IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: **17997/24**

In the matter between:

JACOBUS JOHANNES PIENAAR STEENKAMP
(Identity Number: 7[…]) Applicant

and

COOLAG (PTY) LTD
(Registration Number: 2019/626722/07) Respondent

Date of hearing: 8 November 2024

JUDGMENT DELIVERED ON 12 NOVEMBER 2024

GORDON-TURNER, AJ:

Introduction

1. This is an application for leave to appeal to the full bench of this Court, alternatively to the Supreme Court of Appeal ("*SCA*") against the judgment handed down on 19 September 2024 ("*the judgment*") enforcing a covenant in restraint of trade between the respondent as former employee and the applicant as its former employee.

2. The respondent has applied on an urgent basis for an order in terms of Section 18 of the Superior Courts Act 10 of 2013 ("*the SC Act*") that the operation of the order in terms of the judgment not be suspended by the applicant's notice of his application for leave to appeal, or any further application for leave to appeal to the SCA or petition to the Judge President of that court, pending the outcome of any appeal which may follow, in the event of leave to appeal being granted ("*the s18 application*").

3. For the sake of consistency and to avoid confusion, hereunder I refer to the parties as cited in the leave to appeal application: the applicant is Mr Steenkamp, and the respondent is Coolag (Pty) Ltd.

4. The leave to appeal application and the s18 application were opposed by the respondent and the applicant respectively. The founding affidavit in the s18 application set out the basis for opposing the leave to appeal application. The applicant delivered an answering affidavit, hereafter referred to as "*the opposing affidavit*" to distinguish from the answering affidavit in the application at first instance. No replying affidavit was filed by the respondent.

Application for condonation

5. The leave to appeal application was filed out of time by one court day. The applicant's attorney had, however, sent the application by email on 10 October 2024 (the day before the *dies induciae* expired) to both the respondent and to the registrar assigned to me while I had been serving as an acting judge. The failure to file in time was occasioned by both sets of attorneys' inability to locate the court file for several days despite diligent efforts to do so. Filing of the papers and the arrangements for this hearing were

complicated by all concerned not appreciating the provisions of practice note 45A(8) of the Western Cape High Court practice directives effective from 2 October 2023 which provides that "*In instances where the relevant Judge or Acting Judge in no longer on the Bench or serving on another Bench, whether permanently or temporarily, the application for leave to appeal and the court file is to be furnished to the Chief Registrar who will process the application to the relevant Judge or Judge President as the case may be"*.

6. The applicant delivered an application for condonation of the late filing of the application. The respondent did not oppose, without conceding that the applicant enjoys prospects of success on appeal, and subject to the respondent's right to address the Court on this aspect in arguing the leave to appeal application.

7. A satisfactory explanation was provided for the applicant's default of the rules, and no prejudice was apparent or alleged. Despite my *prima facie* reservations about the applicant's prospects of success on appeal, and because he was entitled in any event to oppose the s18 application set down for hearing at the same time, I considered that it would be unjust to non-suit the applicant from arguing his application for leave to appeal. Condonation for later filing was granted on this basis.

The application for leave to appeal

8. The grounds for appeal against the judgment were that it is erroneous in the following respects:

    8.1. Finding that the respondent had proved the employment agreement between the applicant and the respondent ("*the agreement*") contained a restraint of trade, enforceable against the applicant in circumstances where clause 17.2 of the agreement does not constitute an enforceable restraint of trade clause;

    8.2. Finding that clause 17.2 could be rectified in a replying affidavit in motion

proceedings under circumstances where this was not sought in the notice of motion or in the founding papers.

8.3. Granting punitive costs against the applicant, as well as costs of counsel on scale B, which is allegedly inconsistent with Rule 69A[1] (the applicant's contention being that the application should have been dismissed with costs on a party and party scale including costs of counsel on scale B).

