IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU–NATAL LOCAL DIVISION, DURBAN

CASE NO: D7681/2019

In the matter between:

H & A MANUFACTURING (PTY) LTD	First Applicant
H & A CREATIONS (PTY) LTD	Second Applicant
and	
KIRK BOWER	First Respondent
JEROME ANNAMUTHA	Second Respondent
RORY JOHNSON	Third Respondent
ICONIC COLLECTIVE (PTY) LTD	Fourth Respondent
ICONIC PIXEL (PTY) LTD	Fifth Respondent
HARRINGTON JAMES & ASSOCIATES (PTY) LTD	Sixth Respondent
PRINT OUTSOURCE INTERNATIONAL (PTY) LTD	Seventh Respondent

O R D E R

(a) The first to fifth respondents are granted leave to appeal the judgment delivered on 23 December 2019 to the Full Court of this Division.

(b) The costs of the application for leave to appeal will form part of the costs in the appeal.

(c) It is hereby ordered and directed that in terms of the provisions of s 18(3) of the Superior Courts Act 10 of 2013, as amended, this court's orders granted on 23 December 2019 under Case No. D7681/2019 shall operate and be implemented with immediate effect pending the outcome of any appeal process instituted or to be instituted by anyone, or more, or all of the respondents.

(d) The first to fifth respondents shall pay the applicants' costs of this application jointly and severally, the one paying the other to be absolved.

JUDGEMENT IN APPLICATION FOR LEAVE TO APPEAL AND S 18(3) APPLICATION

HENRIQUES J

Introduction

[1] This is an application for leave to appeal by the first to fifth respondents, to the Full Court of this division against the judgment delivered on 23 December 2019. The application for leave to appeal is opposed by the applicants who have also instituted an application in terms of s 18(3) of the Superior Courts Act 10 of 2013 as amended (the Act).

[2] For the sake of convenience, I will refer to the parties as they are cited in the main judgment. After delivery of the judgment on 23 December 2019, the first to fifth

respondents filed a detailed notice of application for leave to appeal which contained the grounds of appeal.

The test in an application for leave to appeal

[3] Applications for leave to appeal are governed by ss 16 and 17 of the Act. Section 17 makes provision for leave to appeal to be granted where the presiding judge is of the opinion that either the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including whether or not there are conflicting judgments on the matter under consideration.

[4] The first to fifth respondents have indicated in the notice of application for leave to appeal that the application is premised on the provisions of s 17(1)(*a*)(i). This was the basis upon which Mr *Shapiro*, who appeared for the first to fifth respondents, made submissions. Reasonable prospects of success has previously been defined to mean that there is a reasonable possibility that another court may come to a different decision.[1]

[5] With the enactment of s 17 of the Act, the test has now obtained statutory force and is to be applied using the word *'would'* in deciding whether to grant leave. In other words, the test is would another court come to a different decision. In the unreported decision of the *Mont Chevaux Trust v Goosen*[2] *& 18 others*(3 November 2014), the land claims court held, albeit obiter, that the wording of the subsection raised the bar for the test that now has to be applied to any application for leave to appeal. In *Notshokovu v S* (157/15) [2016] ZASCA 112 (7 September 2016) at paragraph 2, it was held that an appellant faces a higher and stringent threshold in terms of the Act.

[6] In *Acting National Director of Public Prosecutions & others v Democratic Alliance in re: Democratic Alliance v Acting National Director of Public Prosecutions & others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016), Ledwaba DJP, writing for the full court considered the test as envisaged in s 17 of the Superior Courts Act.

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[1] *Van Heerden v Cronwight & others* 1985 (2) SA 342 (T) at 343I.
[2] 2014JDR 2325 (LCC)

At paragraph 25 of the aforementioned judgment, he dealt with the test set out in the *Mont Chevaux Trust* case where Bertelsmann J held the following:

'It is clear that the threshold for granting leave to appeal against the judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright &others* 1985 (2) SA 342 (T) at 343H. The use of the word "*would*" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.'

[7] In this particular matter I would have to determine whether another court *would* (my emphasis) come to a different decision. I have considered the application for leave to appeal and the oral submissions of the parties.

[8] During the course of argument Mr *Crots*, on behalf of the applicants, as would be expected, submitted that there are no reasonable prospects of success on appeal and this court did not err when considering the requirements for granting the final relief which the applicants sought.

[9] Mr *Shapiro*, as the record will reveal, made several submissions in relation to whether or not this court correctly found that customer connections had been established and/or whether the applicants had a protectable proprietary interest. Amongst the further submissions he made, some related to the extent and duration of the restraints.

