



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

JUDGMENT

Reportable/Not Reportable

Case no: 136876/25

In the matter between:

PIETER MARITZ

APPELLANT

and

TRUWORTHS LIMITED

RESPONDENT

Neutral citation: *Maritz v Truworths Ltd* (Case no 136876/25) [2025] ZAWCHC
____ (30 October 2025)

Coram: MANGCU-LOCKWOOD J, LEKHULENI J and DAVIS AJ

Heard: 24 October 2025

Delivered: 30 October 2025

Summary: *Appeal in terms of s 18(4)(a)(ii) against an order granted in terms of s 18(3) of the Superior Courts Act 10 of 2013 - operation of interdict in restraint of*

trade pending appeal - relationship between prospects of success on appeal and exceptional circumstances requirement – restraint interdict overbroad – implementation of order not permitted to extent that interdict overbroad – partial implementation of enforcement order

ORDER

1. The appeal is upheld with costs, including the costs of two counsel payable on scale C.
2. The order of the court *a quo* is set aside and replaced with the following order:
 - a) *The operation and execution of paragraph 1.3 of the order granted under case number Case No 136876/25 on 28 August 2025 (**the restraint order**) shall not be suspended by any application for leave to appeal or any appeal.*
 - b) *The order in paragraph 1.3 of the restraint order continues to be operational and enforceable until the final determination of all present and future leave to appeal applications and appeals in respect of the application under Case No 136876/25.*
 - c) *The operation and execution of the orders in paragraphs 1.1 and 1.2 of the restraint order is suspended pending the final determination of*

all present and future leave to appeal applications and appeals in respect of the application under Case No 136876/25.

- d) Each party shall pay its own costs in the application in terms of section 18(3) of the Superior Courts Act 10 of 2013.’*

JUDGMENT

Davis AJ (Mangu-Lockwood and Lekhuleni JJ concurring):

- [1] This is an automatic appeal to the Full Court, in terms of section 18(4)(a)(ii) of the Superior Courts Act 10 of 2013 (**‘the Act’**), against an order granted in terms of section 18(3) of the Act for the upliftment of the automatic suspension of the operation of an order pending an appeal.
- [2] On 28 August 2025, Higgins AJ granted an order in favour of the respondent (**‘Truworths’**) to enforce a covenant in restraint of trade, in terms whereof the appellant (**‘Maritz’**) was interdicted and restrained for a period of 12 (twelve) months from *‘[a]ssuming employment with Tymebank Limited or any holding, subsidiary or associated entities, or any other direct or indirect competitor of [Truworths]...’* (**‘the restraint order’**).
- [3] On 1 September 2025, Maritz applied for leave to appeal against the restraint order. This had the effect of suspending the operation of the restraint order

in terms of section 18(1) of the Act. Truworths then applied in terms of section 18(3) of the Act for an order uplifting the suspension of the restraint order, which order was granted on 19 September 2025 (**‘the execution order’**).

[4] The execution order directs that:

- ‘a. The operation and execution of the restraint order granted on 28 August 2025 shall not be suspended pending the determination of [Maritz’s] application for leave to appeal and any further appeal proceedings.*
- b. The restraint order shall remain in force and be executable until the final determination of all present and future applications for leave to appeal and appeals.*
- c. [Maritz] is to pay the costs of the application, including the costs of two counsel, on scale C.’*

[5] In this appeal, Maritz seeks to set aside the execution order. If the appeal is successful, it will have the effect of reinstating the automatic suspension of the restraint order pending the determination of the application for leave to appeal against the restraint order.

The relevant legal principles

[6] Section 18 of the Act reads as follows in relevant part:

‘18. Suspension of decision pending appeal

- (1) Subject to subsections (2) and (3), and unless a 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) ...
- (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) (a) 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 automatically be suspended, pending the outcome of such appeal.
- (b) ...’

[7] The meaning and approach to the application of section 18 of the Act was considered by the Supreme Court of Appeal (SCA) in *University of the Free State v Afriforum and Another* (‘Afriforum’),¹ *Ntlemeza v Helen Suzman Foundation and Another* (‘Ntlemeza’),² *Johannesburg Society of Advocates*

¹ 2018 (3) SA 428 (SCA).