9. A leave to appeal application must be brought in terms of Section 17(1) of the SC Act, which provides that:

> "***17 Leave to appeal***
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> *(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-*
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> *(a) …*
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> *(i) the appeal would have a reasonable prospect of success; or*
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> *(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*
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> *(b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and*
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> *(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would*

[1] The reference to non-existent Rule 69A was understood to be a typographical error and that the applicant intended to refer to Rule 67A, read with Rule 69, particularly its sub-rule (7).

lead to a just and prompt resolution of the real issues between the parties."

10. Subsections 17(1)(b) and (c) do not apply in the present matter. The leave to appeal application was presented and argued on the basis that there are good prospects of success and that another court would reasonably have come to a different conclusion to that reached in the judgment on the identified grounds of appeal, i.e. under s17(1)(a)(i).

The first ground of appeal: no restraint of trade proved

11. This ground of appeal brings into focus the wording of the agreement, and in particular the Restraint[2] clause 17.2.

12. The applicant framed its argument somewhat differently to the argument at first instance.

13. The applicant asserts in his opposing affidavit that the respondent's evidence as well as the letters addressed by its attorneys clearly prove that the respondent knew that the agreement which it required him to sign "*was*

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[2] The salient portions of the agreement are clauses 16 and 17 which provide:
"*16.* ***CONFIDENTIALITY***
16.1 All information of a confidential nature acquired by the EMPLOYEE during the course of his employment with the EMPLOYER shall not be disclosed to any person during his employment with the EMPLOYER or after termination of such employment.
16.2 For purposes of this agreement 'confidential information' shall be deemed to include but shall not be limited to:
16.2.1 the EMPLOYER'S trade secrets, products, new developments, business methods and techniques;
16.2.2 the identity of the EMPLOYER'S clients and/or customers.
17. ***RESTRAINTS***
17.1 The EMPLOYEE acknowledges that he is employed for the benefit of the EMPLOYER and further undertakes during his employment to preserve the interests of the EMPLOYER at all times and not to involve himself directly or indirectly in any other position offering the same services.
17.2 The EMPLOYEE will for a period of 1 (one) year from the date of termination of Employment, either on his own behalf or on behalf of any person, firm or company competing or endeavouring to compete with the EMPLOYER, directly or indirectly solicit or endeavour to solicit or obtain the custom of any person, firm or company presently a client or supporter (whether financial or otherwise) of the EMPLOYER or which at any time during the 1 (one) year preceding the date of such termination has been a client of the EMPLOYER, or use his personal knowledge of or influence over any such client or person, firm or company known to him as contracting with or having dealings with the EMPLOYER, to or for his own benefit or that of any other person, firm or company in competition with the EMPLOYER."

incorrect" and there was no meeting of the minds and no clear common intention or mistake. In fact, the evidence proves the contrary position. All concerned, including the applicant, had plainly been under the impression all along, up to the point when the applicant was advised on the contents of his answering affidavit, that clause 17.2 was a covenant in restraint of trade: the error of which the applicant belatedly seeks to take advantage – the missing word "*not*" - had been completely overlooked by everyone.[3]

14. Counsel for the applicant submitted that the respondent had to establish the existence of a restraint of trade, and that to do so one must look at the intention of the parties at the time of concluding the employment agreement, of which there was no evidence.

15. However, this submission and the assertions in the applicant's opposing affidavit conflict with the applicant's evidence in his answering affidavit to the application: there he had taken the position that there had been a meeting of the minds in that the (written) agreement included a provision (Clause 17.2) that, in summary, enjoined him to compete with the respondent after termination of his employment by using its trade connections and confidential information. He so contended because the word "*not"* does not appear after the first three words in clause 17.2, namely, "*The EMPLOYEE will".* He submitted that this could not be 'read into' clause 17.2, as this would amount to the Court impermissibly making a new contract for the parties. His case was that the agreement between the parties was the very antithesis of a restraint of trade, and that it imposed a positive obligation upon him to act, rather than desist from acting in the manner which the respondent sought to prevent. Somewhat contradictorily, he also contended that on 3 May 2024 in a discussion with directors of the respondent, he had been released from contractual restraints arising from his contract of employment (the release was denied by the respondent and belied by subsequent correspondence).

