**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED: ✓

Date: ***16th October 2023*** Signature: _____

**CASE NO**: 074606/2023

**DATE:** 16th October 2023

In the matter between:

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| **MICROS SOUTH AFRICA (PTY) LTD** | First Applicant |
| **ADAPT IT (PTY) LTD** | Second Applicant |
| **ADAPT IT INTERNATIONAL LIMITED** | Third Applicant |

and

| | |
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| **KLEYNHANS, ANEKE** | First Respondent |
| **HRS HOSPITALITY AND RETAIL SYSTEMS (PTY) LTD** | Second Respondent |
| **HRS HOSPITALITY AND RETAILS SYSTEMS GMBH** | Third Respondent |

**Neutral Citation**: *Micros SA and 2 Others v Kleynhans and 2 Others (074606/2023)* **[2023] ZAGPPHC ---** (16 October 2023)

**Coram**: Adams J

**Heard**: 13 October 2023 – The 'virtual hearing' of the application for leave to appeal was conducted as a videoconference on *Microsoft Teams*.

**Delivered:** 16 October 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 15:30 on 16 October 2023.

**Summary:** Application for leave to appeal – s 17(1)(a)(i) of the Superior Courts Act 10 of 2013 – an applicant now faces a higher and a more stringent threshold – leave to appeal granted

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**ORDER**

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(1) In terms of Uniform Rule of Court 42(1)(b), any and/or all references to 'and the third respondent' and 'and/or the third respondent' in prayers (3) and (4) of the Court Order dated the 1st of September 2023 be and are hereby deleted in its entirety.

(2) The first and the second respondents' applications for leave to appeal succeed.

(3) The first and the second respondents are granted leave to appeal to the Full Court of this Division.

(4) The costs of the first and the second respondents' applications for leave to appeal shall be costs in the appeal.

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**JUDGMENT [APPLICATIONS FOR LEAVE TO APPEAL]**

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**Adams J:**

[1]. I shall refer to the parties as referred to in the original Urgent Application, in which the first, the second and the third applicants sought to enforce, on an urgent basis, a restraint of trade and a non-disclosure agreement against the first, the second and the third respondents. The first and the second respondents ('the respondents') are the first and the second applicants in these applications for leave to appeal and the first, the second and the third respondents herein were

the applicants in the said urgent application. The respondents apply for leave to appeal against the whole of the judgment and the order, as well as the reasons therefor, which I granted on the 1st of September 2023, in terms of which I had, in the main, interdicted and restrained, for a period of one year, the first respondent from engaging in any business of the second respondent or in any business that competes directly or indirectly with the business of the first and/or the second and/or the third applicants.

[2]. The first respondent was also interdicted and restrained from disclosing, using or disseminating any information of the first and/or the second and/or the third applicants which has commercial or trade value, whether technical or non-technical information, including but not limited to pricing, margins, merchandising plans and strategies, customers, customer lists, purchasing data, sale and marketing plans, future business plans and any other information which is proprietary and confidential to any of the applicants for her own benefit or for the benefit of any third party, including the second and the third respondents. Other ancillary relief was also granted, including an order in terms of which the second respondent was interdicted and restrained from employing the first respondent in relation to its business within the Republic of South Africa, and the SADC and the Indian Ocean regions for a period of a year from the date of my order.

[3]. Furthermore, the second respondent was interdicted and restrained from unlawfully competing with the applicants, including through interfering with the first applicant's contractual relationship with the first respondent or by misappropriating confidential information of the applicants received unlawfully through the first respondent to advance its own business interests and activities.

[4]. At the outset, I need to deal with a preliminary issue relating to a patent error in the judgment and the order in relation to the order granted against the third respondent when Counsel on behalf of the applicants, during the hearing of the urgent application, had indicated to the Court that the applicants do not intend persisting with a claim for relief against the said respondent. This then means that, as per the concession made on behalf of the applicants, no order and/or orders should have been granted against the third respondent. I therefore intend

granting an order in terms of Uniform Rule of Court 42(1)(b), correcting the patent error, which is such that it had resulted in an order being granted which did not reflect my real intention when I pronounced the order. The error is clearly attributable to the court itself, and I may therefore *mero motu* correct what is undoubtedly a clerical error in my order so as to give effect to my true intention.

