IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

23/9/16

CASE NUMBER: 50910/2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
23/9/2016 DATE SIGNATURE

MPU COPIERS (EDMS) BPK	**APPLICANT**
and	
CANON BUSINESS CENTRE (NELSPRUIT) OPERATED BY CBC BUSINESS CENTRE GAUTENG T/A CANON LOWVELD	**FIRST RESPONDENT**
RSA TECHNICAL SERVICES (PTY) LTD	**SECOND RESPONDENT**
IP SOLUTIONS (PTY) LTD	**THIRD RESPONDENT**
WARREN PATRICK MCLINTOCK	**FOURTH RESPONDENT**
STEPHANUS FREDERIK STEYN	**FIFTH RESPONDENT**

JUDGMENT

TLHAPI J

[1] This is an urgent application in terms of section 18 of the Superior Courts Act 10 of 2013 which seeks to enforce a Court Order of 22 July 2016. The Order interdicted the fifth respondent from seeking or retaining employment with the first to the fourth respondent for a period of 12 months from 31 March 2016, and within a 100 km from any office of the applicant pending the finalization of the respondents leave to appeal such Order. The offices

of the applicant were situated in Mpumalanga, Limpopo and Gauteng. This order gave effect to a restraint of trade agreement annexed as "F" to the main application.

[2] Although the merits of the main application were not for consideration in this application which relates to the fifth respondent only (2 of the order of 22 July 2016), it is important to mention that all the respondents in the main application applied for leave to appeal the Order of 22 July 2016. The said Order was in the form of a *rule nisi* pending the finalization of an action to be instituted by the applicant and, apart from the restraint placed on the fifth respondent it also interdicted the other respondents' as summarized by Mr William's for the fifth respondent in his Heads of Argument in this application, where all respondents in the main application in terms of prayers 2, 3 and 4 of the amended notice of motion were:

> "*11.1 ordered to hand over to the applicant, all copies of applicant's client database, financial statements, accounting records, personnel records, sales records of equipment, and records of applicant's pending service contracts, that are in the respondents' possession*
>
> *11.2 interdicted from using, spreading, or disclosing to any other person, any of the information listed in subparagraph 11.1 supra;*
>
> *11.3 interdicted from approaching applicant's existing clients, and from interfering with the contractual relationship between applicant and its clients."*

[3] This application was preceded by communication which exchanged hands between the applicant's and respondents' attorneys:

29 July 2016

> "*we are in the process of preparing summons.....*
>
> *Our instructions are that your clients are indeed in possession of our client's*

confidential information and therefore we enquire whether your clients would be prepared to acknowledge same without prejudice, to return our client's information and to undertake not to use such information in order to avoid further legal action"

01 August 2016 after application for leave to appeal was launched;

"We urgently enquire whether your client is prepared to give an undertaking that it will abide the existing Order in all respects pending the outcome of the Appeal. In particular we receive your unconditional undertaking that the Firth Respondent Mr Steyn will refrain from entering the employment of <u>any of the other Respondents pending the outcome of the appeal."</u>

In response to the above letters the respondents informed the applicant that the respondents' could not abide the Order as given for reasons outlined in the leave to appeal and due to the fact that they were not in possession of any confidential information of the applicant.

[4] The applicant averred that it was as a result of the above response on the part of the fifth respondent that this application was launched. Mr F B Willemse the deponent to the founding affidavit was the managing director and only shareholder of the applicant who in paragraphs 15, 16 and 17 sets out other reasons for the launch of this application. He averred that the applicant would suffer irreparable harm if the fifth respondent was allowed to use its confidential information relating to its client database. The information was unlawfully obtained and would result in the undermining of its client base and reputation. The Fifth Respondent had been the financial and general manager at the Nelspruit office and had direct business dealings with one of the applicant's largest clients. He also had insight into the applicant's confidential information in respect of its marketing strategies, financial models of all its outlets in Mpumalanga, Limpopo and Gauteng. Furthermore, the applicant

contended that the respondents' could, despite the existing *rule nisi* and with the help of the fifth respondent 'change the pricing methods' in order to create the impression to its client base that the applicant was more expensive. The applicant does not dispute the fact that its competitors and itself have other means of generating information on opposition customer base, through the customers themselves in an effort to negotiate better contracts and through a database generated by sales representatives in the business.

[5] The fifth respondent averred that its appeal was based on grounds that there was a dispute concerning the contract governing the relationship between the applicant and himself and that the Court Order exceeded the geographical area of restraint that was enforced. The information sought to be protected was not protectable and he denied having disclosed such information or of having been in possession thereof. The fifth respondent contended that the letter of the 29 July 2016 was not relevant to this application.

[6] The fifth respondent contended that the interim relief was final in effect in that the envisaged action which was still to be instituted would take time before it was finalized which was well beyond April 2017 and that at that time the subject of the relief sought regarding his restraint would be academic. He faced financial ruin because the restraint made it impossible for him to earn an income. He earned a nett salary of R42, 000.00 as compared with the R40, 000.00 earned with the Applicant and between him and his wife they earned an amount of R72 000.00. Their joint monthly expenses amounted to R60 000.00 including mortgage bond motor vehicle loans, medical aid, life insurance and expenses relating to their baby. The applicant had failed to tender security in seeking to enforce the order pending the outcome of the appeal.

