IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: A98/2018

85149/2017

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~.

(3) REVISED. ✓

17/5/18

DATE

SIGNATURE

In the matter between:

THEO DUAN SWART	**1ST APPELLANT**
CASH CONVERTERS SOUTHERN AFRICA (PTY) LTD	**2ND APPELLANT**

And

CASH CRUSADERS FRANCHISING (PTY) LTD	**RESPONDENT**

IN RE:

CASH CRUSADERS FRANCHISING (PTY) LTD	**APPLICANT**

And

THEO DUAN SWART	**1ST RESPONDENT**
CASH CONVERTERS SOUTHERN AFRICA (PTY) LTD	**2ND RESPONDENT**

JUDGMENT

Fabricius J,

1.

On 17 January 2018, Kollapen J granted an order enforcing a Restraint of Trade Agreement concluded between Cash Crusaders Franchising (Pty) Ltd and its erstwhile National General Manager, the First Respondent, T. Swart. The order granted interdicted Swart from *inter alia*, being employed by the Second Appellant, Cash Converters Southern Africa, at any time until 7 April 2019.

2.

On 24 January, Swart and Cash Converters gave notice of their intention to apply for leave to appeal. Leave to appeal was refused. Swart and Cash Converters subsequently lodged an application for leave to appeal to the Supreme Court of

Appeal. The relevant affidavits that have been lodged and the outcome of the application are awaited.

3.

On receiving the Swart/Cash Converters' Notice of Intention to apply for leave to appeal, Cash Crusaders brought an application in terms of the provisions of s. 18 (1) of the ***Superior Courts Act of 2013***, seeking an order directing that, pending the outcome of any appeal process instituted, the interdict granted on 17 January 2018 would operate. This application was granted on 27 February 2018. Section 18 (4) of the ***Superior Courts Act***, grants to a party aggrieved by such an order an automatic right of appeal to the next highest Court, and states that "Such appeal must be dealt with as a matter of extreme urgency".

This appeal is therefore before us sitting as a Full Court.

4.

Sections 18 (1) and (3) of the ***Superior Courts Act***, provide for a twofold enquiry, in that the following requirements must be met before an order appealed against can be put into operation pending the outcome of the appeal:

1. Exceptional circumstances must exist;

2. Proof, on a balance of probabilities must exist, that:

    2.1 The particular applicant will suffer irreparable harm if the order is not put into operation;

    2.2 The other party (in this particular case, both Swart and Cash Converters Southern Africa) will not suffer irreparable harm if the order is put into operation.

See: ***Actom (Pty) Ltd v Coetze and Another ZAGPPHC 548 (31 July 2015)***, a judgment by the Full Court of this Division, agreeing with the judgment of Sutherland J in ***Incubeta Holdings (Pty) Ltd v Ellis 2014 (3) SA 189 (GJ) at par. [16].***

Both judgments make it clear that s. 18 of the ***Act*** has introduced a new dimension to these types of proceedings by requiring first that the discretion may be exercised

only if the conditions precedent of "exceptional circumstances", and actual irreparable harm to one party, and no harm to the other, is proven. It is now incumbent upon the Applicants' seeking leave to execute pending an appeal, to prove on a balance of probabilities that it will suffer irreparable harm if leave to execute is not granted, and that the other party will not suffer irreparable harm if the Court so orders. Once these jurisdictional facts are established, the Court may exercise its wide discretion to grant leave to execute, or not to grant leave.

5.

It is clear from the judgment of Kollapen J that he granted the relief sought on the basis that there were exceptional circumstances as envisaged by s. 18 (1) of the ***Superior Courts Act*** as the relief sought in the main proceedings, enforcing the restraint of trade, would be forfeited because the duration of the restraint would expire before the exhaustion of the appeal processes.

6.

On behalf of the Appellants herein (Swart and Cash Converters), it was argued that whilst exceptional circumstances may well exist, as was found by the Court a quo, the Respondent (Cash Crusaders), failed to establish, as it was required to do by the ***Act***, that it would (as opposed to might) suffer irreparable harm if relief sought by it was not granted, and that the Applicants would not suffer irreparable harm, if relief sought was granted. It was in this context significant, so it was argued, that the Respondent did not set out in its Founding Affidavit any reasons why it would suffer irreparable harm if relief sought by it was not granted. As stated by the Appellants' Answering Affidavit, which assertions were not dealt with at all by the Respondent in its Replying Affidavit, the Respondent would not suffer irreparable harm inasmuch as, since the First Appellant left the Respondent and became employed on 26 June 2017 by the Second Appellant, to a limited extent a competitor of the Respondent, not one of the Respondent's customers had ceased to do business with the Respondent. No actual prejudice had been shown to have existed. Furthermore, if any of these customers ceased to do business with the Respondent, there was no

reason why the Respondent could not quantify its damages and institute action against the Appellants to recover such damages. Also, by now, any confidential information pertaining to the Respondent that the First Appellant gained would all have been imparted to the Second Appellant, and even if so imparted, would not be of any use to the Second Appellant. It was therefore submitted that absent any challenge to these assertions in the Appellants' Answering Affidavit, the Respondent did not establish, on a balance of probabilities that the Respondent would (as opposed to a mere potentiality), suffer irreparable harm, in the event of the relief sought by the Respondent not being granted.

