

SOUTH AFRICA / JUDGMENT

Mix Telematics Africa (PTY) Ltd v Soekoe and Others (J 10/2022) [2022] ZALCJHB 286 (18 October 2022) [2022] ZALCJHB 286

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

J 10/2022

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: J 10/2022

In

the matter between:

MIX
TELEMATICS AFRICA (PTY) LTD
Applicant
and
NATASHA
SOEKOE
First Respondent
FIDELITY
SERVICES GROUP
Second Respondent
BARTMANN,
W
Third Respondent

Heard:

13 October 2022

Delivered: 18 October 2022
(This judgement was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 18 October 2022.)

JUDGMENT

VAN NIEKERK, J

- [1] This is an application in terms of section 18 (1) and (3) of the Superior Courts Act, 10 of 2013.
- [2] On 7 September 2022, Ramolefe AJ granted an order enforcing certain restraint and confidentiality undertakings given by the first respondent to the applicant. On 20 September 2022, the second respondent requested reasons for the judgment when these were not forthcoming, on 28 September 2022, the second respondent applied for leave to appeal. In these proceedings, the applicant seeks an order to the effect that the application for leave to appeal does not suspend the operation and execution of the order issued on 7 September 2022, pending the final determination of the application for leave to appeal.
- [3] The history of the matter can be briefly summarized as follows. On 10 January 2022, the applicant filed an application seeking to hold the first and second respondents to restraint and confidentiality undertakings given by the first respondent to the applicant. On 18 January 2022, the court granted an order postponing the application until 4 May 2022 for final adjudication, and further granting and interim interdict, restraining the first respondent from breaching the restraint and confidentiality undertakings. On 16 August 2022, the applicant filed an application seeking to hold the first to third respondents in contempt of the order. On 19 August 2022, the court issued a rule nisi calling on the first and third respondents to show why they should not be found guilty of contempt of court. The first and second respondents filed opposing affidavits, and the applicant filed a reply. The order granted by Ramolefe AJ would appear to be consequent on those papers. The order granted by Ramolefe AJ reads as follows:
- ‘1. The agreement in Restraint of Trade between the Applicant and First Respondent, shall remain in full force and effect from 18 July 2022 until 28 January 2023 (‘the extended restraint period’).
2. The First and Second respondent are interdicted from conducting any commercial relationship whatsoever with each other, directly or via any commercial affiliates of the Second Respondent, for the entirety of the extended restraint period.

3. The Second Respondent is interdicted from facilitating the breach, either directly or indirectly, by the First Respondent, of the terms of the Restraint, for the duration of the extended restraint period.
 4. The First and Second Respondent are to pay the Applicant's costs of this application:
 - 4.1 On the scale as between attorney and client;
 - 4.2 Including the costs of to counsel, where to counsel were employed.
 5. The Applicant is granted leave to renew the contempt proceedings against the Third Respondent, on supplemented papers and of the service on the Third Respondent.'
- [4] The applicant contends that on 7 September 2022, the court found that the first and second respondents were guilty of contempt of court. This contention appears to emanate from a draft order which records in paragraph one that the first and second respondents are guilty of contempt of court. The balance of the draft order follows the text of the order granted and certified by the registrar on 7 September 2022. The applicant acknowledges the difference between the draft order and the order as granted - the latter does not include a declaration to the effect that the first and second respondents are in contempt of court. The applicant submits however that
- '... it 'cannot seriously be contended by the second respondent that it was not found to be in contempt in circumstances where it was represented by an attorney and counsel in court and a copy of the draft order was printed and given to them.... Plainly put, the parties were record to argue a contempt application. Nothing more. Nothing less. To argue otherwise is, with great respect, farcical. At the end of the day, this court found that the first and second respondent has acted contrary to the provisions of annexure ("MHFO"). That is the plain and simple answer to the current debacle.'
- [5] I am not persuaded that for present purposes, the applicant is permitted to stray beyond the strict wording of the order issued by Ramolefe AJ, as certified by the registrar. In the absence of any order to correct or vary the order, I intend to deal with the present application on the basis of the order as certified, i.e., to the exclusion of any finding that the first and second respondents are in contempt of court.
- [6] Section 18 regulates the suspension of decisions pending appeal. In general terms, the operation and execution of a decision (other than a decision not having the effect of a final judgment) is suspended pending the outcome of an application for leave to appeal or of an appeal (see s 18(1)). The court may order otherwise under exceptional circumstances (see s 18(3)) if it is established on a balance of probabilities that the applicant 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. (See *Incubeta Holdings (Pty) Ltd & another v Ellis & another* 2014 (3) SA 189 (GJ)). If the court orders that the operation or execution of an order is not suspended, the court must record its reasons for doing so.