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[3] The phenomenon of failing to notice a missing word is not unusual and is the subject of academic study. See for example Kuan-Jung Huang and Adrian Staub Why do readers fail to notice word transpositions, omissions, and repetitions? A review of recent evidence and theory Lang Linguist Compass. 2021;e12434. https://doi.org/10.1111/lnc3.12434. The learned authors conclude that certain kinds of errors frequently go unnoticed at a conscious level, and also appear to leave no trace in the eye movement record when they are not noticed.

16. The argument advanced in the leave to appeal application was predicated on a comparison to inapposite case law where an oral agreement in restraint of trade was sought to be proved,[4] whereas this matter concerns a written agreement. The argument avoided reference to the alleged positive obligation in clause 17.2 asserted by the applicant on affidavit (rejected in the judgment as untenable), and to his mutually destructive (disputed) account that he had been released from the restraint.

17. The respondent's case is that the restraint of trade is written into clause 17.2 of the duly executed written employment agreement.

18. In my view, there is no reasonable prospect that another court, when paying attention to the necessary contextual considerations, would arrive at a different conclusion on the meaning of clause 17.2 to that ascribed in the judgment.

19. Clauses 16 and 17.1 provide context for the meaning of clause 17.2: an effective workable agreement between the employer and employee required the applicant to safeguard the proprietary interests and confidential information of the respondent both during his employment and thereafter. A restraint of trade in place for a year served this purpose. It is sensible to read in the word "*not*" into a provision which in all other respects is like the multitude of restraints of trade that have received the attention of our courts. This approach accords with the rule of interpretation *ut regis magis valeat quam pereat* which requires a stipulation to be construed in a sense in which it can have some operation rather than none.

20. Conversely, the interpretation of clause 17.2 which the applicant had advanced – that it created a positive obligation upon him, after termination of his employment to deploy the respondent's proprietary interests and confidential information so as to divert business from the respondent to himself or his own entity – apart from its inherent absurdity, requires a strained and artificial

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[4] *Crazy Splash Swim School (Pty) Ltd v Nortje and others* Case No 20743/2022 13 July 2023

construction of clause 17.2.

21. The applicant's opposing affidavit made repeated reference to the fact that the respondent had drafted the agreement, and called into aid the *contra proferentem* rule, a rule used as a last resort[5] where all other methods of ascertaining the common intention of the parties have failed. Counsel for the applicant was driven to concede that, as the applicant's case is that clause 17.2 is unambiguous,[6] that rule does not apply in this matter. He resorted then to the submission that another court may find that the respondent ought to have taken greater care in preparing the agreement.[7] The necessary implication of this submission is that another court would interpret the agreement against the respondent and in favour of the respondent. For the reasons set out in the judgment and above, I am not persuaded that there is a reasonable prospect of such an interpretation being made. In any event the 'failure to take care' argument is, in effect the '*contra proferentem*' argument in another guise.[8] The binary nature of the respective interpretations advanced by the applicant and the respondent respectively precludes the ambiguity necessary to trigger the use of the '*contra proferentem*' rule. The parties' antithetical interpretations are merely contradictory, but are not ambiguous.

22. Neither the applicant (in his opposing affidavit) nor his counsel (in argument) was able to advance any cogent reason why another court would reason differently to the judgment on the meaning of clause 17.2 of the agreement.

23. Leave to appeal on the first ground is refused.

<u>The second ground of appeal: Rectification of the agreement not permissible</u>

24. The applicant had insisted in his answering affidavit that there was no mistake in the drafting of the agreement, and that the respondent would not be entitled

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5 *Cairns (Pty) Ltd v Playdon & Co, Ltd* 1948 (3) SA 99 (A) at 123

6 cf *Cairns*, supra, at 122 to 123

7 In the notice of application for leave to appeal, this argument is found under the rectification ground at paragraphs 2.7.1 to 2.7.6.

