IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J67/23

In the matter between:

GRANT MONAGHAN AND ASSOCIATES INCORPORATED **Applicant**

and

YOVANKA TORRENTE **First Respondent**

YOVANKA TORRENTE INCORPORATED **Second Respondent**

Heard: **15 March 2023**

Delivered: **17 March 2023**

REASONS FOR ORDER

PHEHANE, J

[1] On 15 March 2023, this application in terms of the provisions of section 18 of the Superior Courts Act[1] (SCA) was heard on an urgent basis. On the same date, I issued the following order:

> '1. The application is heard as urgent in terms of rule 8.
> 2. The application in terms of section 18 of the Superior Courts Act 10 of 2013 (SCA) is granted.
> 3. Paragraphs 2 and 3 of the order by Matyolo AJ under case number J67/23 dated 10 February 2023 is operative and binding pending the conclusion of the appeal proceedings.
> 4. The application to strike out by the first and second applicants (the first and second respondents in the section 18 SCA application) is dismissed.
> 5. There is no order as to costs.'

[2] The reasons for the order follow.

[3] On 10 February 2023, Matyolo AJ issued the following restraint of trade order as against the first and second respondents (Matylolo AJ order):

> '1. The application is heard as one of urgency.
> 2. For a period of a year from 10 February 2023 to 9 of February 2024, the first and second respondents are interdicted and restrained from conducting business closer than the radius of 27km from the applicant's business premises and from employing any employees of the applicant.
> 3. The first and second respondents are interdicted and restrained from directly or indirectly inducing; soliciting and enticing away any employees, agents or any persons that are customers or suppliers of the applicant.
> 4. There is no order as to costs.'

[4] The applicant is a private company registered in the medical field involving orthotics, prosthetics and podiatry practices. The applicant's head office is situated in Sandton and its operational practices are located in Parkwood and Mayfair. The business of the applicant involves manufacturing orthotics, prosthetics and podiatry services for patients referred to it by medical doctors. The applicant attends consultations with clients in order to secure the correct

[1] Act 10 of 2013.

device and to ensure that the device fits correctly. This may necessitate the manufacturing of the device.

[5] The first respondent is the erstwhile employee of the applicant. She was employed as an Orthotist and Prosthetist and was subject to restraint and confidentiality undertakings upon the termination of her employment contract. The second respondent is a private company under the name and style of the first respondent. The first respondent is the sole director of the second respondent. The second respondent is a direct competitor of the applicant, practising within the full scope of the orthotics and prosthetics field. This is common cause. Although no relief was sought against the second respondent in the restraint of trade proceedings, the applicant contends, in these current proceedings, that the first and second respondent are one and the same.

[6] On 3 March 2023, the first and second respondents launched an application for leave to appeal against a part of the Matyolo AJ order. They appeal against the second and third order.[2]

[7] Thereafter, on 7 March 2023, the applicant launched this present application in terms of the provisions of section 18 of the SCA, which 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

[2] See: application for leave to appeal at pp 123 and 124.

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.' (Emphasis added)

[8] It is now established that in order to succeed with an application to execute a court order in terms of section 18 of the SCA, the applicant must satisfy three requirements. In *Knoop NO and Another v Gupta (Execution),*[3] the Supreme Court of Appeal (SCA) explained these requirements as follows: firstly, the applicant must demonstrate on the facts, that there are exceptional circumstances for the grant of an order executing the court order that is the subject of appeal proceedings; secondly, the applicant must demonstrate that s/he will suffer irreparable harm if the court order is not executed; and thirdly, the applicant must demonstrate and the respondent/s will not suffer irreparable harm if the court order is executed.

[3] 2021 (3) SA 135 (SCA) at para [45].

[9] The SCA proceeded to state as follows regarding the term "exceptional circumstances":

> 'In the context of s 18(3) the exceptional circumstances must be something that is sufficiently out of the ordinary and of an unusual nature to warrant a departure from the ordinary rule that the effect of an application for leave to appeal or an appeal is to suspend the operation of the judgment appealed from. It is a deviation from the norm. Exceptional circumstances must arise from the facts and circumstances of the particular case.'[4]

[10] The prospects of success on appeal is a relevant factor in determining whether the execution of a court order pending appeal should be granted.[5] In the recent decision of the Labour Appeal Court (LAC) in *National Education, Health and Allied Workers Union v Minister for the Public Service and Administration and others,*[6] although in the context of strike action, the LAC stated the following regarding the prospects of success on appeal as a factor to be taken into consideration in determining an application in terms of section 18 of the SCA for the grant of exceptional relief:

> 'The Supreme Court of Appeal (SCA) in *University of the Free State v Afriforum and another* approved of the decision in an *Incubeta*, recognising the section 18(3) "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". As to prospects of success, the SCA noted the contrasting views expressed in *Incubeta*, where it was considered that prospects of success play no role at all, and in *Minister of Social Development, Western Cape and others v Justice Alliance of South Africa and another*, in which prospects of success in the appeal were found to remain a relevant factor, and found that a consideration

