

THE REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case No: 15110 / 2024

In the matter between:

SIMAH RISK ADVISORS (PTY) LTD

Applicant

and

MICHIEL VAN NIEKERK

First Respondent

ANNELI JONKER

Second Respondent

MOUNTSURE BROKERS (PTY) LTD

Third Respondent

Coram: Wille, J

Heard: 16 April 2025

Delivered: 29 April 2025

JUDGMENT

WILLE, J:

INTRODUCTION

[1] Before me for adjudication are two applications. The first one to be determined is an application for leave to appeal at the instance of the respondents. For clarity and ease of reference, I will refer to the parties as they were cited in the initial restraint and confidentiality application. The second application is at the instance of the applicant. It is an application for my initial order to be executed and complied with, pending the determination of any further appeal processes by the respondents.¹

[2] In summary, I granted relief against the first and second respondents to enforce certain written confidentiality and restraint of trade undertakings entered into by the first and second respondents to benefit the applicant. In addition, concerning all the respondents, I prohibited them from using the applicant's confidential information.²

[3] In addition, I found that the applicant's protectable interests warranted the enforcement of the confidentiality and restraint of trade undertakings as far as the third respondent was concerned. Accordingly, I formed the view that the applicant was entitled to the relief sought by it against the third respondent.³

[4] The applicant carries on business as a short-term insurance broker. It acquired this business from another discrete entity. The effective date for implementing this business acquisition was over two years ago. The applicant purchased the short-term insurance business and goodwill from this discrete entity and took over some of its employees.⁴

[5] Thus, I held that the applicant was entitled to enforce the written restraint of trade and confidentiality agreements (the 'restraint agreements') concluded with the first and second respondents. I said this because the applicant acquired the entire

¹ The implementation application.

² The third respondent was also interdicted concerning certain ancillary relief.

³ A good case had been made out against the first and second respondents.

⁴ The business it acquired was "Indiwe", and it did so "Lock Stock and Barrel".

business and goodwill of the company that it acquired, coupled with a written cession concluded to the benefit of the applicant.⁵

The Leave to Appeal

[6] I granted the initial order of restraint and confidentiality due to an urgent application about eighteen months ago. I handed down my reasons only about three months after that due to unnecessary procedural delays caused by the respondents. A second application for leave to appeal was filed at the end of last year, and yet another amended application for leave to appeal was allegedly filed on the day of the hearing. This was done without notifying the applicant.⁶

[7] I mentioned the delays at the instance of the respondents in my reasons. I reference them again as these delays are of some moment and bear some influence regarding the reasoning in the implementation application launched by the applicant.⁷

[8] To give effect to my initial order the applicant launched an implementation application in terms of which the applicant seeks an order that the operation and execution of my order is not suspended and is enforceable for the duration of the respondents' application for leave to appeal and will continue to operate and be executed in full, until the determination of all present and future leave to appeal applications and appeals that may be pursued.⁸

The first respondent

[9] I held that the first respondent was an applicant employee. The facts demonstrated that the first respondent was an employee of the applicant. The first respondent received a plethora of correspondence from the applicant's attorneys and never took issue with the assertion that the applicant employed him.⁹

⁵ Indwe's predecessor was Mountainview (Pty) Limited.

⁶ This is then the third application for leave to appeal.

⁷ The respondents after the hearing conceded that they had not filed their amended application.

⁸ This will be referred to as the "implementation" application.

⁹ In my view, there is no reasonable prospect that an appeal court would find otherwise.

The second respondent

[10] On the facts, the second respondent was privy to and had extensive knowledge of the applicant's confidential information. I say this because the second respondent established close and trust-based relationships with the applicant's clients and solicited the applicant's 'clients'.¹⁰

[11] The second respondent asserted that she only did administrative work for the third respondent. It was and is highly improbable that the second respondent was employed by the third respondent in an innocent or neutral capacity. I say this because of the type of industry and because she was employed by the third respondent together with the first respondent.¹¹

The third respondent

[12] Because the third respondent employed both the first and second respondents, and there was no challenge to the duration and area of the restraint and confidentiality agreement, an order against the third respondent was warranted, and there is no prospect, let alone any reasonable prospect, that an appeal court would find otherwise.¹²

The grounds of appeal

[13] As alluded to in my introduction, how this application for leave to appeal has been chartered is unfortunate. An applicant must furnish the grounds of appeal relied upon to support the application for leave to appeal. Put in another way, it is incumbent upon the applicant to state the precise grounds of appeal clearly and succinctly. As a matter of logic, this must be so, and the remarks by Leach J are apposite when he indicated in detail what is expected of an applicant in these circumstances. The minimum standard required is the following:

¹⁰ This was apparent from the papers.

¹¹ There is no reasonable prospect that an appeal court would find otherwise.

¹² Section 17(1)(a)(i) of the Superior Courts Act, 10 of 2013.

