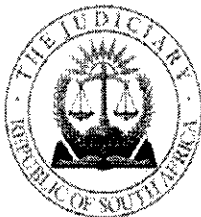


IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 3579/2016

Date: 01/04/2016

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~YES~~/NO
- (2) OF INTEREST TO OTHERS JUDGES: YES/NO
- (3) REVISED

1/4/2016 *[Signature]*
DATE SIGNATURE

In the matter between:

ROLFES PWM (PTY) LTD

APPLICANT

And

ROBERT WILLIAM GOLDING

RESPONDENT

JUDGMENT (APPLICATION FOR LEAVE TO APPEAL)

PRETORIUS J.

APPLICATION FOR LEAVE TO APPEAL

- (1) The court granted a restraining order against the respondent on 12 February 2016. The respondent now applies for leave to appeal the order and the judgment. The parties are cited as they were in the main application for purposes of convenience.
- (2) I have considered all the arguments by counsel, both written and oral, I find that there is a possibility that another court may come to a different conclusion on the facts and leave to appeal should be granted. The parties, in these exceptional circumstances, are entitled to approach the registrar to have the matter heard on an urgent basis by the full bench of this division.

APPLICATION BY APPLICANT

- (3) The applicant is applying to this court that paragraphs 2 and 3 of the original order must be immediately implemented should leave to appeal be granted.
- (4) The applicant is seeking relief in terms of section 18 of the **Superior Court Act, 10 of 2013**. This application by the applicant is brought to restrain the respondent to contact approximately 150 of the applicant's customers. It is common cause that the respondent is currently employed by G-Chem, where both his father and uncle are working. G-Chem is in direct competition with the applicant.

- (5) The original application was launched as the respondent had approached one of the applicant's clients and did a presentation, in the same field as he had worked for the applicant namely to FNB, Fairlands. This lead to the urgent application.
- (6) The applicant argues that exceptional circumstances exist in the present application as it takes between 18 to 24 months for a full bench appeal to be heard. Therefore, according to the applicant, the urgent order of 12 February 2016 will be of no value as the restraint of trade will have expired by the time the appeal is heard. The applicant further submits that it would suffer irreparable harm should the court grant leave to appeal and not grant the relief sought pending the outcome of the appeal.
- (7) The further argument is that the respondent will not suffer irreparable harm should the order be implemented, as, if the respondent is successful on appeal, he can sue for loss of earnings.
- (8) The respondent avers that he will suffer irreparable harm as, according to him he was only employed in Gauteng Central and therefore the order of the whole of Gauteng is too wide.
- (9) The respondent submits that if the application is granted he will have to relocate to the Cape Province, which will cause him irreparable harm, as he will only be able to return to Gauteng in November 2017, after the restraint has lapsed.
- (10) The respondent has made a tender, which was confirmed in court that

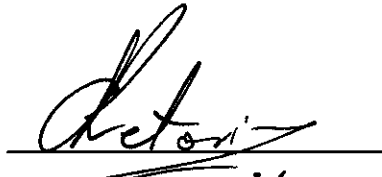
he will not approach any of the approximately 150 customers of the applicant whose identity he will have been notified of by the applicant in writing within the geographical area of the jurisdiction of the High Court of Gauteng Local Division, Johannesburg.

- (11) The applicant did not accept the tender and informed the respondent in a letter, dated 1 March 2016, that the respondent *"is acutely aware of the prescribed customers"*.
- (12) In the case of **Incubeta Holdings (Pty) Ltd and Another v Ellis and Another 2014(3) SA 189 (GJ)**, Sutherland J dealt extensively with section 18 and found in paragraph 22:

*"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 am not of the view that one can be sure that any true novelty has been invented by s 18 by the use of the phrase. Although that phrase may not have been employed in the judgments, conceptually the practice as exemplified by the text of rule 49(11), makes the notion of the putting into operation an order in the face of an appeal process a matter which requires particular ad hoc sanction from a court. It is expressly recognised, therefore, as a deviation from the norm, ie an outcome warranted only 'exceptionally'."* (Court's emphasis)

- (13) I agree with Sutherland J's finding that procedural delays, although not due to the fault of any of the litigants, is sufficient to create exceptional circumstances. Therefor the applicant has met the first requirement.
- (14) The respondent will be able to sue for damages, whilst the applicant's damages if the restraint order is suspended pending the outcome of an appeal will be irreparable. The respondent's damages will be quantifiable.
- (15) Under these circumstances, if I allow the tender to be implemented, the finding in the original judgment will be of no value to the applicant.
- (16) The applicant has complied with the section 18 test on both legs and therefore the application should succeed.
- (17) Accordingly, the order is:
1. Leave to appeal is granted to the Full Bench of the Gauteng Division.
 2. Paragraphs 2 and 3 of the order under the aforesaid case number – dated 12 February 2016 – are immediately implemented notwithstanding leave to appeal such order having been granted.
 3. Costs of the leave to appeal will be costs in the appeal.
 4. Costs of the application for the immediate implementation of paragraphs 2 and 3 of the order of 12 February 2016 must be paid by the respondent.
 5. The parties are entitled to seek an urgent allocation for the hearing

of the appeal from the registrar.



Judge C Pretorius

Case number : 3579/2016

Matter heard on : 30 March 2016

For the Applicant : Adv. FJ Erasmus

Instructed by : VDT Incorporated

For the Respondent : Adv. J Blou SC

Instructed by : Cyril Ziman & Associates

Date of Judgment : 1 April 2016