[4] *Supra* at para [46]. See also*: Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* 2014 (3) SA189 (GJ) at paras [21] - [22].
[5] See: *Minister of Social Development Western Cape and Others v Justice Alliance of South Africa and another* [2016] ZAWCHC 34 (WCC). See also: *University of the Free State v Afriforum and Another* 2018 (3) SA 428 (SCA) at para [15].
[6] Unreported judgment under case no: JA 19/2023 dated 13 March 2023 at para [33]. Footnotes are omitted.

of "prospects of success in the appeal are relevant in deciding whether or not to grant the exceptional relief" of an order under section 18.' (Emphasis added)

[11] In *L'Oreal South Africa (Pty) Ltd v Kilpatrick and another,*[7] this Court stated as follows in consideration of exceptional circumstances in cases involving restraint of trade interdicts:

'[49] In the case of a restraint of trade interdict, it is the immediate protection of the protectable interest of the applicant that is critical to the application even having any purpose. It is all about the elimination of continued risk, which in the case of a protectable interest relating to confidential information can only be achieved by interdicting employment of the individual respondent with the competitor where such respondent is so employed… If an applicant manages to pass the quite substantial hurdle of convincing a judge to exercise the judge's discretion in the applicant's favour, it is in my view untenable that all this effort and the very objective that needs to be achieved is thwarted by the respondent party simply proceeding with an appeal. It is, in my view, the nature of restraint of trade proceedings that in itself must contemplate 'exceptional circumstances'. As the Court said in an *Incubeta Holdings*, which I agree with:

"Do these circumstances giving rise to 'exceptionality' as contemplated? In my view the predicament of being left with no relief, regardless of the outcome of an appeal, constitutes exceptional circumstances which warrant a consideration of putting the order into operation. The forfeiture of substantive relief because of procedural delays, even if not protracted in bad faith by a litigant, ought to be sufficient to cross the threshold of 'exceptional circumstances'."

[50] While appeal proceedings are continuing, and if the original order is suspended, the individual respondent would remain employed with the competitor. Every day this is allowed to perpetuate would systematically erode the protectable interest of the applicant away to nothing.

[7] (2015) 36 ILJ 2617 (LC) at paras [49] – [50].

> Therefore, and in its simplest terms, it is the appeal process itself, and not the appeal outcome, that defeats the restraint, even where the court has found compelling reason to enforce it. Worse still, by the time the matter may end up before an appeal court, and because of the limited duration (period) of restraints, the restraint period would probably have expired, the appeal would be academic, and the appeal court would decline to determine it with no detriment to the individual respondent (other than costs, of course). Once again, the simple consequence of this would be that the individual respondent would achieve the objective of defeating the restraint without even having to run the risk of successfully prosecuting an appeal, having actually lost in the court a *quo*. So, no matter what, to the loser in the case of restraints goes all the spoils. In short, the merits of the appeal simply does not matter, but it is the mere noting of the appeal that defeats the restraint and the very objective it is designed to achieve. This simply cannot be permitted and is tantamount, in my view, to an abuse of process. In any event, to allow a restraint to be in essence be defeated on this basis would be entirely inequitable and a failure of justice. It must also be considered that the Labour Court was specifically established as a court of equity as well, as I have referred to above, and equity must apply to all parties before the court.'

[12] In a subsequent decision of this Court in *Shoprite Checkers (Pty) Ltd v Jansen and another,*[8] it was held that exceptional circumstances are the nature of the right that the applicant seeks to enforce, moreso where a breach continues to occur and the applicant has no other means to protect its interests.

[13] It is pertinent to point out that although the respondents contend that the Matyolo AJ order is ambiguous in that it does not expressly mention that the respondents are permitted to conduct business in Bedfordview (outside the 27km radius), during the proceedings, the parties agreed that this is not in issue. Put simply, the parties agree that the respondents may run their practice in Bedfordview. What remains a bone of contention, is that the first respondent may not conduct business within the 27 km radius of the applicant's rooms and

[8] (2018) 39 ILJ 2751 (LC) at paras [22] to [26].

may not entice the applicant's agents, customers or suppliers. The terms of the restraint provisions specifically record that the first respondent may not entice patients.[9] The respondents contend that patients are not customers.