8 *Ibid*

to rectification of the agreement, if sought. In its replying affidavit, the respondent did seek rectification of clause 17.2.

25. Once again, the applicant's case in the leave to appeal application diverged from his case at first instance. The argument was advanced that there was a mistake (in clause 17.2), that is was a unilateral one by the drafter of the agreement (the respondent) and the applicant merely signed it, 'snatching at the bargain'. First, as set out above, this does not accord with the evidence in the applicant's answering affidavit. Second, even if this were to be accepted as true (which it cannot in the face of the applicant's own evidence), there is authority that rectification will be granted in cases of unilateral conduct induced by *dolus* in the sense of unconscionable conduct.[9] This covers the party who, although not responsible for the fact that the document does not correctly record the agreement, knows that it does not and stands silently by while the mistaken party signs in the belief that it does.[10]

26. The judgment in *Kidrogen RF (Pty) Ltd v Nordien and others 2023 JDR 0260 (WCC)*,[11] which permitted rectification of a lease agreement even though it was not applied for in the founding papers, was applied in the judgment.[12] During argument of the leave to appeal application the Court directed counsel's attention to the fact that the full bench's decision in *Kidrogen* has been the subject of an application for leave to appeal to the SCA, where it was argued simultaneously with the appeal, and the SCA's judgment is presently awaited. On behalf of the applicant, Mr Le Roux agreed that until the SCA overturned *Kidrogen*, this Court is bound to follow it, unless (so I understood him to submit) I was persuaded that another Court would find differently to the full bench in *Kidrogen*, or that another Court would find that this matter is distinguishable in the respects relied upon in my judgment.

27. It would be impertinent for me, presiding as a single judge, to express a view on

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9 GB Bradfield *Christie's Law of Contract in South Africa*, 7 ed at 375, and the authorities cited at footnote 74.

10 *Ibid*

11 2023 JDR 0260 (WCC)

12 At paragraphs 60 to 62

the prospects of another court finding differently to the three judges of the WCHC full bench (who were in agreement). That is a matter presently for decision by the SCA, and I cannot second guess the SCA's pending decision. I am bound to determine this application for leave to appeal on the basis that *Kidrogen* is binding authority.

28. As for points of distinction between this matter and *Kidrogen*, Mr Le Roux was able to direct me to only one: *Kidrogen* concerned an agreement of lease, which required rectification in relation to the identity of the landlord, while the present matter concerns an agreement of employment in which rectification is sought to the restraint of trade clause. I regard there to be no difference in principle such as to preclude rectification being sought in reply, and granted. In *Kidrogen*, Cloete J articulated it thus: "*Put differently, until delivery of the answering affidavit the first respondent neither seriously nor unambiguously took issue with the written recordal of the lease by contending that it did not in fact reflect the parties' true intention*". Equally in this matter, until receiving advice from his attorney and counsel on how to settle his answering affidavit, the applicant made no mention of the omission of the word "*not*" from clause 17.2 of the employment agreement. Indeed, the respondent's attorneys had addressed a letter to the applicant on 27 May 2024 advising that preparation had commenced for an urgent application "*to enforce the restraint of trade ...",* yet the answer by the applicant's attorneys on 28 May 2024 not only provided undertakings to the respondent but notably did not refute that the applicant was under a restraint of trade as referred to by the respondent's attorneys.

29. Taking this evidence into account, I am not persuaded that there are reasonable prospects of another court holding that *Kidrogen* is distinguishable from the facts and principles in this case, or that rectification was precluded by a dispute of fact regarding the parties' common intention to include a restraint of trade provision in their agreement, or that the respondent failed to prove the common intention of the parties (this was proven by the applicant's own evidence as well as that of the respondent), or that the applicant failed to make out a case for rectification.

