IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 15682/09

DATE: 3 February 2010

In the matter between:

SYSTEMATIC DESIGNS (PTY) LTD T/A REDLINK Applicant

and

JOHAN PHILIPUS JACOBUS COETZER Respondent

JUDGEMENT

(Application for Leave to Appeal)

BOZALEK, J

Following my judgment and order in this matter, handed down on 15 December last, the respondent now seeks leave to appeal to the Supreme Court of Appeal, alternatively the full bench of this Division, and I refer to the parties in their capacities in the original application.

The applicant opposes the granting of leave and has brought an application in terms of Rule of Court 49(11) that, in the event leave is granted, the Court's restraining order remain operative, or, in the event that leave is refused, but

respondent petitions the SCA for leave to appeal, similarly this Court's order be made operative. It is material to both applications that the order restraining the respondent from competing with the applicant in certain respects, and from disclosing certain confidential information, will expire on 30 June 2010, ie it has no more than five months to run.

The original agreement between the parties provided for a restraint period of two years from termination of employment, and the shortened restraint period comes about as a result of the matter taking some time to come before Court and this Court's decision that the restraint should run for a period of only six and a half months. The order has not been operative since 18 December last, ie the first one and a half months of its intended operation, by reason of the virtually immediate noting of an appeal and the time taken to arrange for a hearing of this application.

As regards the application for leave to appeal Mr Howie, for the respondent, addressed me at length on the merits of the matter. All the arguments he raised were canvassed by him in the original hearing. A full judgment was given in this matter, and I do not propose to traverse the same ground again. It suffices to say that I am left unpersuaded that there is a reasonable prospect that another Court will arrive at a

different conclusion. Even if I am wrong in this view which I take of the respondent's prospects on appeal, there is another factor which I consider militates strongly against the prospect of an appeal ever being heard, and that is the question of mootness. Having regard to existing practice and time periods I regard it as highly unlikely that any appeal will, in the ordinary course, be heard before the end of June 2010, let alone the end of 2010. By that time the matter will in all probability be moot since the order will have expired by the effluxion of time and will be incapable of being revived, irrespective of the outcome of the Rule 49(11) application.

See in this regard the provisions of Section 21 A of the Supreme Court Act, 59 of 1959, which provide *inter alia* in (1) and (3) as follows:

> "(1) When at the hearing of any civil appeal in the appellate division, or any provincial or local division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone."
>
> "{3} Save under exceptional circumstances

the question whether the judgment or order would have no practical effect or result is to be determined without reference to consideration of costs."

See also the cases quoted in the commentary on this section, in Erasmus, Superior Court Practice at A1-54 and 54A, and in particular the judgment of Howie, JA, as he then was, in Western Cape Education Department v George 1998(3) SALR pg 77 SCA at pg 84D.

Mr Howie subsequently advised that if leave was granted to the full bench he would seek an accelerated or urgent hearing of the appeal, a procedure provided for in Rule 49(18). The indications are however that such a hearing will not be lightly granted and only where the parties may otherwise suffer irreparable prejudice. In the circumstances of this matter I do not regard the respondent's prospects of obtaining such a hearing as promising.

For both of these principal reasons the APPLICATION FOR LEAVE TO APPEAL TO THE SUPREME COURT OF APPEAL OR THE FULL BENCH MUST FAIL.

This ruling leaves the Court's order of 15 December operative,

and thus all that remains of the applicant's counter application for Rule 49(11) relief is the alternative prayer, namely, that in the event that the respondent petitions the SCA for leave to appeal this Court's order should nevertheless remain operative. This is not a remote concern on the part of the applicant, since Mr Howie confirmed from the Bar that it was likely, in the event of leave being refused by this Court, that his client would petition the SCA for leave to appeal.

The applicant's concern is of course that the remaining period of operation of the order granted will be consumed either wholly or partially by the lodging of any such petition, the filing of which has the automatic effect of suspending the execution of the order. See Beecham Group PLC v South African Druggists Limited 1987(4) SALR, pg 869. Although no such petition has yet been lodged I consider that it is competent for this Court to grant the relief sought. This represents a practical approach to the situation, since all material considerations are presently before the Court, and deferring the taking of any decision at this point will only lead to a further hearing and additional costs and delay, as and when Apetition is in fact lodged.

Furthermore any such order is interlocutory and can, if needs be, be revisited by this Court should new circumstances come

to the fore in the future. In South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Limited 1977(3) SALR, 534 AD it was held that the applicant for an order in terms of Rule 49(11) bears the onus of showing why the judgment should be carried into execution. It was held further that the Court has a wide general discretion to grant or refuse such leave and should determine what is just and equitable in all the circumstances. In so doing it would normally have regard to the following factors:

(1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal, if leave to execute were to be granted;

(2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal, if leave to execute were to be refused;

(3) the prospects of success on appeal, including more particularly the questions to whether the appeal is frivolous or vexatious or has been noted not with a *bona fide* intention of seeking to reverse the judgment, but for some indirect purpose, for example to gain time or harass the other party;

(4) whether there is the potentiality of irreparable harm or prejudice to both appellant and the respondent, the balance of hardship or convenience, as the case may

be.

In the present matter the applicant has a judgment in its favour, with a limited life of five months left. I regard the balance of hardship and convenience as decisive in the present case.

Without making any observation regarding whether the application for leave to appeal has been noted with some ulterior motive, I regard the respondent's prospects of success in the appeal as very limited. If the relief sought is not granted, and a petition is lodged, it is quite likely that it will ultimately be refused, or the appeal may never eventuate, or it may fail and yet the applicant will have enjoyed no substantive relief at all against the respondent, since the restraining order will have expired.

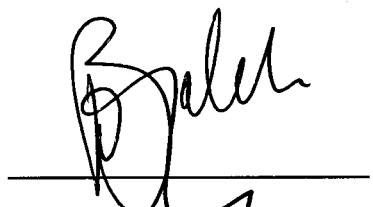
In the circumstances I consider that the applicant has made out a case for the alternative relief under Rule 49(11). The following order is then made:

(1) The RESPONDENT'S APPLCIATION FOR LEAVE TO APPEAL IS DISMISSED.

(2) In the event that the respondent files a petition to the SCA in terms of Section 20(4)(b) of the Supreme Court

Act 59 of 1959, the order of this Court dated 15 December 2009 shall remain operative.

(3) The respondent is ordered to pay the applicant's costs in the applications for leave to appeal and to execute the judgment in terms of Rule 49(11), save in the event that the respondent successfully petitions for leave to appeal, in which event the costs of these applications shall be costs in the appeal.



BOZALEK, J