Respondent and she remained the only employee in that division. After her departure, the Applicant stopped trading in that division.

[13] The Respondents do recruitment in IT sales and not in other recruitment areas in which the Applicant does recruitments. Even if the Applicant does do IT sales on ad hoc basis as alleged, that business would only form 10% of the Applicants business and 10% of its income. Therefore, if the First Respondent is competing with the Applicant, such would be negligible since it would only be with 10% of the Applicant's business. Therefore, a final interdict is not an appropriate relief in the circumstances.

[14] I endorse the following sentiments as expressed by the court in *Incubeta*, that:⁸

"Do these circumstances give rise to 'exceptionality' as contemplated? In my view the predicament of being left with no relief, regardless of the outcome of an appeal, constitutes exceptional circumstances which warrant a consideration of putting the order into operation. The forfeiture of substantive relief because of procedural delays, even if not protracted in bad faith by a litigant, ought to be sufficient to cross the threshold of 'exceptional circumstances'."

[15] In this instance, by the very nature, the restraint order contemplates 'exceptional circumstances' since it provides immediate protection of the protectable interest and elimination of continued risk in relation to confidential information.⁹

Irreparable harm to the Applicant

[16] The Applicant asserts that it carries on a business as a specialist staff recruitment consultancy in the information technology sector, and as such sources and places candidates who are skilled in variety of software platforms the country.

[17] Whilst in the employ of the Applicant, the First Respondent was tasked with canvassing the job seekers' market searching for suitably qualified candidates that she would introduce to potential employers seeking to engage their services. As such, she was exposed to or acquired knowledge or (which she still has) of the Applicant's confidential information that is valuable to the

⁸ Above n 5 at para 27.

⁹ L'Oréal above n 2 at para 49.

competitor, and is known only to the Applicant's members and senior employees. The First Respondent possesses such information and the risk of disclosure by her to a competitor could have detrimental effect in the Applicant. Such information is a key differentiating factor as to the Applicant's success in such a highly competitive market.

- [18] The First Respondent took up employment with Second Respondent immediately after terminating her employment with the Applicant, a company that she has been a director since last May 2014 whilst in the employ of the Applicant. She is employed as a Senior Specialist Consultant & Head Hunter by a company that markets itself as being *"made up of headhunters – experts in their field, specializing in information technology"*.
- [19] The Second Respondent's profile changed soon after it employed the First Respondent as it boasts of a large client base across the country despite the fact that it is only new in the market and the fact that the First Respondent had no prior experience in IT Sales Recruitment before being employed by the Applicant.
- [20] The First Respondent changed the password and user name of the Applicant's LinkedIn profile which is the Applicant's electronic data base of its clients. She refuses to provide such details to the Applicant.
- [21] The restraint order has stopped the First Respondent's breach of restraint of trade and prevents the Second Respondent from unlawfully interfering with the contractual relationship between the Applicant and the First Respondent, to protect the Applicant's legitimate interest during the period of 1 September to 31 August 2016.
- [22] The Applicant has no suitable alternative remedy:

13.1 The Applicant has no other relief that would have the effect of preventing the First Respondent from breaching restraint of trade and the Second Respondent from unlawfully interfering with the contractual relationship between the Applicant and the First Respondent, thus eliminating the continued risk;

13.2 It will be difficult to compute the damages suffered by the Applicant consequent upon the First Respondent enticing its clients away since the extent of the business loss would not be known by the Applicant;

13.3 A damage claim would not be appropriate as such a claim would take some time to be heard and would not have immediate effect on an interdict, which is necessary to limit the damages that have been suffered by the Applicant.

[23] Instead, the Applicant's prejudice is compounded by the First Respondent continued employment by the Second Respondent. Therefore, on the balance of probabilities, the Applicant will suffer irreparable harm if the relief is not granted.

[24] The First Respondent asserts that she did not take any copies of the Applicant's documents or data base. As such, the knowledge would not be confidential information but would be her personal knowledge or a skill. Such personal knowledge or a skill would not form an interest deserving of protection to enforce a restraint of trade.

Irreparable harm to the First Respondent

[25] The Applicant asserts that restraint order does not prevent the First Respondent from using her own skills and abilities, and earning a living in any area other than areas she is precluded from in terms of the restraint; to recruit in any other field other than IT recruitment sector; to sell IT products and services as she did before taking up employment with the Applicant; and to sell any products she wishes to as her sales skills are transferable to selling product. The Respondent would be free to compete with the Applicant in IT sales after a relatively short restraint period.