² 2017 (5) SA 402 (SCA).

and Another v Nthai and Others (‘Nthai’),³ *Premier for the Province of Gauteng and Others v Democratic Alliance and Others*,⁴ *Knoop NO and Another v Gupta (Execution)* (‘Knoop’),⁵ *Zuma v Downer and Another*,⁶ and *Tyte Security Services CC v Western Cape Provincial Government and Others* (‘Tyte’).⁷

[8] A number of principles may be distilled from these cases and summarised as follows:

- a. Subsections 18(1) and (3) proceed from the common law premise that the norm is that a judgment and its attendant orders are suspended pending an appeal, and that the implementation of orders pending an appeal constitutes an extraordinary deviation from the norm. Such relief can only be granted ‘under exceptional circumstances’.⁸
- b. Section 18 does not purport merely to codify the common law; it introduces more onerous requirements.⁹ Apart from the requirement of exceptional circumstances, an applicant is required ‘in addition’ to prove on a balance of probabilities that he or she ‘will’ suffer irreparable harm if the execution order is not made, and that the other

³ 2021 (2) SA 343 (SCA).

⁴ [2021] 1 All SA 60 (SCA); [2020] ZASCA 136 (27 October 2020).

⁵ 2021 (3) SA 135 (SCA).

⁶ 2024 (2) SA 356 (SCA).

⁷ 2024 (6) SA 175 (SCA).

⁸ *Afriforum (supra)* para 9.

⁹ *Afriforum supra* paras 10 and 11.

party ‘will not’ suffer irreparable harm if the execution order is made.¹⁰

- c. The concept of ‘exceptional circumstances’ is sufficiently flexible to be considered on a case-by-case basis.¹¹ It is undesirable to attempt to lay down any general rule in respect of exceptional circumstances, and each case must be considered on its own facts.¹²
- d. What is ordinarily contemplated by the words ‘exceptional circumstances’ is something out of the ordinary and of an unusual nature, something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different.¹³
- e. The existence or otherwise of exceptional circumstances is a question of fact, not a matter of judicial discretion.¹⁴
- f. The existence of ‘exceptional circumstances’ is a necessary precondition, or jurisdictional requirement, for the exercise of the court’s discretion under s 18. If the circumstances are not truly exceptional, the application must fail.¹⁵

¹⁰ *Afriforum (supra)* para 10.

¹¹ *Premier for the Province of Gauteng and Others v Democratic Alliance and Others (supra)* para 14.

¹² *Tyte (supra)* para 12.

¹³ *Premier for the Province of Gauteng and Others v Democratic Alliance and Others (supra)* para 14, referring to *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas and Another* 2002 (6) SA 150 (C) at 156I – 157C. (See, too, *Tyte (supra)* para 12.)

¹⁴ *Ibid.* (See, too, *Afriforum* para 13.)

¹⁵ *Tyte (supra)* para 11.

- g. The three enquiries posited in subsections 18(1) and (3), namely the existence or otherwise of exceptional circumstances and the presence and absence of irreparable harm to the parties, should not be approached as a box-ticking exercise in a compartmentalised fashion. A holistic approach is required, the overarching enquiry being whether or not there are exceptional circumstances.¹⁶
- h. The presence or absence of irreparable harm cannot be divorced from the exceptional circumstances enquiry. The need to establish exceptional circumstances is likely to be closely linked to the requirement that an applicant show that he or she will suffer irreparable harm if the order is not implemented immediately, and, concomitantly, that the respondent will not suffer irreparable harm if the order is implemented immediately.¹⁷ The two harms may be understood as two sides of the same coin; the same facts inform both enquiries.¹⁸
- i. Section 18(3) casts an onus on the applicant, which requires proving a negative, viz the absence of irreparable harm to the respondent. However, a respondent may attract an evidentiary burden where the facts are peculiarly within his or her knowledge.¹⁹
- j. A court seized with an application in terms of s 18(3) retains a discretion whether or not to grant an order. This allows for a

¹⁶ *Tyte (supra)* paras 10 and 14.

¹⁷ *Tyte (supra)* para 13.

¹⁸ *Tyte (supra)* para 15.