30. Leave to appeal on the second ground is refused.

The third ground of appeal: scale of costs order

31. The applicant's third ground of appeal concerns the punitive costs order and whether the judgment correctly incorporated into an attorney and client costs order the scales A, B and C provided for in Uniform Rule 69(7), bearing in mind that the scales appear to apply only to party and party costs awards.[13] Counsel for the applicant, Mr Le Roux, conceded that a matter of costs alone cannot ordinarily be the subject of an appeal. He submitted that if leave to appeal was granted on other grounds, the appeal would afford an opportunity for clarity on whether the scales apply only to party and party costs orders.

32. I have already found that the applicant does not enjoy reasonable prospects of success on his main grounds of appeal (the restraint of trade and the rectification). Attaining certainty on the applicability of scales A, B or C in the costs order is not a compelling reason to grant leave to appeal.

33. There is a reasonable prospect that another court will hold that the scales for counsel's fees (A, B and C) provided in Uniform Rule 69(7) do not apply to an attorney and client costs order, even where, as in the present case, the applicant proposed scale B to be appropriate for an award of party and party costs in his favour. However, counsel conceded that the effect of applying scale B in the costs order caps the fees of the respondent's counsel, to the benefit of the applicant. To my mind, even if an appeal court were to disturb that aspect of the costs order, no advantage would inure to the applicant.

34. Regarding the costs order being granted on a scale as between attorney and client, as recently articulated by Movskovitz AJ,[14] a high threshold must be met before a costs order alone will be permitted to form the subject of an appeal. An appeal against it may entail adjudication of the merits through the back-door,

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[13] *Mashavha v Enaex Africa (Pty) Ltd* (2022/18404) [2024] ZAGPJHC 387 (22 April 2024) at paragraphs [5] and [7]

[14] *YG Property Investments (Pty) Ltd v Ekurhuleni Metropolitan Municipality and another (Leave to Appeal)* 2024 JDR 3425 (GJ)

which would potentially be an enormous waste of judicial resources. The costs order entails no issue of great legal principle. In any event the costs order is an exercise of a wide discretion, to be exercised judicially, with which appeal courts will seldom interfere.[15] The Constitutional Court, in considering the discretion of the High Court on the issue of costs,[16] has stated that:

> *"A cautious approach is, therefore, required. A court of appeal may have a different view on whether the costs award was just and equitable. However, it should be careful not to substitute its own view for that of the High Court because it may, in certain circumstances be inappropriate to interfere with the High Court's exercise of discretion*."

35. Other than to submit that the application ought to have been dismissed with party and party costs (scale B) in its favour, the applicant has not laid any basis for any interference in this case. I am not persuaded that there are reasonable prospects that another court would interfere in the award of costs on the scale as between attorney and client to the successful respondent. Leave to appeal on the third ground is refused.

The section 18 application

36. To render the suspended judgment operative, s18(1) of the SC Act[17] requires

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[15] In *Kruger Bros & Wasserman v Ruskin* 1918 AD 63 at [69]:
"The rule of our law is that all costs – unless expressly otherwise enacted – are in the discretion of the Judge. His discretion must be judicially exercised, but it cannot be challenged, taken alone and apart from the main order, without his permission."

[16] *Hotz and Others v University of Cape Town* 2018 (1) SA 369 (CC) at para 2

[17] Those sections provide:
"***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."

exceptional circumstances to be established. The SCA recently held that consideration of the three requirements in section 18(3) is not a hermetically sealed enquiry and could hardly be approached in a compartmentalised fashion, explaining[18] that:

> "... *the existence of 'exceptional circumstances' is a necessary prerequisite for the exercise of the court's discretion under s 18. If the circumstances are not truly exceptional, that is the end of the matter. The application must fail and falls to be dismissed. If, however, exceptional circumstances are found to be present, it would not follow, without more, that the application must succeed*."
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> ...
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> *... the presence or absence of irreparable harm, as the case may be, can hardly be entirely divorced from the exceptional circumstances enquiry.*
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> *...*
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> *The overarching enquiry is whether or not exceptional circumstances subsist. To that end, the presence or absence of irreparable harm, as the case may be, may well be subsumed under the overarching exceptional circumstances enquiry. As long as a court is alive to the duty cast upon it by the legislature to enquire into, and satisfy itself in respect of, exceptional circumstances, as also irreparable harm, it does not have to do so in a formulaic or hierarchical fashion.*"

