Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 1837/2015

In the matter between:

FIDELITY SECURITY SERVICES (PTY) LTD	**APPLICANT**
and	
KUBENTHRAN NAIDOO	**FIRST RESPONDENT**
SECURITAS TECHNOLOGY (PTY) LTD	**SECOND RESPONDENT**

Heard: **1 February 2016**

Judgment delivered: 3 February 2016

JUDGMENT

VAN NIEKERK J

[1] There are two applications before the court. The first is an application for leave to appeal against a part of the judgment delivered by this court on 16 November 2015, when the court upheld a restraint agreement concluded between the applicant and the first respondent. In terms of the order granted, amongst other things, the first respondent was interdicted from being interested in a competitor business until 31 July 2016, within a radius of 100 kilometres from the applicant's office in Helderkruin, Gauteng. Also before the court is an application for an order that the operation and execution of the judgment shall not be suspended pending the application for leave to appeal and if leave is refused, pending any further petition or application for leave to appeal. For convenience, I refer to the parties as they are cited in the main application.

[2] The material facts are recorded in the judgment that is the subject of the present application. It is sufficient to record for present purposes that the first respondent was found to be in breach of the restraint undertaking, by virtue particularly of his seeking employment with and employment by the second respondent, a direct competitor of the applicant. As I have indicated, the order granted interdicts and restrains the first respondent from being employed by any of the applicant's competitors within a radius of 100 kilometres from the applicant's offices, until the expiry of the 12 month restraint on 31 July 2016.

[3] I deal first with the application for leave to appeal. The test to be applied in an application such as the present is that referred to in s 17 of the Superior Courts Act, 10 of 2013. Section 17(1) provides:

> Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgements on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

[4] The traditional formulation of the test that is applicable in an application such as the present requires the court to determine whether there is a reasonable prospect that another court may come to a different conclusion to that reached in the judgment that is sought to be taken on appeal. This is not a test to be applied lightly – the Labour Appeal Court has recently had occasion to observe that this court ought to be cautious when leave to appeal is granted, as should the Labour Appeal Court when petitions are granted. The statutory imperative of the expeditious resolution of labour disputes necessarily requires that appeals be limited to those matters in which there is a reasonable prospect that the factual matrix could receive a different treatment or where there is some legitimate dispute on the law (See the judgment by Davis JA in *Martin & East (Pty) Ltd v NUM* (2014) 35 *ILJ* 2399 (LAC), and also *Kruger v S* 2014 (1) SACR 369 (SCA) and the ruling by Steenkamp J in *Oasys Innovations (Pty) Ltd v Henning & another* (C 536/15, 6 November 2015).

[5] There is nothing in the application for leave to appeal that persuades me that the first respondent has any prospects of success.

[6] Turning next to the application for leave to execute the judgment and order pending appeal. This court is a superior court, and subject to the Superior Courts Act, 10 of 2013. Section 18 of that Act 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, i.e. that the operation and execution of the judgment and order appealed against is suspended. The approach established by s 18 requires an applicant in an application for leave to execute to show that the facts and circumstances of the particular application are exceptional and warrant a deviation from the normal rule. This has been referred to as a 'threshold factual test' (see *Incubeta Holdings (Pty) Ltd and another v Ellis and another* 2014 (3) SA 189 (GJ)) and requires the applicant to show that the facts and circumstances of its particular case are uncommon, unusual and\or out of the ordinary to the extent that a departure from the ordinary rule that an appeal suspends the operation of the judgement in order appealed against should not apply. Further, the applicant is required to prove on a balance of probabilities that it will suffer irreparable harm should the order for leave to execute not be granted pending the appeal. Finally, the applicant must prove on a balance of probabilities that the respondent in the application for leave to execute will not suffer irreparable harm if leave to execute is granted pending appeal. (See *Incubeta Holdings* (supra); and the unreported judgment by Murphy J in *Coetzer and ERB Technologies v Actom (Pty) Ltd*, A 269/2015).

[7] In so far as the requirement of exceptional circumstances is concerned, the courts have in applications for leave to execute on an interdict enforcing a restraint of trade agreement given considerable weight to the fact that if the order was not put into operation, the relief would be forfeited by the applicant because of the short duration of the restraint which would inevitably expire before exhaustion of the appeal process. The present matter is no different. The restraint has some six months to run. The limited duration of the balance of the restraint period and the prospect of the order granted on 16 November 2015 being rendered nugatory, and the enforcement of the restraint undertakings futile, are sufficient to constitute exceptional circumstances for the purposes of s 18.

[8] Turning next to the irreparable harm that the applicant contends it will suffer, I am satisfied that the applicant has no alternative way of protecting itself and its proprietary interests against the competition with the subject of the restraint

agreement. The harm that the applicant will suffer if leave to execute is not granted is self-evident, since if leave to execute is refused, the first respondent's contractual undertakings and the interdict granted by the court will be worthless. The prospect of any reparation of harm by way of damages is remote. Damages would be difficult to quantify and prove in an instance where what is sought to be protected is an investment in customer relationships and the value of each contract the applicant concludes with its customers. As the court in *ERB Technologies* observed, in restraint cases, damages are not an appropriate alternative remedy precisely because the relief sought aims to compensate for the ineffectiveness of that remedy (see paragraph 20 of the judgment).

[9] Finally, there is the issue of whether the first respondent would suffer irreparable harm if leave to execute were granted. The first respondent world be denied the opportunity to be in an employment relationship in breach of the restraint, for the duration of the restraint period. While it is his working life of some 23 years being engaged in the security industry, it is clear from the papers that the applicant has not solely being engaged in new business development. It is not unreasonable to conclude that the first respondent is in a position to find employment, for example, with suppliers of security equipment, in a capacity that does not bring him within the ambit of the restraint. I must also take into account the fact that the first respondent elected to resign from his employment with the applicant and to join the applicant's direct competitor, despite warning not to do so. I must also take into account the limited geographic component of the restraint, which serves to permit the first respondent to compete with the applicant outside of a 100km radius. The fact that the first respondent is not entitled to engage in his preferred employment does not constitute irreparable prejudice. On the other hand, as I have indicated, for as long as the first respondent remains employed with the second respondent in breach of the restraint agreement, the applicant's legitimate protectable interests which it is shown to exist and has no other means to protect, would continue to be eroded and prejudiced.

[11] For the above reasons, I am satisfied that the applicant has made out a proper case for an order for leave to execute.

[12] Finally, there is no reason why the first respondent ought not to pay the costs of both the application for leave to appeal and the application to execute.

I make the following orders:

1. Leave to appeal against the judgment delivered by this court on 16 November 2015 is refused.
2. The operation and execution of the order granted on 16 November 2015 shall not be suspended pending any petition for leave to appeal or application for leave to appeal that might be filed consequent on any successful petition.
3. The first respondent (the applicant in the application for leave to appeal) is to pay the costs of the application for leave to appeal, in addition to the costs of the application for an order to execute the judgment delivered on 16 November 2015.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCES

For the Applicant: Adv. A. Botha instructed by Blake Bester, De Wet & Jordaan

For the Respondent: Mr. J. Kotze of Johan Kotze Attorneys