[5]. The two separate applications for leave to appeal are mainly against my factual finding that the applicants had demonstrated that they have a protectable interest, worthy of protection and which requires to be protected by the enforcement of the restraint of trade and the non-disclosure agreement in force as between the applicants and the first respondent. I also erred, so it was contended on behalf of the first and the second respondents, in finding that the restraint of trade and the non-disclosure agreement were enforceable. It is furthermore contended by the first respondent that the restraint of trade relief, is too wide, open-ended, and oppressive, as same interdicts, and restrains her from being employed by anyone, which even renders any hospitality or IT services, which may be perceived as indirectly competing with the applicants, throughout the Republic, the SADC region, and the Indian Ocean region. This relief, so the argument continues, goes above and beyond what is reasonably required to protect the alleged interests of the applicants.

[6]. Nothing new has been raised by the first and the second respondents in their applications for leave to appeal. In my original judgment, I have dealt with most of the issues raised and it is not necessary to repeat those in full. Suffice to restate what I said in my judgment, namely that, in the circumstances of this matter, there is a substantial risk that, should the first respondent be permitted to take up employment with second respondent, she will take to a competitor – providing the same product to the same target market in the same territory – proprietary interests of the applicants in the form of trade connections and confidential information. The first respondent's conduct falls squarely within the scope of what the applicants sought to protect against in the restraint undertaking.

[7]. The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may come to a

different conclusion to that reached by me in my judgment. This approach has now been codified in s 17(1)(a)(i) of the Superior Courts Act 10 of 2013, which came into operation on the 23rd of August 2013, and which provides that leave to appeal may only be given where the judge concerned is of the opinion that *'the appeal would have a reasonable prospect of success'.*

[8]. In *Mont Chevaux Trust v Tina Goosen,* LCC 14R/2014 (unreported), the Land Claims Court held (in an *obiter dictum*) that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. I agree with that view, which has also now been endorsed by the SCA in an unreported judgment in *Notshokovu v S,* case no: 157/2015 [2016] ZASCA 112 (7 September 2016). In that matter the SCA remarked that an appellant now faces a higher and a more stringent threshold, in terms of the Superior Court Act 10 of 2013 compared to that under the provisions of the repealed Supreme Court Act 59 of 1959. The applicable legal principle as enunciated in *Mont Chevaux* has also now been endorsed by the Full Court of the Gauteng Division of the High Court in Pretoria in *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016).

[9]. I am persuaded that the issues raised by the first and the second respondents in their applications for leave to appeal are issues in respect of which another court is likely to reach different conclusions to those reached by me. I am therefore of the view that there are reasonable prospects of another court coming to factual findings different from those reached by me. The appeals therefore, in my view, have reasonable prospects of success.

[10]. Leave to appeal should therefore be granted to the Full Court of this Division.

**Order**

[11]. In the circumstances, the following order is made:

(1) In terms of Uniform Rule of Court 42(1)(b), any and/or all references to 'and the third respondent' and 'and/or the third respondent' in prayers (3) and (4) of the Court Order dated the 1st of September 2023 be and are hereby deleted in its entirety.

(2) The first and the second respondents' applications for leave to appeal succeed.

(3) The first and the second respondents are granted leave to appeal to the Full Court of this Division.

(4) The costs of the first and the second respondents' applications for leave to appeal shall be costs in the appeal.

**L R ADAMS**
*Judge of the High Court of South Africa*
*Gauteng Division, Pretoria*

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| HEARD ON: | 13th October 2023 – via *Microsoft Teams* |
| JUDGMENT DATE: | 16th October 2023 – judgment handed down electronically |
| FOR THE FIRST, THE SECOND AND THE THIRD APPLICANTS: | Adv A E Franklin SC, together with Advocate E A Van Heerden |
| INSTRUCTED BY: | Garlicke & Bousfield Incorporated, La Lucia, Durban |
| FOR THE FIRST RESPONDENT: | Advocate Christo Van der Merwe |
| INSTRUCTED BY: | Vince Van der Walt Attorneys, Kempton Park. |
| FOR THE SECOND RESPONDENT: | Advocate A P Ellis |
| INSTRUCTED BY: | Minnie & Du Preez Incorporated, Kempton Park |
| FOR THE THIRD RESPONDENT: | No appearance |
| INSTRUCTED BY: | No appearance |