37. The respondent motivated the need for urgent relief with reference to the applicant's apparent determination to continue diverting the respondent's customers to his own business. This appeared from correspondence attached to the founding affidavit. Two court days after delivery of the judgment, the applicant's attorneys addressed a letter to the respondent's attorneys advising that a consultation had been arranged on 25 September 2024 with the applicant and counsel to consider the prospects of successfully launching an application for leave to appeal. The respondent was requested to indulge the applicant by

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Sub-section 18(2) of the SC Act does not apply in this matter as the order sought to be appealed has final effect.

[18] *Tyte Security Services CC v Western Cape Provincial Government and Others* 2024 (6) SA 175 (SCA) at paragraphs [10], [11], [13] and [14]

not enforcing the judgment during the fifteen day period permitted to file the application. On 23 September 2024, prior to that scheduled consultation, the applicant addressed an email marked with high importance to one of the respondent's clients, Coastal Air Conditioning ("*Coastal*") who had been listed in the judgment as a client whose custom the applicant was restrained from soliciting or obtaining up to 2 May 2025. The applicant reported that within the next few days he and his legal representatives would be preparing an application for leave to appeal the judgment, and quoted his attorneys' aforesaid letter requesting that the judgment not be enforced in the fifteen day period. He concluded by saying "*Inteendeel het my advocaat en prokureur my aanbeveel om voort te gaan met my werk totdat die appel en saak heeltemaal afgehandel is. Weerens jammer vir die ongerief dat jy en my ander kliente daar onder moet lei"*.

38. Coastal forwarded the email to the respondent on 2 October 2024.

39. The applicant did not use the opportunity in his opposing affidavit to explain the reason for his email to Coastal and the meaning of his quoted words. It is unclear whether he was asserting an entitlement to continue trading with Coastal, or apologising for having to stop doing so. Either way, it is clear that he had by then, at the very least, attempted to solicit Coastal's business, in breach of the order. His expression of regret for inconvenience to his other clients makes sense only if they were also clients listed in the order as the respondent's clients whose custom the applicant was restrained from soliciting or obtaining – no apology or regret is required in regard to customers <u>not</u> listed in the order, whose custom the applicant is free to secure. His email accordingly provides compelling evidence, without any countervailing evidence from the applicant, that he has been actively soliciting and possibly also obtaining custom from the respondent's clients.

40. The respondent filed its s18 application on 15 October 2024, the day after the leave to appeal application was delivered. Although the respondent could have filed the application beforehand because by 2 October 2024 it had become aware of the applicant's intention to proceed with a leave to appeal

application,[19] the respondent cannot be criticised for failing to act expeditiously. In any event, there was no challenge to the contentions regarding the urgency of the s18 application, and it was accordingly entertained as such.

41. Of significance to the enquiry into the respective potential of irreparable harm to each of the parties respectively is that the applicant does not challenge the finding in the judgment that the respondent has proprietary interests susceptible of protection, comprised of trade connections and confidential information.

42. Similarly, the applicant does not dispute that he had encroached upon the client relations of the respondent to promote the commercial interests of his own entity by utilising the respondent's trade connections, and he had wilfully diverted the resources of the respondent for his own benefit and for the benefit of his entity. He had done so even while employed by the respondent (which he concedes was a breach of clause 17.1 of the employment agreement). I have considered above the more recent undisputed evidence of his endeavours to obtain the custom of Coastal and other clients of the respondent. The applicant endeavoured to justify his attempts to appropriate the respondent's clients by asserting no less than four times in his opposing affidavit that he attracts their custom because they are dissatisfied with the work rendered by the respondent. This hearsay, as well as being devoid of any details as to which clients he referred, was not confirmed by any allegedly dissatisfied clients. It was also not proven in the main application – there also the applicant's contentions were hollow and unsubstantiated.