¹⁹ *Tyte (supra)* para 15.

weighing-up of the respective harm to the parties. The mere presence of some irreparable harm to a respondent, irrespective of its nature and extent, and regardless of how slight or inconsequential, or that it is significantly outweighed by that of an applicant, cannot non-suit an applicant.²⁰

- k. The prospects of success in the pending appeal are relevant to the exceptional circumstances enquiry. The less sanguine a court seized with a section 18(3) application 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.²¹

The grounds of appeal

[9] In the heads of argument filed on behalf of Maritz, and in argument before us, it was contended that the requirements of s 18(3) had not been met in that Truworths had failed to show a) that the circumstances were exceptional; b) that it would suffer irreparable harm in the absence of an enforcement order, and c) that Maritz would not suffer irreparable harm by virtue of an enforcement order.

[10] Mr Cockrell, who with Ms Scheepers appeared for Maritz, argued that the appeal against the restraint order enjoys good prospects of success because the restraint order was incompetent in that it went further than the wording

²⁰ Tyte (*supra*) paras 16 to 18.

²¹ *Afriforum (supra)* paras 14 and 15.

of the restraint covenant, and was not anticipated by the contents of the founding affidavit in the interdict application. He contended that the restraint order should not have been asked for, or granted, in the terms in which it was worded.

[11] Mr Cockrell further contended that, if it was accepted that the restraint order was overbroad and incompetent, the point was dispositive of the s 18(4)(a)(ii) appeal because it meant that the strong prospects of success on appeal militated against a finding that there are exceptional circumstances favouring the implementation of the restraint order pending the appeal.

[12] This brings me to the question of whether or not the restraint order is incompetent.

Is the restraint order incompetent?

[13] In the restraint agreement, a ‘*restrained business*’ is defined as:

‘...any business which is the same as, or materially similar to or competitive with any business conducted by Truworths (“the Competitive Business”) or the business of any supplier who supplies goods and services to a competitor or competitors of Truworths. Without limiting the generality of the foregoing, the Competitive Business shall be deemed to include any organisation, undertaking or business which is a retailer of clothing and footwear and related accessories and/or jewellery and/or homewares. Furthermore, and again without limiting the generality of the description of “restrained business” above, the Competitive Business shall be deemed to include any organization, undertaking or business which is the same as, or materially similar to or competitive with any specialist business unit or department of Truworths (in existence

or to be formed) conducted and operated to offer specialist services to the broader spectrum and which business units or departments are dependent on the speciality experience and input of the Restrainee through his/her employment with Truworths. Each facet of this definition shall, for purposes of enforcing this restraint or otherwise, be regarded as severable.'

[Emphasis added]

[14] Also pertinent is clause 4.1 of the restraint agreement, which reads as follows in relevant part:

'4.1 ...The Restrainee hereby undertakes to and in favour of Truworths that:

4.1.1 he/ she shall not, throughout the period of his/her employment with Truworths and for a period of 12 (twelve) months with effect from the Termination Date, and anywhere within the Territory, directly or indirectly:

4.1.1.1 carry on; or

*4.1.1.2 **be engaged or concerned or interested in or employed by;**
or*

4.1.1.3 solicit business for; or

4.1.1.4 be a proprietor or partner or, or a director, shareholder or member in; or

4.1.1.5 act as a consultant, trustee, manager, employee, agent, administrator, representative, assignee, partner, advisor, officer or in any other like capacity to; or

4.1.1.6 render any services (gratuitously or otherwise) to; or

4.1.1.7 *lend or advance, or bind himself as surety for, any sum of money or assist financially,*

*any business, company, close corporation, partnership, trust, person, body corporate, juristic person, association or other legal or business entity (incorporated or unincorporated) **which in any manner whatsoever (wholly or partly) carries on the Restrained Business.***

[Emphasis added]

[15] If the provisions of clause 4.1 are read with the definition of ‘restrained business’, it appears that Maritz essentially bound himself for a period of 12 (twelve) months not to be employed by, or in any way involved with, any business which is the same as, or materially similar to or competitive with any business conducted by Truworths, including the business of any specialist business unit or department of Truworths.

[16] The latter aspect of the definition of restrained business is significant. It was common cause that in-house credit counts for over 70% of Truworths’ total sales and that Truworths has a highly skilled credit-analytics department, which is integral to the success and sustainability of its retail business. Before the termination of his employment with Truworths, Maritz held the position of Executive: Risk & Analytics, one of the two most senior executives in the credit analytics department. He had been instrumental in the development and rollout of ‘Pay3’, a ‘buy-now-pay-later’ (BNPL) product aimed at customers who are new to credit or are considered higher risk. One can therefore accept that the provision of in-house consumer credit for purposes of retail purchases constitutes a specialist business unit or department within Truworths.