[7] Section 18 (3) places a heavy onus on the applicant (see DE van Loggerenberg and E Bertelsmann Erasmus: Superior Court Practice (2 ed vol 1 issue 2). In Swart & another v Cash Crusaders Southern Africa (Pty) Ltd 2018 (6) 287 (GP), the Full Bench said the following, at paragraph 4 of the judgment:

‘Sections 18 (1) and (3) of the Superior Courts Act, provide for a twofold enquiry, in that the following requirements must be met before an order appealed against can be put into operation pending the outcome of the appeal:

1. Exceptional circumstances must exist;
2. Proof, on a balance of probabilities must exist, that:
 - 2.1 The particular applicant will suffer irreparable harm if the order is not put into operation;
 - 2.2 The other party will not suffer irreparable harm if the order is put into operation.

See: Actom (Pty) Ltd v Coetze and Another ZAGPPHC 548 (31 July 20 15), a judgment by the Full Court of this Division, agreeing with the judgment of Sutherland J in Incubeta Holdings (Pty) Ltd v Ellis 2014 (3) SA 189 (GJ) at par. [16].

Both judgments make it clear that s. 18 of the Act has introduced a new dimension to these types of proceedings by requiring first that the discretion may be exercised only if the conditions precedent of "exceptional circumstances", and actual irreparable harm to one party, and no harm to the other, is proven. It is now incumbent upon the Applicants' seeking leave to execute pending an appeal, to prove on a balance of probabilities that it will suffer irreparable harm if leave to execute is not granted, and that the other party will not suffer irreparable harm if the Court so orders. Once these jurisdictional facts are established, the Court may exercise its wide discretion to grant leave to execute, or not to grant leave.’

[8] More recently, in JE v CE (42949/2013, 21 May 2019), the court held that a failure by an applicant to aver both that she will suffer irreparable harm if the court does not grant the order and that the respondent will not suffer irreparable harm if the order is granted, is a fatal omission.

[9] In the present instance, in the absence of reasons for the order made by Ramolefe AJ, I am unable to assess the applicant's prospects of success in the application for leave to appeal. The applicant avers that it will suffer irreparable harm should the order for leave to execute the contempt order not be granted. For the reasons recorded above, there is no contempt order and the matter of irreparable harm does not arise, at least to that extent. To the extent that the applicant nonetheless (faintly) submits that it will suffer irreparable harm should that part of the order upholding the restraint and confidentiality undertakings not remain operational and enforceable, the applicant has failed to set out with any degree of

particularity why the predicament in which the applicant finds itself gives rise to truly exceptional circumstances, and why it will suffer irreparable harm if the court does not grant the order. As I have indicated, the averments in the founding affidavit are. predicated largely on the

mistaken assumption that the order granted on 7 September 2022 somehow incorporates a finding that the first and second respondents are in contempt of court. In any event, the applicant makes no case whatsoever to the effect that the respondents will not suffer irreparable harm if the court grants the order that is sought. In the light of the authorities to which I have referred, this is a fatal admission and the application stands to be dismissed on that basis alone.

[10] For all of the above reasons, I am not satisfied that the applicant has met the threshold established by section 18 (1) and (3), and the application thus stands to be dismissed. Finally, there is no reason to disallow the second respondent its costs. The present application is nothing less than misguided and the second respondent is entitled to recover their costs in opposing these proceedings. Counsel for the second respondent sought the costs of senior counsel. In my view, these are not warranted and the order for costs is limited to the costs of a junior counsel.

I make the following order:

1. The application is dismissed, with costs.

André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the applicant:

F Venter

Instructed by:

Beech Veldman Inc.

For the second respondent:

H Gerber SC

Instructed by:

BPG Attorneys

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