43. The respondent contended that the nature of restraint proceedings, directed at the immediate protection of a protectable interest, in itself contemplates the 'exceptional circumstances' applicable to a s18 application.

44. Referring to the delays inherent in the prosecution of an appeal process, which may render any ultimate decision of only academic or limited value, the respondent further contended that it stands to suffer irreparable harm if the

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[19] *Fidelity Security Services (Pty) Ltd v Mogale City Local Municipality and Others* 2017 (4) SA 207 (GJ) at paragraphs [20] and [25]

judgment is not put into effect pending any possible appeal or further applications or petitions for leave to appeal and ensuing appeals. The restraint period ends within less than six months on 2 May 2025, so with each passing day that the applicant is able to continue to solicit (and obtain custom from) the respondent's clients, the efficacy of any relief which the respondent may obtain if and when the applicant's appeal(s) fail, is diluted. Indeed, even if dealt with on an expedited basis the duration of the appeal process may render useless any relief that the respondent receives if successful in opposing the appeal(s). As things stand, the respondent has been denied the full benefit of the restraint of trade, and of the order granted on 19 September 2024, for a period of over six months.

45. The respondent's submissions have merit, and are supported by the reasoning of the Labour Court in *L'Oreal South Africa (Pty) Ltd v Kilpatrick and Another*[20] in finding that the suspension of an order enforcing a restraint of trade covenant would entail the steady erosion of the former employer's protectable interests, which is irreparable harm[21] to the employer.

46. The respondent has discharged the *onus* upon it to show that it will suffer irreparable harm should the order not be put into operation.

47. Regarding the third enquiry, i.e., the potential of irreparable harm to the party opposing a s18 application, the SCA has held that "*... although s 18(3) casts the onus (which does not shift) upon an applicant, a respondent may well attract something in the nature of an evidentiary burden. This would be especially so where the facts relevant to the third are peculiarly within the knowledge of the respondent. In that event it will perhaps fall to the respondent to raise those facts in an answering affidavit to the s 18 application, which may invite a response from the applicant by way of a replying affidavit*."

48. The applicant, who is now self-employed, did not take issue either in his opposing affidavit or in argument with the findings in the judgment:

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20 2015 (6) SA 256 (LC)
21 *Ibid* at para [56]

48.1. that the restraint of trade does not preclude him from using his skills, knowledge and experience in a similar industry to that in which the respondent conducts its business, or even from attaining employment as a project manager in a different industry, and

48.2. that limited as proposed by the respondent, the restraint of trade is reasonable.

49. In addressing the issue of irreparable harm, the applicant once again resorted to generalised and generic statements devoid of any substantiating facts. He asserted that if the order was not suspended (and the restraint of trade therefore operative) he would be unable to 'put bread on [his] table'. This statement is meaningless without any particulars of his earnings and the sources thereof, none of which were provided.

50. In neither of his affidavits does the applicant provide any details of his current customers, his attempts to procure business from customers other than those of the respondent, and whether he has attempted to apply his project management experience in fields other than that in which the applicant operates.

51. Even if it is accepted that the applicant will suffer a measure of financial hardship if the order was rendered operative for the remaining months of the restraint period, on the limited evidence, this does not amount to irreparable harm. The applicant did not discharge its evidentiary burden.