[17] The restraint agreement targets business activities which are the same as, or materially similar to or competitive with any business activities conducted by Truworths (ie, competitive activities), and persons or entities engaged in competitive activities (ie, competitors). One does not find a stipulation in the restraint agreement that Maritz is precluded from being employed by or involved with any holding or subsidiary company or associated entity of a competitor of Truworths. It is clear that the prohibition in clause 4.1 is limited to persons or entities which carry on the restrained business themselves, ie., to competitors of Truworths. The restraint agreement does not cover employment with persons or entities which do not themselves engage in competitive activities, and are merely related to, or associated with, a competitor of Truworths.

[18] As mentioned above, the restraint order, which followed the wording of the Notice of Motion in the interdict application, interdicted Maritz from:

*‘... assuming employment with TymeBank Limited **or any holding, subsidiary or associated entities**, or any other direct or indirect competitor of [Truworths] as envisaged in the restraint of trade agreement concluded by the respondent on 15 January 2015.’*

[Emphasis added]

[19] In the interdict application, Truworths’ case in the founding affidavit was that Maritz would be employed by TymeBank Limited (**‘TymeBank’**). It was alleged that TymeBank was a competitor of Truworths, because it had its own BNPL product called *‘MoreTyme’* which competes directly with Truworths’ Pay3 product, and because it has strategic partnerships with The

Foschini Group (TFG) and Pick 'n Pay, both of which retail clothing in competition with Truworths.

[20] In the answering affidavit, Maritz denied that he would be employed by TymeBank. He alleged that he would be employed by Tyme Pte Limited ('**Tyme Pte**')²² in the role of Head of Merchant Cash Advance (MCA) Analytics.

[21] Maritz also pertinently denied that his employment with Tyme Pte would breach the restraint agreement. He alleged, *inter alia*, that there were material differences between Truworths and Tyme Pte which showed that the two entities did not operate in competition with one another, including: the fact that Truworths offers retail credit linked to the purchase of clothing and other goods in Truworths stores, whereas Tyme Pte offers SME (Small and Medium-sized Enterprise) financing, business banking and fintech-driven lending solutions unrelated to retail clothing credit; and Truworths operates in South Africa and some neighbouring countries, based on a store-based retail model, whereas Tyme Pte operates as a multi-country digital banking and financing group, focusing on emerging markets, with its home base in Singapore.

[22] It can be accepted, in my view, that the employment of Maritz by TymeBank would fall within the ambit of the restraint agreement, by virtue of a) the

²² In the answering affidavit in the interdict application, Maritz defined Tyme Pte Limited as 'the Tyme Group'. This led to confusion with the group or association of related companies of which TymeBank Limited and Tyme Pte Limited form part, also referred to as 'the Tyme Group'. Read correctly, however, Maritz's references to 'the Tyme Group' in the answering affidavit should be understood as references to Tyme Pte Limited.

direct competition between TymeBank's 'MoreTyme' and Truworths' 'Pay3' products, and b) the fact that TymeBank supplies BNPL goods and services to TFG and Pick 'n Pay, who are competitors of Truworths.²³

[23] However, it seems to me that Truworths, on whom the onus rested, made out no case in the founding affidavit that Tyme Pte is a competitor of Truworths. The version put up by Maritz in the answering affidavit suggests that Truworths and Tyme Pte '*fish in different ponds*' when it comes to the provision of credit: Truworths provides credit to individual retail customers, whereas Tyme Pte provides financing to businesses.

[24] I agree with the submission by Mr Cockrell that there is a disconnect between the wording of the restraint agreement and the wording of the notice of motion to the extent that the notice of motion sought an order restraining Maritz from assuming employment with '*any holding, subsidiary or associated entities*' of TymeBank Limited, regardless of whether or not such associated entities are in fact competitors of Truworths. As Mr Cockrell put it, the order was so broadly worded as to prohibit employment with a catering company within the Tyme group of companies, notwithstanding the obvious lack of any competition with Truworths.