[7] Section 18 of the Act provides:

"*Suspension of decision pending appeal*"

(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and the execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending 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 judgement, 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.

[8] The three jurisdictional requirements to be proved are provided for in section 18(1) and 18(3) and they are (i) exceptional circumstances; and that the party who applies to court must prove (ii) irreparable harm (iii) on a balance of probabilities. What constitutes exceptional circumstances cannot be imported at random from existing authorities. In **Incubeta Holdings (Pty) Ltd and Another v Ellis and Another** 2014 (3) SA 189 (GJ) from paragraphs 18 – 20 it was stated that the conclusion that exceptional circumstances exist was not "a product of a discretion, but a finding of fact' and that the meaning, and enquiry into the existence of such circumstances should be found within the specific provision of that specific statute and that it was important to determine the 'function it performs in that specific

context'. At paragraph 21 of **Incubeta** *supra* the following is stated:

> *"The context relevant to section 18 of SCRT is the set of considerations pertinent to a threshold test to deviate from a default position; ie the appeal stays the operation and execution of the order. The realm is that of procedural laws whose policy objectives are to prevent avoidable harm to litigants. The primary rationale for the default position is that finality must wait the last court's decision, in case the last court decides differently, the reasonable prospect of such outcome, being an essential ingredient of the decision to grant leave in the first place. Where the pending happening is the application for leave itself, the potential outcome in that proceeding, although conceptually distinct from the position after leave is granted, ought for policy reasons, to rest on the same footing."*

[9] The Court is to establish whether there are exceptional circumstances that justify a departure from the norm that an application for leave to appeal would have the effect of suspending the *rule nisi.* Exceptional circumstances would exist if the applicant would suffer irreparable harm if the relief sought is not granted. The test is whether the applicant for leave to appeal (the fifth respondent) would suffer irreparable harm, if answered in the affirmative the order must remain stayed '*even if the stay will cause the victor (the applicant) irreparable harm too. In addition, if the loser will not suffer irreparable harm, the victor must nevertheless show irreparable harm to itself*' ; **Incubeta** *supra,* paragraph 24.

[10] The applicant contention is that if the relief sought is not granted he would suffer irreparable harm due to the potential that exists it would lose clients and suffer damages in that the fifth respondent would share information with its competitors in the same business being the other respondents. The concession by Counsel for the applicant that the *rule nisi* exceeded the geographical area of the restraint dilutes to a great extent the grounds upon

which the applicant maintains it will suffer irreparable harm. It was submitted by council for the fifth respondent that there was an inherent risk in this competitive market and in the business that confidential information could be obtained by means other than the information being sourced from a former employee such as the fifth respondent. The fact that in the business competitor information can be obtained and used to determine better pricing by means other than the fifth respondent's employment by a competitor is indicative of the fact that the fifth respondent will not 'undermine applicant's reputation' or cause it to suffer damages if the *rule nisi* is stayed..

[11] Counsel for the applicant argued that in view of the concession made the *rule nisi* could be applied only to the Nelspruit Office. I am not in agreement with this submission because it is not for this Court to amend the application of the rule nisi. The merits in the main application were fully ventilated and the rule is the subject of an application for leave to appeal. It was evident that the *rule nisi* was granted on the assumption that the restraint was applicable to Mpumalanga, Limpopo and Gauteng and within a 100 km of such offices. This application also is based on grounds that the applicant would suffer irreparable harm in the areas already mentioned in that the fifth respondent would share confidential information with competitors. The relaxation of the rule to be applicable in Mpumalanga alone brings to futility the reason for this application. Furthermore, by making this concession the applicant would still have to show that it will suffer irreparable harm. As I see, it no case in this regard has been made out on the papers.

[12] As I see it this concession alone establishes that it is the fifth respondent who will suffer irreparable harm if the relief sought is granted. The personal circumstances of the fifth respondent show that up to now the restraint has restricted the fifth respondent from gainful employment not only in his hometown Nelspruit but in the geographical areas exceeding the restraint agreement. It is unlikely that the appeal would be heard before 31 March 2017. I am not inclined to deal with whether there are prospects in the appeal. As already indicated the

concession alone greatly dilutes that which the applicant wished to protect and I find that the fifth respondent would be prejudiced by the grant of the relief sought. The application must therefore fail.

[13] In the result the following order is given:

1. The application is dismissed with costs.

TLHAPI VV

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	**23 AUGUST 2016**
JUDGMENT RESERVED ON	:	**23 AUGUST 2016**
ATTORNEYS FOR THE APPLICANTS	:	**CHROST SMITH**
		PROKUREURS INGELYF
ATTORNEYS FOR THE RESPONDENTS	:	**EAMON DAVID QUINN ATT**