7.

It was therefore submitted that the conclusion by the learned Judge a quo, that "It is clear that if the order is not put into operation then the Applicant will suffer irreparable harm as a risk of the passing-on and use of its confidential information will remain alive" was incorrect and was not born out by the evidence.

8.

The First Appellant, in his Answering Affidavit, stated that:

1. The consequence of being precluded from being employed by a competitor were the following:

   8.1 Whilst the Respondent tendered to pay to him the salary that he would have earned until the date of judgment in the appeal was delivered, this would be cold comfort. There was no obligation on the Second Appellant to keep the First Appellant's position available until the proceedings had been concluded, and it would not be practical for the Second Appellant to do so;

   8.2 By the time that the appeal was heard, or the remainder of the restraint period expired, the First Appellant would have been precluded from being employed by any franchise operation selling pre-owned and new goods until 7 April 2019, if not a few months earlier;

8.3 First Appellant worked for the Respondent from 2003 until 2017. His working experience was therefore some 14 years as an employee in the franchise operation that sells pre-owned and new goods. The First Appellant would have to try to find employment in the retail industry other than such a franchise operation. This would be nay impossible given the current economic climate and the First Appellant's specific work experience. If the First Appellant attempted to find employment after the appeal, which he would obviously have to do, he would face a prospect of having been out of the retail industry and especially the franchise retail industry for many months.

9.

It was therefore submitted that there was no real challenge to the First Appellant's assertion of irreparable harm. The conclusion of the learned Judge a quo was in this respect incorrect.

10.

It was also submitted that the learned Judge limited the relevant enquiry in terms of s. 18 (3), to whether the First Appellant would suffer irreparable harm merely to whether he would suffer financial harm during the period of the restraint. It was submitted that this approach was wrong. The enquiry ought not to be limited to the immediate effects of the relief sought by Respondent but also required an enquiry into consequent effects after the period of the restraint. It was submitted that the provisions of s. 18 (3) of the ***Superior Courts Act*** did not allow for a narrowing of the scope of the enquiry.

11.

A further submission going to the heart of the matter, and the interpretation of the provisions s. 18 (3) was the following: the Respondent did not in its s. 18 (1) application deal with the position of the Second Appellant at all. The Second Appellant employed the First Appellant and also opposed the Respondent's main application. Both the Second Appellant and the First Appellant brought an

application for leave to appeal against the judgment of Kollapen J. Thus, the Respondent in seeking relief in terms of s. 18 (1) was required to make out a case of absence of irreparable harm in regard to both the First Appellant and the Second Appellant. The Respondent says nothing in its application in regard to the absence of irreparable harm to the Second Appellant, and this was therefore a fatal omission to the Respondent's application and on this basis alone, it ought to have been dismissed with costs by Kollapen J.

12.

I am constrained to agree with the criticism of both Appellants of the reasoning and conclusions of the Court a quo that I have set out. It is clear from the affidavits before Kollapen J and his judgment that the consequent effects after the period of the restraint on the First Appellant were not dealt with at all and to this extent, the scope of the enquiry in terms of s. 18 (3) was indeed limited. It is also abundantly clear that the position of the Second Appellant was not dealt with at all. I agree therefore that the Respondent in seeking relief in terms of s. 18 (1) was required to

make out a case of absence of irreparable harm, in regard to both the first Appellant and the Second Appellant. This was not done and accordingly, I agree that the Respondent's application ought to have been dismissed with costs by Kollapen J.

13.

Having regard to the above, I would propose that the following order is made:

1. **The appeal is upheld with costs;**

2. **The order of the Court a quo is set aside, and replaced with the following order: "The application is dismissed with costs".**

JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION PRETORIA

And

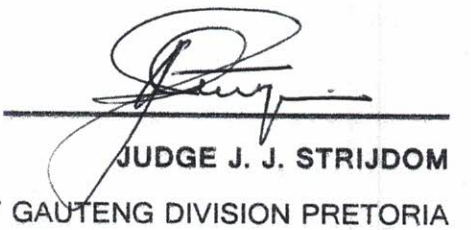
I Agree

JUDGE B. WANLESS

ACTING JUDGE OF THE HIGH COURT GAUTENG DIVISION PRETORIA

And

I Agree



JUDGE J. J. STRIJDOM

ACTING JUDGE OF THE HIGH COURT GAUTENG DIVISION PRETORIA