[25] Mr Sholto-Douglas, who with Ms Maddison appeared for Truworths, argued that the restraint order was worded so as to meet the exigencies of the case where Truworths did not know whether Maritz would be employed with TymeBank or another entity within the Tyme group of companies. That, to

²³ Also included in the definition of '*restrained business*' is '*the business of any supplier who supplies goods and services to a competitor or competitors of Truworths.*'

my mind, is no answer. A loophole in the restraint of trade agreement cannot be cured by judicial invention. Since the restraint agreement does not preclude employment with an entity merely by virtue of its association with a competitor of Truworths, if that entity itself is not a competitor of Truworths, there was no basis for the broad wording of the restraint order.

[26] I consider that, by granting an order in these terms, Higgins AJ granted an order that was not anticipated or justified by the contents of the founding affidavit.

[27] I am accordingly of the view that the restraint order was incompetent to the extent that it precluded Maritz from assuming employment with Tyme Pte in circumstances where Tyme Pte has not been shown to be a competitor of Truworths, and such employment therefore does not fall within the ambit of the restraint agreement.

[28] In my judgment, an appeal against the restraint order would enjoy good prospects of success inasmuch as I consider it likely that an appellate court would, in the exercise of its power under s 19(d) of the Act, amend the restraint order by deleting the reference to employment with any holding, subsidiary or associated entities' of TymeBank Limited.

The relationship between exceptional circumstances and prospects of success on appeal

[29] For the reasons already mentioned, I am of the view that the contemplated appeal against the restraint order would enjoy good prospects of success, at

least to the extent that the restraint order precludes employment with any holding or subsidiary of TymeBank, or any entities associated with TymeBank.

- [30] In his judgment in the section 18(3) application, Higgins AJ downplayed the prospects of success on appeal. He held that prospects of success, while relevant, do not outweigh the exceptional circumstances created by the effective forfeiture of Truworths' relief because the restraint will expire before the exhaustion of the appeal process. In this regard, the learned Acting Judge evidently aligned himself with the views expressed by Sutherland, J in *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another*(*'Incubeta'*)²⁴ that, *'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".'*²⁵
- [31] It is a problem specific to restraint of trade orders that, given the generally short duration of the restraint period, the restraint will expire before the appeal is heard. As a result, the relief under a restraint order will effectively be forfeited, regardless of the outcome of an appeal, unless the restraint order is put into operation immediately, pending the appeal.²⁶

²⁴ 2014 (3) SA 189 (GJ).

²⁵ *Incubeta (supra)* para 27.

²⁶ *Incubeta (supra)* at 196 D.

- [32] In my view, care should be taken not to regard the short duration of restraint of trade orders as an invariable indication of exceptional circumstances warranting the implementation of the restraint order pending an appeal against the order. As I understand the judgment in *Incubeta*, Sutherland, J did not purport to lay down a general rule in this regard. As the learned Judge stated, exceptionality must be fact-specific, and *[t]he circumstances which are or may be “exceptional” must be derived from the actual predicaments in which the given litigants find themselves.*²⁷ It should also be borne in mind that Sutherland, J did not regard the question of prospects of success on appeal as a relevant consideration – an approach which has not been endorsed by the SCA.
- [33] In *Afriforum*, the SCA confirmed that the prospects of success on appeal are relevant to the enquiry into the existence or otherwise of exceptional circumstances.²⁸ The prospects of success on appeal will inevitably vary from case to case. At one end of the spectrum, a proposed appeal may be clearly vexatious, enjoying no prospects of success whatsoever. At the other end of the spectrum, success on appeal may be a racing certainty. It seems to me that, at either end of the spectrum, where the prospects of success may be assessed with relative ease and accuracy, strong or weak prospects of success must weigh heavily in the exceptional circumstances enquiry, and the choice of the court whether or not to implement the judgment pending appeal will be clear-cut.

²⁷ *Incubeta (supra)* para 22.

²⁸ *Afriforum (supra)* paras 14 and 15.

- [34] In between the two ends of the spectrum, however, where the prospects of success on appeal are uncertain and cannot be gauged without an in-depth engagement with the merits which anticipates the work of the appeal court, the prospects of success on appeal will, perforce, carry less weight in the exceptional circumstances enquiry, which will focus more on the presence and absence of irreparable harm to the parties.
- [35] In fairness to Higgins AJ, the learned Judge was not confronted in the section 18(3) application with the legal point that the restraint order was incompetent, as the point was argued for the first time before us. Nevertheless, I am of the view that he misdirected himself by overemphasising the potential forfeiture of the restraint remedy and failing to have due regard to the question of the prospects of success on appeal.