[10] Among the issues which concerned me when the matter was argued, and having regard to the decision in *Basson v Chilwan,* was the geographical extent and duration of the respective restraint of trade agreements. I raised the matter with Mr *Crots* during the course of argument, and the concession was made that the geographical area extended too wide and the final orders granted restricted this to KwaZulu-Natal and limited it to only certain companies. I also considered the duration of the restraints of trade and dealt with this in the written judgment.

[11] Having considered the arguments presented by the first to fifth respondents, I am of the view that there is a reasonable prospect another court would differ with

me. Consequently, leave to appeal ought to be granted to the Full Court and the costs of the application for leave to appeal, be costs in the appeal.

[12] That then brings me to the application in terms of s18(3).

The section 18(3) application

[13] Prior to the enactment of the Superior Court's Act, execution pending appeal was dealt with in terms of the provisions of rule 49(11) as well as the common law. The test employed was that set by Corbett JA in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1973 (SA) 534 (A).

Section 18 of the Act

[14] The applicable provisions of s 18 read as follows:

'18 Suspension of decision pending appeal

(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.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(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) 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 be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.'

How does one interpret the provisions of s 18

[15] Section 18 of the Act introduces a new test when one seeks to execute an order pending the appeal processes being finalised. Consequently, authorities that predate the enactment of the section have been overtaken by its enactment.

[16] A number of decisions have dealt with the interpretation of s 18, specifically the words 'exceptional circumstances' as it appears in the section. The first of these was a decision of Sutherland J in *Incubeta Holdings (Pty) Ltd & another v Ellis & another* 2014 (3) SA 189 (GJ) paragraph 16. Sutherland J held the following:

'[16] It seems to me that there is indeed a new dimension introduced to the test by the provisions of s 18. The test is twofold. The requirements are:

- First, whether or not 'exceptional circumstances' exist; and
- Second, proof on a balance of probabilities by the applicant of
    - the presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order; and
    - the absence of irreparable harm to the respondent/loser, who seeks leave to appeal.'

[17] In the *Incubeta Holdings* judgment, Sutherland J examines a definition to be ascribed to 'exceptional circumstances' by referring to a number of authorities. The ultimate conclusion is that exceptional circumstances may not be definable and may be difficult to articulate but whether or not such circumstances exist in a given case is not a product of the exercise of a court's discretion but rather a finding of fact[3]. At paragraph 22, he opines that exceptionality must be 'fact–specific'. The circumstances which may or may not be exceptional must be derived from the actual predicament in which the litigants find themselves.

[3] *Incubeta Holdings (Pty) Ltd v Ellis* para 18.

[18] The second leg of the s 18 test is to determine if the loser who seeks leave to appeal will suffer irreparable harm. The order must then be stayed even if the stay will cause the victor irreparable harm too. If the loser will not suffer irreparable harm, the victor must nevertheless show irreparable harm to itself. Two distinct findings of fact must now be made, rather than weighing-up to discern a 'preponderance of equities'.

[19] At paragraph 26 of the *Incubeta Holdings* judgment, Sutherland J indicates that the merits of a case are not pertinent to the enquiry that one embarks on. Sutherland J, in reaching a decision in *Incubeta Holdings,* did not consider the prospects of success on appeal.

[20] In *Minister of Social Development Western Cape v Justice Alliance of South Africa* 2016 JDR 0606 (WCC) a judgment of the Full Court Western Cape Division, differed from the approach adopted in the *Incubeta Holdings* case and held the following:

'[27] Differing in this respect on the approach propounded in *Incubeta Holdings*, I consider, consistently with the view expressed by Corbett JA in *Southgate Corporation* at 545 E, that the court's assessment of the prospects of success in the appeal (factor (3) in *Southgate Corporation*) remains a relevant factor in the consideration. (…)It follows that the less sanguine a court seized of an application in terms of s 18 (3) 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. The same quite obviously applies in respect of a court dealing with an appeal against an order granted in terms of s 18 (3). The position is very much akin to that which pertains when interim interdictory relief pending a judicial review is considered.

[28] Sutherland J appears to have considered that the prospects of the appeal do not form part of the consideration because leave to appeal inherently carries in it an acceptance that there was a reasonable prospect the appeal might succeed. That is indeed so in most cases, but even in such matters there is a scope for degrees of conviction on the likelihood of such prospect being realised. This is especially so if the court deciding the s 18(3) application is differently constituted from that which granted leave to appeal; which will always be the case when the order made in terms of an application in terms of s 18(3) is taken on automatic appeal. Moreover, as the facts in *Incuteba Holdings* illustrate, an application in terms of s 18(3) may arise for determination before an application for leave to appeal is heard or decided; alternatively, after an application for leave to appeal has been

refused and a further application for leave has been noted to the Supreme Court of Appeal, but not yet determined.'