‘...Accordingly, insofar as rule 49(3) is concerned it has been held that grounds of appeal are bad if they are so widely expressed that it leaves the appellant free to canvas every finding of fact and every ruling of law made by the court a quo, or if they specified the findings of fact or rulings of law appealed against so vaguely as to be of no value...’¹³

[14] The respondents’ grounds of appeal are not formulated concisely or coherently. Further, it is unclear on what basis the grounds of appeal relied upon would satisfy the test for leave to appeal. The complaints by the respondents amount to a near repetition of the same arguments advanced at the hearing of this application.¹⁴

The Section 18(3) Application

[15] I directed that this application was to be heard together with the application for leave to appeal, and a timetable was set regulating the further conduct of the matter. The respondents again failed to comply with the periods set out in the timeline. The applicant’s counsel took no issue with this tardiness.¹⁵

[16] To succeed with this application, the applicant, in summary, must demonstrate the following:

- (a) exceptional circumstances;
- (b) that the applicant will suffer irreparable harm if an order is not made;
and
- (c) that the respondents will not suffer irreparable harm if an order is made.¹⁶

¹³ Songono v Minister of Law and Order 1996 (4) SA 384 (ECD) at 385 E.

¹⁴ The amended application for leave to appeal was never properly filed by the respondents.

¹⁵ The applicant’s counsel suggested the matter should be disposed of without any further delay.

¹⁶ Section 18(1) read with section 18(3) of the Superior Courts Act, 10 of 2013.

[17] The determination of whether to grant an implementation order involves the exercise of discretion concerning all the facts. The overarching enquiry is whether or not exceptional circumstances exist, and the presence or absence of irreparable harm, as the case may be, may well be subsumed under the overarching exceptional circumstances enquiry. A less exacting approach to proof of exceptionalism is required; a holistic test is to be adopted, not a hermetically sealed enquiry to be approached in a compartmentalised fashion.¹⁷

[18] The prospects of an appeal succeeding are relevant in determining the requirements to assess exceptionality and as a factor to be considered when the court must exercise discretion.¹⁸

[19] If leave to appeal is refused and the respondents apply to the Supreme Court of Appeal for leave to appeal and in the unlikely event that an appeal is then heard, the restraint periods will either have expired or a substantial period of the restraint periods will have expired, rendering any judgment on appeal moot and the relief sought by the applicant enforcing the restraints of trade would be forfeited.¹⁹

[20] In the interim, the respondents' continuing to act contrary to the court order has caused considerable harm to the applicant. This conduct would continue to cause further damage and harm to the applicant, which is not likely to be realistically recoverable from the respondents.²⁰

[21] This must be assessed against the possible losses that the respondents might suffer if the implementation order is granted, which losses (if they exist and are established) would, in all likelihood, be ultimately recoverable from the applicant.²¹

[22] I say this because despite an undertaking by the first and second respondents to comply with the initial court order, they are breaching the order granted by this court. The respondents in this application now repeat and assert that they will abide

¹⁷ Tyte Security Services CC v Western Cape Provincial Government and Others 2024 (6) SA 175 (SCA).

¹⁸ University of the Free State v AfriForum and Another 2018 (3) SA 428 (SCA) para [14].

¹⁹ Incubeta Holdings (Pty) Ltd v Ellis 2014 (3) SA 189 (G)

²⁰ The respondents have demonstrated their unwillingness to adhere to court orders.

²¹ This is a concession that they were in breach of the terms of the court order.

by their previous undertaking and will do so until the appeal process is determined. What is telling is that the respondents now allege that they do not have any of the applicant's confidential information and now take issue with the terms of the court order in this connection. The applicant contends that it cannot accept the mere say-so of the respondents regarding their allegation that they do not possess any of the applicant's confidential information without a court order in place to secure their rights.²²

Costs

[23] In my initial order, an order was granted jointly and severally against the first and third respondents for the applicant's costs of and incidental to the application. Given the position occupied by the second respondent in the exercise of my discretion, I did not make an order for costs against her. The second respondent in these applications has seemingly not paid any attention to the reasons as to why no cost order was granted against her in the initial order that I granted. Further, it seems that none of the respondents adhered to the terms of my court order. The second respondent did not demonstrate why a costs order should not follow against her in the circumstances of these two fresh applications.²³

Conclusion and Order

[24] The application for leave to appeal must fail, and the implementation application, pending any further steps in the appeal process, must succeed. Thus, the following order is granted:

1. The application for condonation for the respondents' late filing of their answering affidavits (such as it was) is granted.
2. The application for condonation for the late filing by the respondents of their belated amended application for leave to appeal (such as it was) is granted.

²² With this, I agree.

²³ The second respondent seemingly aligned herself with these applications.

3. The legal representatives of the respondents shall not be permitted to recover any costs or disbursements incurred in connection with the late filing of the affidavits in the implementation application and the late filing (non-filing) of the amended application for leave to appeal.
4. The application for leave to appeal is dismissed.
5. The operation and execution of the initial order granted (under Case Number 15110/2024 dated 30 July 2024) is not suspended and is enforceable for the duration of the application for leave to appeal at the instance of the respondents, including any application to the Supreme Court of Appeal and any further proceedings and will continue to operate and be executed until the final determination of all present and future leave to appeal applications and appeals.
6. The respondents jointly and severally (the one paying the other to be absolved) shall be liable for the costs of and incidental to the application for leave to appeal and the implementation application on the party and party scale together with costs of counsel, following Scale C.

E. D. WILLE
(CAPE TOWN)