Irreparable harm

- [36] In the answering affidavit in the interdict application, Maritz stated that he would be employed by Tyme Pte. In accordance with the rule in *Plascon-Evans*,²⁹ his version must prevail, as, in my judgment, it is not so inherently implausible as to warrant its rejection merely on the papers.
- [37] In the answering affidavit in the section 18(3) application, Maritz alleges that he took up employment with Tyme Pte on 2 September 2025. While Truworths expresses doubts about the credibility of his version, it is not able to offer evidence which contradicts it. In my view, it can be accepted on a balance of probabilities, as disclosed in the papers in the section 18(3)

²⁹ *Plascon-Evans Paints (Tvl) Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 620 (A).

application, that Maritz is now employed by Tyme Pte, and not by Tyme Bank.

- [38] If one accepts, as I do, that the restraint order was overbroad and should not have included a prohibition on Maritz being employed by any holding or subsidiary company of TymeBank, or any entities associated with TymeBank, that view necessarily informs the enquiry into irreparable harm.
- [39] If the order which precludes Maritz from being employed by Tyme Pte is incompetent and should not have been sought or granted, it must follow that Truworths cannot suffer any irreparable harm if it is precluded from implementing immediately an order to which it was not entitled in the first place.
- [40] Moreover, since there is no indication in the papers that Tyme Pte competes with Truworths – they *‘fish in different ponds’* – Truworths does not stand to suffer any harm if Maritz continues in his employment with Tyme Pte pending the contemplated appeal.
- [41] On the other hand, Maritz stands to suffer real prejudice if the restraint order, in its current overbroad form, is put into effect immediately, as this will have the consequence that his employment with Tyme Pte will be terminated. He will be forced to seek alternative employment, which he alleges will take some time to find, during which he will be without income and the medical aid cover required to fund his ill son’s expensive medical treatment.

- [42] On the day before the hearing of this appeal, Truworths made a tender to pay any damages which Maritz may be able to prove if the restraint order is set aside on appeal. Mr Sholto-Douglas contended that this tender meant that Maritz would not suffer any irreparable harm if the restraint order were to be implemented at once.
- [43] I am not persuaded that the tender to pay damages cures all the prejudice which Maritz stands to suffer if his employment with Tyme Pte is terminated as a result of the execution order. Much of the harm referred to by Maritz in his answering affidavit in the section 18(3) application is such that it cannot readily be quantified in monetary terms. No price can be put on the inevitable stress and anxiety which would accompany an immediate loss of income and medical aid benefits pending a search for new employment, particularly given the medical needs of Maritz's son. Nor can one readily quantify the prejudice arising from a period of interruption in employment in the fast-evolving field of finance and technology.
- [44] In my judgment, the probabilities are that Truworths will not suffer irreparable harm if the restraint order is not implemented pending the proposed appeal, whereas Maritz will suffer irreparable harm of a type not curable by a claim for damages if the restraint order is implemented at once. What weighs particularly heavily with me is the inherent unfairness of subjecting Maritz to an order which has profound negative consequences for him, if the order is incompetent and should not have been granted.
- [45] I therefore conclude that Truworths has not established the existence of exceptional circumstances which warrant the immediate implementation of

the restraint order. On the contrary, I consider that, due to what I regard as strong prospects of success on appeal in regard to the objectionable part of the restraint order, fairness dictates that the default position be maintained, namely that the operation of the restraint order is suspended pending an appeal.

Should the restraint order be partially implemented?

[46] The fact that an appeal court will, in my view, likely overturn part of the restraint order is not necessarily dispositive of this appeal, as the question arises whether the restraint order should be partially implemented pending an appeal. This court, sitting as an appellate court in the section 18(4)(a)(ii) appeal, has the power in terms of s 19(d) of the Act to vary the order granted by Higgins AJ in the s 18(3) application.

[47] The restraint order has three parts:

- a. In terms of paragraph 1.1, Maritz is interdicted from assuming employment with TymeBank Limited or any holding, subsidiary or associated entities, or any other direct or indirect competitor of Truworths.
- b. In terms of paragraph 1.2, Maritz is essentially interdicted from being involved in any way with an entity which carries on the 'restrained business', ie, with a competitor of Truworths.
- c. In terms of paragraph 1.3, Maritz is interdicted, at any time after the termination of his employment with Truworths, from himself utilising,

divulging or disclosing to any other person any of the trade secrets and know-how of Truworths, as defined in clause 3.1.4 of the restraint agreement.

