



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case No: A5028/2015

In the matter between:

TREVOR FLETCHER
SKIDATA SOUTH AFRICA (PTY) LIMITED

First Appellant
Second Appellant

and

ZEAG SA (PTY) LIMITED

Respondent

Case Summary: Appeal – Generally – Power of court of appeal in terms of s 16(2)(a) of the Superior Courts Act 10 of 2013 - Appeal to be determined only if judgment or order of court of appeal will have real practical result or effect – Appeal dismissed.

JUDGMENT

MEYER, J (SATCHWELL and MAKUME JJ concurring)

[1] This is an appeal against an order of the Gauteng Local Division of the High Court (Mayat J) on 5 December 2014, enforcing a restraint of trade agreement concluded between the first appellant, Mr Trevor Fletcher, and the respondent,

ZEAG SA (Pty) Limited (ZEAG), by interdicting Mr Fletcher from being employed by the second appellant, SKIDATA South Africa (Pty) Limited (SKIDATA), until 1 October 2015, and interdicting him from competing unlawfully with ZEAG (using its confidential information). The appeal is with the leave of the Supreme Court of Appeal.

[2] ZEAG is a technology-based company. It has been operating in South Africa for more than 20 years. Its business includes the assembly, installation and maintenance of electronic parking and traffic control systems. It offers specialised equipment, machinery, software and services to the revenue-generating parking market. Its customer base is comprised mostly of property owners and developers, property funds, government departments, airports and professionals, such as architects and quantity surveyors. It is common cause that ZEAG's business is within a specialised and highly competitive market in which a limited number of competitors fiercely compete for market share. ZEAG and SKIDATA are direct competitors in that market.

[3] Mr Fletcher was employed by ZEAG as its chief sales and marketing officer from 1 March 2008 until 30 September 2014. He and ZEAG concluded a restraint of trade agreement on 5 March 2008 (the restraint agreement). Having left ZEAG's employment on 30 September 2014, he immediately took up employment with SKIDATA, which act, so ZEAG contends, constituted a breach of the restraint agreement.

[4] ZEAG, accordingly, launched the present application as an urgent one on 16 September 2014. In striking the matter from the urgent motion court roll on 30 September 2014, Sutherland J found the urgency to have been self-created. The

application was thereafter heard in the ordinary opposed motion court by Mayat J on 5 December 2014. She granted the following order:

- ‘1. Interdicting and restraining the First Respondent until 1 October 2015 from being interested in or engaged by the Second Respondent, directly or indirectly, anywhere in the Republic of South Africa in any capacity (including but not limited to advisor, agent, consultant, independent contractor, director, employee, financier, manager, member of a close corporation, member of a voluntary association, partner, proprietor, shareholder or trustee).
2. Interdicting and restraining the First Respondent, for his own benefit or the benefit of a third party, from utilising or directly or indirectly disclosing or making available or deriving any profit from any of the Applicant’s intellectual property, trade secrets or confidential information.
3. The First and Second Respondents are directed to pay Applicant’s costs, jointly and severally, the one paying the other to be absolved, including the costs of two counsel.’

[5] The further procedural background to this appeal is also relevant. Mr Fletcher and SKIDATA filed an application for leave to appeal on 24 December 2014. Due to the absence of Mayat J from this division during the first term of 2015, the application for leave to appeal was heard by Boruchowitz J on 23 March 2015, which was within days after the transcribed judgment had become available. The application for leave to appeal was dismissed with costs, including those of two counsel. Mr Fletcher and SKIDATA then lodged an application for leave to appeal with the registrar of the Supreme Court of Appeal on 7 April 2015. ZEAG’s affidavit in answer to the application for leave to appeal was lodged on 10 April 2015 and the replying affidavits of Mr Fletcher and of SKIDATA on 24 April 2015. On 22 May 2015, the

Supreme Court of Appeal (Ponnan and Dambuza JJA) granted Mr Fletcher and SKIDATA leave to appeal to the full court of this division.

[6] In terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 (the Act), which provides 'that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation', ZEAG applied to the President of the Supreme Court of Appeal for a referral of the decision of Ponnan and Dambuza JJA for reconsideration and variation. The answering affidavit of Mr Fletcher and of SKIDATA was lodged with the registrar of the Supreme Court of Appeal on 19 May 2015 and ZEAG's reply on 2 July 2015. Mpati P dismissed the application for reconsideration and variation with costs on 16 July 2015 on the basis that no exceptional circumstances have been shown to exist for such a referral. The notice of appeal, record of the proceedings and the parties' respective heads of argument were thereafter filed and the appeal was allocated for hearing before us on 8 June 2015.