[21] The Supreme Court of Appeal has endorsed the two-fold test to be applied as enunciated in *Incubeta Holdings.* It has however, held that the prospects of success is a factor which must also be considered by a court in a s 18(3) application.[4] It approved the approach of the full court of the Western Cape division in *University of the Free State v Afriforum & another* 2018 (3) SA 428 (SCA) at 433A-435A, where the court held the following:

'[8] This is the first appeal under s 18(4)(ii) of the Act that has reached this court. Section 18 of the Act has, however, been considered by divisions of the High Court. In this regard reference can be made to *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* 2014 (3) SA 189 (GJ); *Liviero Wilge Joint Venture & Another v Eskom Holdings SOC Ltd* [2014] ZAGPPJHC 150; and *Minister of Social Development Western Cape & Others v Justice Alliance of South Africa and Another* [2016] ZAWCHC 34. Although these judgments differ in certain respects as to the application of the requirements of s 18 of the Act, they are closely reasoned and of much assistance in the interpretation of this novel provision.

[9] In embarking upon an analysis of the requirements of s 18, it is firstly necessary to consider whether, and, if so, to what extent, the legislature has interfered with the common-law principles articulated in *South Cape Corporation*, and the now repealed Uniform Rule 49(11). What is immediately discernible upon perusing s 18(1) and (3) is that the legislature has proceeded from the well-established premise of the common law that the granting of relief of this nature constitutes an extraordinary deviation from the norm that, pending an appeal, a judgment and its attendant orders are suspended. Section 18(1) thus states that an order implementing a judgment pending appeal shall only be granted 'under exceptional circumstances'. The exceptionality of an order to this effect is underscored by s 18(4), which provides that a court granting the order must immediately record its reasons; that the aggrieved party has an automatic right of appeal; that the appeal must be dealt with as a matter of extreme urgency; and that pending the outcome of the appeal the order is automatically suspended.

[10] It is further apparent that the requirements introduced by s 18(1) and (3) are more onerous than those of the common law. Apart from the requirement of 'exceptional circumstances' in s 18(1), s 18(3) requires the applicant 'in addition' to prove on a balance of

[4] *Ntlemeza v Helen Suzman Foundation & another* 2017 (5) SA 402 (SCA).

probabilities that he or she 'will' suffer irreparable harm if the order is not made, and that the other party 'will not' suffer irreparable harm if the order is made. The application of rule 49(11) required a weighing-up of the potentiality of irreparable harm or prejudice being sustained by the respective parties and, where there was a potentiality of harm or prejudice to both of the parties, a weighing-up of the balance of hardship or convenience, as the case may be, was required. Section 18(3), however, has introduced a higher threshold, namely proof on a balance of probabilities that the applicant will suffer irreparable harm if the order is not granted, and conversely that the respondent will not if the order is granted.

[11] In *Incubeta Holdings* supra [8] para 24 Sutherland J aptly commented as follows on s 18(3):

“A hierarchy of entitlement has been created, absent from the *South Cape* [*Corporation*] test. Two distinct findings of fact must now be made, rather than a weighing-up to discern ‘a preponderance of equities.”

DE van Loggerenberg & E Bertelsmann *Erasmus: Superior Court Practice* vol I 2 ed (service issue 2) correctly conclude that s 18(3) “is a novel provision and places a heavy onus on the applicant”. On a proper construction of s 18, it is clear that it does not merely purport to codify the common-law practice, but rather to introduce more onerous requirements. As submitted on behalf of the UFS, had the legislature intended the section to merely codify the common law, it would have followed the authoritative formulation by Corbett JA in *South Cape Corporation*.

[12] The concept of 'exceptional circumstances' introduced by s 18(1) was considered by Mpati P in *Avnit v First Rand Bank Ltd* [2014] ZASCA 132, in the context of s 17(2)*(f)* of the Act, which provides that in 'exceptional circumstances' the President of this court may refer a decision on an application for leave to appeal to the court for reconsideration. Mpati P held that, upon a proper construction of s 17(2)*(f)*, the President will need to be satisfied that the circumstances are 'truly exceptional' before referring a matter for reconsideration.