- [48] The question, then, is whether any of the provisions of the restraint order should be implemented pending the appeal, shorn of any reference to ‘*any holding, subsidiary or associated entities.*’
- [49] Since the prospects of success on appeal in regard to the order in respect of TymeBank are not as clear-cut as the prospects of success in relation to the order in respect of employment within the broader Tyme group of companies, this question to my mind falls to be answered with reference to the question of irreparable harm.
- [50] As I have already mentioned, Maritz stated in the section 18(3) application, and it can be accepted in my view, that he is now employed by Tyme Pte.
- [51] That being the case, it seems to me that the probabilities are that Truworths will not suffer any irreparable harm if paragraph 1.1 of the restraint order is not immediately implemented with reference to TymeBank and/or any other competitor of Truworths, as Maritz is in fact employed by Tyme Pte, and not by TymeBank.
- [52] For the same reason, I consider that the probabilities are that Truworths will not suffer any irreparable harm if paragraph 1.2 of the restraint order (which prohibits any involvement with a competitor of Truworths) is not

implemented, as Maritz is employed by Tyme Pte, which has not been shown to be a competitor of Truworths.

[53] Paragraph 1.3 of the restraint order, however, stands on a different footing. In terms of paragraph 1.3, Maritz is precluded from using or divulging any trade-secrets and know-how of Truworths, as defined in the restraint agreement.

[54] It was common cause in the interdict application that Maritz has knowledge of confidential trade-secrets and know-how by virtue of his employment with Truworths. It was also common cause in the interdict application, and the position has not changed in the section 18(3) application, that Maritz would be physically based in the offices of TymeBank in Cape Town, regardless of the fact that he is employed by Tyme Pte.

[55] Maritz gave an undertaking to Truworths on the record that he will not disclose, whether directly or indirectly, any confidential or proprietary information belonging to Truworths, to Tyme Pte, Tyme Bank or any other entity or person outside of Truworths. However, Truworths is not obliged to be content with an undertaking on the part of Maritz not to breach the restraint agreement by divulging confidential information.³⁰

[56] In my view, given the fact that Maritz will be working from the offices of TymeBank, his physical proximity with employees of TymeBank gives rise to an inherent and increased risk of disclosure of confidential information to TymeBank. There is, therefore, the potential of irreparable harm to

³⁰ *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at 500 A – D.

Truworths as a result of the disclosure of confidential information, if the order in paragraph 1.3 of the restraint order is not implemented immediately.

[57] On the other hand, there can be no harm at all to Maritz if the order in paragraph 1.3 of the restraint order is implemented immediately, as the order merely serves to enforce Maritz's obligation in terms of the restraint agreement, and is consistent with the terms of the undertaking given by Maritz to Truworths. Maritz could hardly be heard to complain of irreparable harm if he is ordered to do what he himself has undertaken to do.

[58] In my view, the particular circumstance of this case – specifically, Maritz's close physical proximity to TymeBank employees with the attendant risk of disclosure of confidential information which would cause irreparable harm to Truworths, and the concomitant absence of any harm to Maritz – amount to exceptional circumstances warranting the immediate implementation of the order in paragraph 1.3 of the restraint order.

[59] It follows that, in my view, the order of Higgins AJ falls to be amended to allow for the immediate implementation of paragraph 1.3 only of the restraint order.

Attempt to regulate the position pending further appeal processes

[60] It remains only to deal with a further argument advanced by Mr Cockrell that the order granted by Higgins AJ in the section 18(3) application was incompetent to the extent that it purported to regulate what happens in future proceedings. In this regard:

- a. Paragraph a) of the execution order provides that the restraint order *‘shall not be suspended pending the determination of the Respondent’s application for leave to appeal and any further appeal proceedings.’*
- b. Paragraph b) of the execution order provides that the restraint order *‘shall remain in force and be executable until the final determination of all present and future applications for leave to appeal.’*

[61] As I understood Mr Cockrell’s argument, paragraph b) of the execution order was incompetent as Higgins AJ could not bind the discretion of a court seized with possible future applications for leave to execute pending possible future application for leave to appeal to the SCA and/or the CC.