[7] ZEAG contends that no practical effect or result can any longer be achieved in this case and that the appeal should therefore be dismissed in terms of subsection 16(2)(a) of the Act, which provides as follows:

- '(2)(a)(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.
- (ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.'

Subsections 16(2)(a)(i) and (ii) are similar in wording to subsections 21A(1) and (3) of the former repealed Supreme Court Act 59 of 1959.

[8] It is a fundamental principle, spelt out in many cases, that courts will not make determinations that will have no practical effect. An appeal is to be determined only if the judgment or order of the court of appeal will have a real practical result or effect. (See *Premier, Provinsie Mpumalanga v Groblersdalse Stadsraad* 1998 (2) SA 1136 (SCA), at 1143A-B; *Western Cape Education Department v George* 1998 (3) SA 77 (SCA), at 84G; *Rand Water Board v Rotek Industries (Proprietary) Limited* 2003 (4) SA 58 (SCA), para 26; *Radio Pretoria v Chairman, Independent Communications Authority of South Africa* 2005 (1) SA 47 (SCA), para 45.) The object of subsection 16(2)(a) is to alleviate the heavy workload of courts of appeal. (See *Groblersdalse Stadsraad* (supra), at 1143A-C.)

[9] Mr Fletcher, in terms of the order of the court *a quo*, was interdicted from being employed by SKIDATA for a period of one year from 1 October 2014 until 1 October 2015. The order was never put into effect due to the applications for leave to appeal, first unsuccessful to this court and then successfully to the Supreme Court of Appeal. The restraint period has now terminated.

[10] In resisting the dismissal of the appeal on the ground that the order sought will have no practical effect or result, Mr Fletcher and SKIDATA argue that ZEAG's mootness argument was implicitly rejected by two Supreme Court of Appeal justices (Ponnan and Dambuza JJA), who granted them special leave to appeal, and it was rejected by the President of the Supreme Court of Appeal, who rejected ZEAG's application for a referral of the decision granting them leave to appeal for reconsideration and variation. I disagree.

[11] Subsection 17(1) of the Act provides that leave to appeal may only be given where the judge or judges concerned are of the opinion *inter alia* that the appeal would have a reasonable prospect of success and the decision sought on appeal does not fall within the ambit of subsection 16(2)(a). The decision sought on appeal obviously did not fall within the ambit of subsection 16(2)(a), either when leave to appeal was granted on 22 May 2015 or when the application for reconsideration and variation was dismissed on 16 July 2015. It only became moot on 1 October 2015. It was open to Mr Fletcher and SKIDATA to approach the Deputy Judge President of this division for a preferential date for the hearing of the appeal in order to have the appeal finalised before the decision sought on appeal had become without practical effect or result. They did not avail themselves of the opportunity.

[12] Mr Fletcher and SKIDATA argue that the court *a quo*'s judgment (if not reversed) may have future repercussions regarding Mr Fletcher's 'status'. They complain about certain findings made by the court *a quo* in granting the relief to ZEAG. But appeals do not lie against the reasons for judgment; only against the substantive order of a lower court. (See *Atholl Development v The Valuation Appeal Board for the City of Johannesburg* [2015] ZASCA 55 (30 March 2015).)

[13] Mr Fletcher and SKIDATA found authority for their contention, that this appeal should be considered on its merits, in *Centre for Child Law v Governing Body of Hoërskool Fochville* 2016 (2) SA 121 (SCA), at 14, wherein it was held that-

'... absent an appeal its judgment will in all probability continue to influence how litigants approach such an enquiry, if the High court erred in its approach, as it appears that it indeed has, then future litigants are entitled to the benefit of this court's view on the issue. I thus consider that the determination of the appeal will have a 'practical effect or result' within the

meaning of that expression, inasmuch as a discrete legal issue of public importance arises that would affect matters in the future and on which the adjudication of this court is required.’

[14] There are no circumstances in the present case that might conceivably create a practical need for this court to express its view on a particular point of law – on a matter of wide public interest or to resolve conflicting high court decisions. No such need exists here. The principle enunciated in *Governing Body of Hoërskool Fochville* (supra), therefore, does not find application in the present appeal. The court *a quo* did not pronounce on the law, but approached the interpretation of the restraint agreement in accordance with our modern day dual approach to the interpretation of instruments.