[26] Also, if the relief is granted, the First Respondent would not lose her current employment or be prejudiced as she is the sole employee and shareholder of the Second Respondent. As a small business, it would be able to refocus its

area of operation to the areas not covered by restraint. No employee stand to be affected by the by the refiled sought.

- [27] If the Respondents succeed in the appeal, they can sue for loss of earnings and the quantum of damages is feasible to compute since it would either be the First Respondent's salary or Second Respondent's profits or any other income she would have derived from her position within the Second Respondent.
- [28] Conversely, the First Respondent asserts that she will suffer irreparable harm should the relief be granted as she is a single mother and the sole provider in her household. She had no any other income than her employment in the Second Respondent.
- [29] If the order is granted she would not be able to provide for her 4 year old child and pay the rental for the property where she is residing with her child. She has no family in South Africa to offer her accommodation in the event she is evicted for defaulting.
- [30] The area covered by the restraint is in the main cities of the country where most IT sales opportunities would be. Also she would not afford to leave Johannesburg because of her child school commitments and support wise, her boyfriend works in Johannesburg.
- [31] The following considerations and concluding remarks in *Incubeta*¹⁰ are pertinent in this instance:

"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.

Furthermore, it is plain from the summary of circumstances given above that the applicants would indeed suffer irreparable harm if the order is not put into operation. Moreover, it is plain that Ellis will not suffer irreparable harm if the order is put into operation. Although Ellis in his answering affidavit complains

¹⁰ Above n 5 at paras 28 to 29.

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 s 18 test is met on both counts of the second leg."

- [32] However, unlike Ellis, the First Respondent has made allegations that she and her family will suffer real hardship during restraint period of 8 months mainly since her sole source of income comes from her employment by the Second Respondent. Still, this assertion does present a novel situation. In *University of the Western Cape Academic Staff Union and Others v University of the Western Cape*,¹¹ referred to with approval in *L'Oreal*:

*"Mlambo J (as he then was) said: 'With regard to the notion of irreparable harm it needs to be mentioned that loss of income as a result of dismissal is the inevitable consequence and as such provides no good ground for the granting of urgent interim relief', which reasoning can equally apply to the contentions of the first respondent now made in this application. I thus accept that the applicant has indeed show irreparable harm to exist, and I also accept that it has been shown that the current financial harm to the first respondent, is not irreparable harm."*¹²

- [33] The above finding is true in this instance. In my view, the Applicant has successfully met both counts of the second leg in terms section 18 requirements.

Prospects of success

- [34] The counsel for the Applicant contended that, in the light of *Incubeta* test, there is no need to consider the prospects of success on appeal in this application. I do agree. In *Incubeta*, the court made no reference to merits of the case that led to the interdict. Sutherland J stated further that:

"In my view they are not pertinent to this kind enquiry. The considerations that are valuable presuppose a bona fide application for leave to appeal or actual

¹¹ (1999) 20 ILJ 1300 (LC) at para 17.

¹² Above n 5 at para 54.

appeal. No second-guessing about the judgment per se comes into reckoning."¹³

[35] Therefore, I am not inclined to follow the court's approach in *L'Oreal* as suggested by the Respondents' counsel. In any event, the Applicant does not dispute that the leave to appeal is bona fide and, most pertinently, Boyce AJ has not pronounced on the leave to appeal. Indeed, any reference to the merits would amount to second-guessing that outcome.

Conclusion

[36] I am persuaded that, by the very nature, the restraint order contemplates 'exceptional circumstances' since it provides immediate protection of the protectable interest and elimination of continued risk in relation to confidential information. I also accept that the Applicant has successfully shown that indeed irreparable harm does exist on its part; and that, conversely, the First Respondent's harm is not irreparable.

[37] On urgency, the authorities are clear that breaches of restraint of trade have an inherent quality of urgency.¹⁴ That urgency certainly extends to this application, which is consequent to the application for leave to appeal.

Costs

[38] On the issue of costs, there is no reason for me to deviate from the general principle in applications of this nature that is, in the event of the application succeeding, the costs should be made costs in the appeal.

Order

[39] In the circumstances, I make the following order:

1. The orders 2, 3 and 4 of Boyce AJ restraint order of 22 October 2015 shall not be suspended and shall continue to remain operative pending the outcome of the appeal process, which process shall include the application for leave to appeal and/or petition for leave to appeal, and/or any appeal

¹³ *Incubeta* at para 26.

¹⁴ *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another* 2009 (3) SA 78 (C) 89A.

noted, if at all.

2. The costs of this application are to be costs in the appeal.

Nkutha-Nkontwana AJ

Acting Judge of the Labour Court of South Africa