[13] Whether or not 'exceptional circumstances' for the purposes of s 18(1) are present must necessarily depend on the peculiar facts of each case. In *Incubeta Holdings* supra [8] para 22 Sutherland J put it as follows:

“Necessarily, in my view, exceptionality must be fact-specific. The circumstances which are or may be exceptional must be derived from the actual predicaments in which the given litigants find themselves.”

I agree. Furthermore, I think, in evaluating the circumstances relied upon by an applicant, a court should bear in mind that what is sought is an extraordinary deviation from the norm, which, in turn, requires the existence of truly exceptional circumstances to justify the deviation.

[14] A question that arises in the context of an application under s 18 is whether the prospects of success in the pending appeal should play a role in this analysis. In *Incubeta Holdings* Sutherland J was of the view that the prospects of success in the appeal played no role at all. In *Liviero Wilge Joint Venture* supra [8] [para 30] Satchwell J, Moshidi J concurring, was of the same view. However, in *Justice Alliance* supra [8] para 27 Binns-Ward J (Fortuin and Boqwana JJ concurring) was of a different view, namely that the prospects of success in the appeal remain a relevant factor and therefore —

"the less sanguine a court seized of an application in terms of s 18(3) 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. The same quite obviously applies in respect of a court dealing with an appeal against an order granted in terms of s 18(3)."

[15] I am in agreement with the approach of Binns-Ward J. In fact, *Justice Alliance* serves as a prime example why the prospects of success in the appeal are relevant in deciding whether or not to grant the exceptional relief. Binns-Ward J concluded that the prospects of success on appeal were so poor that they ought to have precluded a finding of a sufficient degree of exceptionality to justify an order in terms of s 18 of the Act. This conclusion was subsequently proven to be justified when this court upheld the main appeal in *Justice Alliance*.'

[22] In both *Ntlemeza v Helen Suzman Foundation & another* 2017 (5) SA 402 (SCA) and *Afriforum,* the SCA did not have the appeal record before it. Consequently, the approach to be followed is to apply the two-fold test of Sutherland J in *Incubeta Holdings* and to consider the prospects of success on appeal in deciding whether or not to grant any relief in terms of s 18(3).

[23] In *Ntlemeza*[5], the Supreme Court of Appeal, in referring to s 18(1) and (3), indicated that 'the legislature had set the bar fairly high'.

[24] Having regard to the authorities referred to herein, when applying the test, it is clear that the applicant has a substantial hurdle to cross in satisfying this court that

[5] *Ntlemeza* at 413D.

there are ‘exceptional circumstances’ warranting this court not suspending the order of 23 December 2019 pending any further appeal or petition.

[25] I turn now to whether or not ‘exceptional circumstances’ exist on the facts of the matter. The applicants founding affidavit contains the detailed submissions as to why the court ought to implement the order pending the finalisation of any appeal. I have taken them into consideration and do not propose to repeat them for purposes of the judgment.

[26] In addition, Mr *Crots* in argument submitted that exceptional circumstances existed warranting this court implementing the order. He submitted that the applicants would suffer irreparable harm in the event of this court not giving effect to its order. In summary, he submitted that should this court not grant the application it would render nugatory the order that it had issued. In support of the submissions, the applicants relied quite heavily on the decision of Sutherland J in *Incubeta Holdings.*

[27] The first to fifth respondents, in opposing such application, elected not to file any answering affidavits and Mr *Shapiro* made submissions from the bar. He submitted that the applicant had not discharged the onus of showing that exceptional circumstances existed apart from general allegations and further, that the first to fifth respondents would not suffer irreparable harm should the order be implemented.

[28] He indicated that in the event of the court granting the application for leave to appeal, this in itself constituted exceptional circumstances in favour of the respondents warranting the court not implementing the order pending the finalisation of the appeal process. He indicated that the decision in *Incubeta Holdings* was distinguishable as the application for leave to appeal had not been filed as yet. He submitted that no case has been made out by the applicants showing irreparable harm and there is a general proposition made by the applicants in this regard. One cannot ignore that in respect of the third respondent, four of the six months has expired already and the first to third respondents have been employed since 1 October 2019.

[29] In any event, the investigative report which the applicants obtained is of no assistance as this dealt with the position after the judgment was granted and stayed by the filing of the application for leave to appeal. In addition, if the court finds that there are reasonable prospects of success on appeal these are exceptional circumstances which tilt the balance in favour of the first to third respondents. A further submission was that there was nothing to justify the costs of the application in terms of s 18(3) as such application was not formally opposed by the first respondent by the filing of affidavits, rather submissions were made from the bar.

Analysis

[30] I will now consider the two-fold test which must be applied and the prospects of success on appeal.

