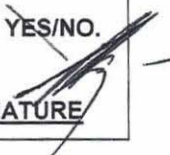




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
27/02/2018 DATE	 SIGNATURE

27/2/18
CASE NO: 85149/2017
DATE: 27/02/2018

IN THE MATTER BETWEEN:

**CASH CRUSADERS
FRANCHISING (PTY) LTD**

Applicant

and

THEO EDUAN SWART

First Respondent

**CASH CONVERTERS
SOUTHERN AFRICA
(PTY) LTD**

Second Respondent

JUDGMENT (Application in terms of Section 18(1) of the Superior Courts Act)

KOLLAPEN J:

1. The Applicant has approached court on an urgent basis seeking relief in substantially the following terms:

- i. Directing that the forms of service be dispensed with in respect of this Application and that it be heard as one of urgency, together with the Application for Leave to Appeal.
 - ii. That the order granted by this Honourable Court on 17 January 2018 shall operate pending the outcome of any appeal process instituted by the Respondents, including the Application for Leave to Appeal and any appeal noted thereafter.
2. Both Respondents oppose the relief sought.
3. The application for leave to appeal against the order and judgement of this court of the 17th January 2018 was heard together with this application and judgment in that application will be delivered at the same time as this judgment. Whatever the outcome of that application, the relief sought in these proceedings remains relevant in defining the rights and interests of the parties.
4. Section 18(1) of the Superior Courts Act 10 of 2013 ('the Act') provides as follows:

"Suspension of decision pending appeal

18. (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".

5. In ***Incubeta Holdings (Pty) Ltd and Another v Ellis and Another 2014 (3) SA 189 (GSJ) (16 October 2013)***, the Court characterised Section 18 as

introducing a new dimension to the test hitherto applied and went on to describe the test as twofold, the requirements being:

1. Whether or not 'exceptional circumstances' exist; and
 2. Proof on a balance of probabilities by the applicant of-
 - i. The presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order, and,
 - ii. The absence of irreparable harm to the respondent/loser, who seeks leave to appeal.
6. The Court also considered the meaning to be ascribed to the phrase "exceptional circumstances" and in this regard adopted the following approach taken in *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, & Another 2002 (6) SA 150 (C)*:

1. 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: 'besonder', 'seldsaam', 'uitsonderlik', or 'in hoë mate ongewoon'.
2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.
3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.
4. Depending on the context in which it is used, the word 'exceptional' has two shades of meaning: the primary meaning is unusual or different: the secondary meaning is markedly unusual or specially different.

5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.'
7. The Court in both *Incubeta* as well as the full bench in *Actom (Pty) Ltd v Coetzer and Another (A269/2015) [2015] ZAGPPHC 548 (31 July 2015)* accepted the principle that in restraint cases the requirement of exceptional circumstances would be met under circumstances if the order was not put into operation, the relief obtained in the main proceedings (enforcing the restraint) would be forfeited because the duration of the restraint will expire before the exhaustion of the appeal processes.
8. This is precisely the case here. If the order is not put into operation then in all likelihood the remaining period of the restraint, some fourteen months, will have expired or substantially elapsed by the time any appeal process is concluded. In such circumstances the relief obtained in the judgment of the 17th of January 2018 would largely be of academic value.
9. My view is that that factor in itself would constitute exceptional circumstances and while Mr Hollander, for the Respondents, accepted that as the proper statement of the law, he nevertheless contended that there were circumstances that would distinguish this matter from those that served before the Courts in *Incubeta* and *Actom*, and they included that there was no evidence of prejudice suffered by the Applicant, no evidence that it lost

customers, and that some six months of the restraint period had already elapsed.

10. As a matter of law I am not convinced that there is any basis for the consideration of these factors given the approach taken in *Incubeta* and *Actom* that the fact that the relief will be forfeited will constitute exceptional circumstances. If however I am wrong then I am not in any event persuaded that those considerations in any way stand to dislodge the conclusion of exceptional circumstances.
11. In the circumstances and as required by Section 18(4)(i) of the Act I am satisfied that exceptional circumstances exist and they are that the relief that the Applicant succeeded in obtaining on the 17th of January 2018 will be forfeited if the order of the 17th of January 2018 is not put into operation, as the restraint period will probably expire before the expiration of the appeal processes.
12. On the second requirement relating to irreparable harm, it is clear that if the order is not put into operation then the Applicant will suffer irreparable harm as the risk of the passing on and use of its confidential information will remain alive. On the other hand the first Respondent will not suffer irreparable harm on account of the following considerations:
 - a) The restraint only prevents him effectively from taking up employment with the second Respondent. He has considerable experience in the retail industry and is free to seek employment in the open market with very limited restriction.

- b) There is no evidence that he will suffer financial hardship during the period of the restraint. While his complaint is that he will be rendered unemployable, he does not go so far to suggest he will be financially prejudiced during this time.
- c) The Applicant has agreed to pay the current salary of the first Respondent until April 2019 into its attorney's trust account for onward transmission to the Applicant in the event he is successful with any appeal process he embarks upon. This will considerably moderate any harm he may suffer financially.

13. I am accordingly satisfied that both requirements as contemplated in Section 18 of the Act have been met and that a proper case has been made out for the relief sought.

Order

14. In the circumstances I would make the following order:

- I. An order is granted in terms of Section 18 of Act 10 of 2013, directing that the order granted by His Lordship Mr Justice Kollapen on 17 January 2018 shall operate pending the outcome of any appeal process instituted by the Respondents, including the application for leave to this court or any higher court, against the order granted by His Lordship Mr Justice Kollapen on 17 January 2018.

- II. Any appeal which the Respondents may wish to bring in terms of Section 18(4) of Act 10 of 2013 shall be instituted by the filing of a notice of appeal within 5 days of the date hereof, failing which the Respondents' right of appeal in terms of Section 18(4) shall lapse in which event the Respondents shall pay the costs of this application jointly and severally, which costs shall include the costs of senior counsel, the one paying the other to be absolved.

- III. It is noted the Applicant irrevocably undertakes to pay the salary which the First Respondent would have received from the Second Respondent during the period from the date hereof until the appeal referred to in paragraph 1 above is finalised, if such appeal is determined in favour of the First Respondent.

N KOLLAPEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

85149/2017

HEARD ON: 23 February 2018

FOR THE APPLICANT: Adv. A Oosthuizen SC

INSTRUCTED BY: Ashersons Attorneys (ref.: S Zackon)

(Correspondent Attorneys: Jacobson & Levy Inc (ref.: Jonathan Levy/K4504))

FOR THE RESPONDENTS: Adv. L Hollander

INSTRUCTED BY: Thomson Wilks Inc (ref.: S Thomson/Mat13897)

(Correspondent Attorneys: Barnard Inc & Pretorius Le Roux)