52. The applicant contends that it is impermissible for the respondent to seek an order that the judgment is not suspended even if the leave to appeal application is refused thereby "*depriving* [him] *of the right to suspension of the order, pending the finalisation of the whole process"*. No authority was advanced for this proposition. Equally, the respondent did not cite any authority in support of the relief to render the order operative for the period beyond the present application for leave to appeal. However, such extended execution orders have

been granted.[22] Bearing in mind the high threshold to attain section 18 relief, such extended execution orders are a pragmatic solution to the potential problem of multiple s18 applications burdening the court rolls as the aggrieved party wishing to appeal the order and to retain its suspension, initiates and prosecutes the next phase of appeal or applying for leave to appeal, as the case may be. Provided that the aggrieved party has evinced its intention to take further steps in the appeal process, an order that provides for operation of the order for a more extended period facilitates the efficient administration of justice and avoids the potential injustices meticulously explained by Kathree-Setloane J in the *Fidelity Services* judgment.[23] The aggrieved party enjoys an automatic right of urgent appeal should a s18 application be granted[24] which provides the opportunity to obtain protection against any resulting injustice from an extended execution order, which has the effect of automatically suspending the execution order pending the outcome of the appeal, and which cannot be thwarted by the range of an execution order extending to an appeal against the execution order itself.[25] It is therefore unsurprising and appropriate that our courts have not flinched from granting execution orders that extend beyond the current step in the appeal process.

53. I am satisfied that the respondent has met the requirements for the relief sought in the s18 application.

Costs

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[22] See *Tyte Security Services CC v Western Cape Provincial Government and Others,* supra at para [7] (the SCA upholding the execution order at para [29]);
Fidelity Security Services (Pty) Ltd v Mogale City Local Municipality and Others, supra at para [35]

[23] *Ibid* at paragraphs [17] to [20]

[24] This right is provided in section 18(4) of the SC Act, which provides:
"(4)(a) 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.
*(b) **'Next highest court'**, for purposes of paragraph (a) (ii), means-*
(i) a full court of that Division, if the appeal is against a decision of a single judge of the Division; or
(ii) the Supreme Court of Appeal, if the appeal is against a decision of two judges or the full court of the Division."

[25] *Knoop NO and Another v Gupta (Execution)* 2021 (3) SA 135 (SCA) at para [29]

54. Mr Aggenbach submitted that for similar reasons to those set out in the judgment, an award of attorney and client costs should be made against the applicant if leave to appeal were refused. He submitted that such an order was justified because the leave to appeal application is a calculated stratagem to wear away the duration of the restraint while the appeal processes were being followed, which he described as an abuse of process.

55. The applicant gave notice to the respondent a week after the judgment was granted that it would possibly apply for leave to appeal after conferring with his legal representatives, but he only lodged the appeal almost two weeks later. It may well be fair comment that the applicant is deliberately 'running down the clock' on the period of the restraint which ends on 2 May 2025 so that he can enjoy the benefit of the judgment being suspended. However, it does not necessarily follow that the appeal is an abuse of process. The applicant has acted on the advice of his legal representatives and has focussed his application for leave on limited grounds of appeal. He exercised a procedural right to which he is entitled. Punitive costs are not justified. Similar considerations apply to his opposition to the s18 application.

56. The following order is granted:

56.1. The application for leave to appeal is dismissed with party and party costs to be paid by Jacobus Johannes Pienaar Steenkamp, including the costs of counsel on scale B of Uniform Rule 69(7).

56.2. The operation and execution of the orders in the judgment granted under case number 17997/2024 on 19 September 2024 are to be implemented with immediate effect pending any further application for leave to appeal to the Supreme Court of Appeal ("*SCA*") or to the President of the SCA and pending any appeal process by Jacobus Johannes Pienaar Steenkamp, or until another court otherwise directs.

56.3. The applicant, Jacobus Johannes Pienaar Steenkamp, shall pay the respondent's party and party costs in the section 18 application,

including the costs of counsel on scale B of Uniform Rule 69(7).

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GORDON-TURNER AJ

Appearances:

Counsel for the Applicant:	Adv J H F Le Roux
Instructed by:	Mr Pieter Strydom P J S Inc. Attorneys
Counsel for the First Respondent:	Adv Mornè Aggenbach
Instructed by:	Mr James Galloway C & A Friedlander Attorneys