[31] The restraints of trade operate for a period of 12 months in respect of the first and second respondent and in respect of the third respondent, for a period of six months. All such periods commenced on 1 October 2019. In essence, the third respondent's restraint will only apply until 1 April 2020 and that of the first and second respondents until 30 September 2020. Given the nature and extent of the restraints, they are restricted to KwaZulu-Natal and only to certain competitors of the applicants. Given the '*broad skill base'* as alleged by the first and second respondents, they ought to be able to find alternative employment.

[32] In addition, the applicants submit that one must also consider the conduct of the first to third respondents who have already engaged in direct competition with the applicants in complete disregard for the restraints of trade. This was dealt with in the affidavits filed in the main application. In addition, the fourth and fifth respondents unashamedly 'poached' the first to third respondents knowing full well of the existence of the restraints of trade.

[33] I agree with the applicants that by the time the appeal process is finalised it will render nugatory any order granted as the period in respect of which the restraints of trade apply, would have already expired. The applicants will suffer irreparable harm with no recourse in due course. The first to fifth respondents, specifically the

first to third respondents, can seek alternative employment and also have an alternative remedy available to them which the applicants do not have, being that of a claim for damages. In addition, the fourth and fifth respondents are able to legitimately compete with the applicants as no restraint applies to their businesses save that they are prevented from employing the first to third respondents. They successfully operated these business without the three respondents prior to their employment on 1 October 2019.

[34] The first to third respondents have merely submitted from the bar that they will be without employment. That is the irreparable harm they will suffer. The restraints do not apply to all of the applicants' competitors in KwaZulu-Natal. They have gone no further than to indicate this. I align myself with the sentiments expressed by Sutherland J in *Incubeta*. Whatever the outcome of the appeal process is, the relief which the applicants have obtained given the short duration of the restraints will expire before the appeal process is finalised. The applicants have been successful in showing a protective proprietary interest and the breach thereof. The applicants do not have an alternative remedy available to them like a damages claim as a restraint is in a different position to other forms of relief. The first to third respondents, whilst they may be without work for the duration of the restraint, it is financial prejudice. In addition, they have the option of, if they are successful in the appeal, instituting a claim for loss of earnings.

[35] In addition, the restraint only applies to their employment here in KZN and to certain of the applicants' competitors. It is a not a blanket restraint operating in other provinces and applying to other competitors of the applicant. In any event, the first to fifth respondents have pinned their colours to the mast in the sense that they have elected to oppose the application in terms of s 18(3) and make submissions from the bar. They have not indicated either on oath or during the course of their submissions that they will be unable to find alternative employment or what their position is in relation to other subsidiaries of the remaining respondents.

[36] In my view, given that a finding of exceptional circumstances must be "fact-specific" on the facts of this matter, I am satisfied that the applicants have satisfied the two prong test. I have also factored into this consideration their prospects of

success on appeal. I have granted the applicants leave to appeal but I am also, as was Sutherland J 'conscious of the undesirable outcome that relief granted by the court becomes a vacuous gesture.' In addition, by not implementing the order, it would undermine the role of courts and also render nugatory any order granted in restraint of trade matters. It must follow then, that I am of the view that the applicants would suffer irreparable harm if the order is not put in operation and that the first to third respondents will not suffer irreparable harm if the order is put into operation.

Costs

[37] That then brings me to the aspect of costs. Although Mr *Shapiro* indicated that there is no need for this court to make a costs order in the s 18(3) application, it seems to me that there is no reason to depart from the usual rule in relation to costs. The rules make provision for the applicants to bring such an application, they have done so. The first to fifth respondents did oppose the application and Mr Shapiro made oral submissions, consequently the costs ought to follow the result.

[38] Consequently, the following orders will issue:

(a) The first to fifth respondents are granted leave to appeal the judgment delivered on 23 December 2019 to the Full Court of this Division.

(b) The costs of the application for leave to appeal will form part of the costs in the appeal.

(c) It is hereby ordered and directed that in terms of the provisions of s 18(3) of the Superior Courts Act 10 of 2013, as amended, this court's orders granted on 23 December 2019 under Case No. D7681/2019 shall operate and be implemented with immediate effect pending the outcome of any appeal process instituted or to be instituted by anyone, or more, or all of the respondents.

(d) The first to fifth respondents shall pay the applicants costs of the s 18(3) application jointly and severally, the one paying the other to be absolved.

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HENRIQUES J

Case Information

Date of hearing	:	3 February 2020
Date of judgment	:	7 February 2020

Appearances

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