[62] In addition, it was contended that Higgins AJ could not grant an order which overrides the express provision in s 18(4)(a)(iv) that, where the court orders otherwise as contemplated in s 18(1), any such any order is automatically suspended pending the outcome of an appeal in terms of s 18(4)(a)(ii). In other words, Higgins AJ could not grant an order to the effect that the restraint order remains operative and executable pending the determination of this appeal in terms of s 18(4)(a)(ii).

[63] To the extent that the wording of paragraph a) of the execution order is arguably wide enough to include the present appeal proceedings, it is incompetent.³¹ Properly construed, however, and bearing in mind the

³¹ *Knoop (supra)* paras 24 and 27 to 35.

provisions of section 18(4)(a)(iv) of which Higgins AJ was doubtless aware, it seems to me that the order was not intended to include the present appeal in the words ‘*any further appeal proceedings.*’

- [64] As regards the objection that Higgins AJ could not dictate what happens in future applications for leave to execute pending future applications for leave to appeal, it seems to me that the complaint is misconceived. A similar argument was rejected in *Ntlemeza*,³² where the SCA endorsed a pro-active approach by a court seized with an application for an execution order, so as to avoid ‘*a multiplicity of applications*’ and a ‘*to-ing and fro-ing of litigants.*’³³ Navsa JA approved wording similar to that in the execution order, and stated in this regard that:

‘The high court reasonably apprehended on the evidence before it that further appeals were in the offing and issued an order that sought not just to crystallize the position but also to anticipate further appeal processes.’

- [65] It would be most unsatisfactory, in my view, for courts to be faced with successive applications for execution orders each time a new application for leave to appeal is lodged. There can be no quibble with courts acting as ‘*guardians of their own processes*’³⁴ to avoid a waste of judicial resources.

- [66] There is accordingly no merit, in my view, in the contention that the execution order was incompetent by virtue of the fact that it sought to

³² *Ntlemeza (supra)* paras 31 and 32.

³³ *Ibid.*

³⁴ *Ntlemeza (supra)* para 32

regulate the position pending all further applications for leave to appeal, and any resultant appeal.

Costs

[67] For all the reasons set out above, I am of the view that the appeal must succeed, and the order granted by Higgins AJ in the section 18(3) application amended as set out hereunder.

[68] In my judgment, Maritz has achieved substantial success in this appeal, and the costs ought to follow the result. I am mindful in this regard that Truworths sought interdictory relief which, in my view, was overbroad and incompetent, and, despite having been alerted to the fact, it has not abandoned the unjustifiable part of the restraint order, but has instead sought to defend the implementation of the execution order in its overly broad terms.

[69] As regards the costs of the section 18(3) application itself, it seems to me that the fairest course would be to order that each party pay its own costs in the application, given the limited success achieved by Truworths relating to the implementation of paragraph 1.3 only of the restraint order.

[70] I would therefore make the following order:

3. The appeal is upheld with costs, including the costs of two counsel payable on scale C.

4. The order of the court *a quo* is set aside and replaced with the following order:

- 'a) The operation and execution of paragraph 1.3 of the order granted under case number Case No 136876/25 on 28 August 2025 ('the restraint order') shall not be suspended by any application for leave to appeal or any appeal.*
- b) The order in paragraph 1.3 of the restraint order continues to be operational and enforceable until the final determination of all present and future leave to appeal applications and appeals in respect of the application under Case No 136876/25.*
- c) The operation and execution of the orders in paragraphs 1.1 and 1.2 of the restraint order is suspended pending the final determination of all present and future leave to appeal applications and appeals in respect of the application under Case No 136876/25.*
- d) Each party shall pay its own costs in the application in terms of section 18(3) of the Superior Courts Act 10 of 2013.'*

D M DAVIS

ACTING JUDGE OF THE HIGH COURT

Mangcu-Lockwood J (concurring)

**N MANGCU-LOCWOOD
JUDGE OF THE HIGH COURT**

Lekhuleni J (concurring)

**J D LEKHULENI
JUDGE OF THE HIGH COURT**

Appearances

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For respondent: A R Sholto-Douglas SC with M Maddison

Instructed by: Ward Brink Attorneys, Cape Town