[14] The applicant contends that the first respondent is in breach of the Matyolo AJ order by attending a workshop relating to its business within a 27 km radius of the applicant's practice, by enticing patients of the applicant and by advertising that she practices in Petervale (within the 27 km radius of the applicant's business).[10] The first respondent does not seriously dispute this. She admits attending a function within the 27 km radius and asserts that the Matyolo AJ order does not prohibit her from marketing herself (and her skills). On her own admission, she states that she was contacted by a patient of the applicant (patient Roets) and agreed to see this patient in Petervale. The first respondent contends that this patient was not *bona fide* in contacting her and was "*put up to this"* by the applicant. In other words, the first respondent avers she was trapped by the applicant. The first respondent also denies having treated this patient.[11] In refuting this allegation, the applicant attaches an invoice to demonstrate that the first respondent indeed treated this patient.[12]

[15] The respondents contend that they have good prospects of success on appeal on two legs: firstly, no order was sought against the second respondent, but an order is made against the second respondent. Secondly, it is unclear what "conducting business" means. It wassubmitted on behalf of the respondents, when asked by the Court as to whether the term "conducting business" is defined in the employment contract, that it is not, and therefore, the first respondent is not restrained from attending any networking function within the 27 km radius of the applicant's rooms/practice. The applicant, on the other hand, contends that the respondents have zero prospects of success on appeal and submits that paragraph 4.1[13] of the restraint provisions provide that the first

[9] Clause 4.2, p 26.
[10] Founding affidavit paras 37 to 40, p 10 and annexures "D" to "G" at pp 68 to 73.
[11] Answering affidavit, para 19, p 89 and para 38.9, p 103.
[12] Replying affidavit, para 79, p 293 and annexure "D" thereto, at p 300.
[13] p 26.

respondent is restrained from conducting any business that is directly or indirectly in competition with that of the applicant.

[16] At best, the respondents contend that the Matyolo AJ order is erroneous in issuing an order against the second respondent and is ambiguous as to the meaning of "*conducting business*". On this contention, in my view, the respondents ought to have brought an application to rescind the Matyolo AJorder in terms of the provisions of section 165 of the Labour Relations Act[14] read with rule 16A of the Labour Court Rules.[15] In the premises, I am of the view that the prospects of success on appeal are slim. Added to this, the ground of appeal, that Matyolo AJ found that the applicant had proprietary interests deserving of protection, is incorrect. Matyolo AJ found nothing of the sort.[16] His order restrains the respondents from enticing and soliciting employees, agents, customers and suppliers. It also reduces the area and duration of the period of restraint.

[17] The first respondent's contention that she was trapped by the applicant insofar as her having contact with patient Roets is, in my view, far-fetched in consideration of the facts as set out in paragraph 14 above. In the premises and on the *Plascon-Evans* principle, I find for the applicant.[17]

[18] On the facts, the applicant has demonstrated that the first respondent has and is enticing its patients and offered to treatment at no cost and has treated a patient in Petervale. In addition, she advertises that she practices in Petervale and is adamant about attending functions in the area in which she is restrained. This is in direct contravention of the Matyolo AJ order and the applicant will suffer irreparable harm if the Matyolo AJ order is not executed.

[19] With the abovementioned authorities in mind, in my view, given the short duration of the period of restraint (12 months), the probability that the appeal

[14] Act 66 of 1995, as amended.
[15] Rules for the Conduct of Proceedings in the Labour Court as promulgated by GN 1665 in GG 17495 of 14 October 1996.
[16] See: para [23] of the Matyolo AJ judgment.
[17] See: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) and *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* [2008] 2 AII SA 512 (SCA).

proceedings would not be finalised when the term of the restraint ends and further, with the continued breach by the first respondent of the restraint undertakings, and the slim prospects of success on appeal, I am of the view that the applicant has demonstrated that exceptional circumstances exist for the grant of the relief sought in *casu*.

[20] On the facts as set out above, the applicant has demonstrated, on a balance of probabilities, that it will suffer irreparable harm if the Matyolo order is not executed. The applicant has demonstrated that the respondents will not suffer irreparable harm should the Matyolo AJ order be executed, as the first respondent is not restrained from practising in Bedfordview for the reduced period of the restraint of 12 months. The applicant has stated that it takes no issue with the respondents conducting business in Bedfordview and I reiterate that the parties agreed during these proceedings, that this is not in issue.

[21] I accordingly find that the applicant has satisfied the jurisdictional requirements for the grant of relief to execute the Matyolo AJ order pending the outcome of the appeal proceedings.

[22] The respondents delivered a notice of motion seeking to strike out certain paragraphs in the applicant's replying affidavit and annexure "D" thereto. No case is made out by the respondents to substantiate the striking out of these paragraphs on any grounds. For this reason, the application does not succeed. The applicant emphatically contends that nothing new is raised in its replying affidavit and further, that the contentious invoice annexed and marked as "D" to its replying affidavit was annexed to refute the first respondent's allegation that she did not treat patient Roets.

[23] It is for the above reasons that the aforesaid order was handed down on 15 March 2023.

M. T. M. Phehane

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr. C. Higgs of Higgs Attorneys
For the Respondents:	Adv. R. Bhima
Instructed by:	Pagel Schulenburg Inc.