[15] The judgment of the court *a quo* is not likely to ‘in all probability continue to influence how litigants approach’ the question of interpretation. In the past decade there have been significant developments in the law relating to the interpretation of instruments. (See *Belet Cellular v MTN Service Provider* (936/2013) [2014] ZASCA 181 (24 November 2014).) But the principles of interpretation have now been established and agreements are to be interpreted in accordance with such established principles, which are to be found in the leading judgments of the Supreme Court of Appeal on the topic, such as *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), para 18 and *Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA), para 12. (See *Kilburn v Turning Fork (Pty) Ltd* [2015] ZASCA 53 (27 March 2015), para 10.)

[16] Mr Fletcher and SKIDATA argue that this appeal should be considered on its merits since the relief granted in terms of paragraph 2 of the order of the court *a quo* - interdicting Mr Fletcher from competing unlawfully with ZEAG (using its confidential information) - is not dependent on the period of the restraint agreement and the

order sought on appeal includes the setting aside of that part of the order. There is also no merit in this argument.

[17] Competition which is unlawful, such as using a competitor's confidential information, is prohibited by the common law, and actionable. Mr Fletcher may legally not utilise ZEAG's confidential information irrespective of whether or not paragraph 2 of the order of the court *a quo* is set aside on appeal. That part of the order is in the widest of terms and meaningless. Moreover, Mr Fletcher has in any event tendered not to divulge any confidential information of ZEAG. In substance that part of the order thus embodies Mr Fletcher's own tender. A ground of appeal raised in the notice of appeal is that in light of the tender the court *a quo* erred in granting costs against Mr Fletcher and SKIDATA in respect of that part of the order. I disagree. ZEAG would have remained substantially successful had that part of the order not been granted.

[18] In terms of subsection 16(2)(a)(ii), the question whether a judgment or order by a court of appeal would have a practical effect or result may in exceptional circumstances be decided with reference to considerations of costs. There are no such exceptional circumstances that compel this court to exercise its discretion in favour of entertaining the appeal on its merits.

[19] In *Oudebaaskraal (Edms) Bpk en Andere v Jansen van Vuuren en Andere* 2001 (2) SA 806 (SCA), apart from a costs order, the appeal became moot as a result of the repeal of the Water Act 54 of 1956 at a time when the appeal was ripe for hearing. In response to an argument that the appeal should be dismissed in terms of s 21A of the now repealed Supreme Court Act, the Supreme Court of Appeal held as follows (at 812D):

'In die onderhawige geval het die saak in die Waterhof etlike dae geduur. Die oorkonde beslaan 2 379 bladsye. Die appellante is verteenwoordig deur 'n senior en 'n junior advokaat, die respondente deur 'n prokureur en die Departement deur 'n senior advokaat. Verskeie deskundiges is as getuies geroep. Die verhoorkoste is dus 'n wesenlike faktor. Verder was die appèl gereed vir verhoor op die stadium wat die Waterwet herroep is. Ten minste nege kopieë van die oorkonde, bestaande uit 35 volumes elk, moes voorberei word. Hoofde van argument was ook reeds geliasseer.

Die voormelde oorwegings stel na my mening buitengewone omstandighede soos bedoel in art 21A(3) daar. Ingevolge die artikel kan die vraag of die uitspraak of bevel van hierdie Hof 'n praktiese uitwerking of gevolg sal hê dus bepaal word met verwysing na oorweging van koste. Op dié basis sal die uitspraak van hierdie Hof, indien die appèl sou slaag, wel 'n praktiese uitwerking of gevolg hê en is hierdie nie 'n geval waar die appèl ingevolge die artikel van die hand gewys behoort te word nie.'

[20] In dismissing an appeal in terms of s 21A of the now repealed Supreme Court Act, the Supreme Court of Appeal in *Radio Pretoria v Chairman, Independent Communications Authority of South Africa* 2005 (1) SA 47 (SCA), paras 42-43, distinguished the circumstances in *Oudebaaskraal*. In this regard Navsa JA held thus:

'[42] . . . We were referred by counsel for Radio Pretoria to the judgment in *Oudebaaskraal (Edms) Bpk en Andere v Jansen van Vuuren en Andere* 2001 (2) SA 806 (SCA) as support for his submission that, in the circumstances of the present appeal, Radio Pretoria was entitled to rely on s 21A(3). In terms of this subsection, the question whether a judgment or order by a court of appeal would have a practical effect or result may in *exceptional* circumstances be decided with reference to considerations of costs. It was submitted on behalf of Radio Pretoria that the circumstances that prompted the present appeal were, as in the *Oudebaaskraal* case, exceptional.

[43] I disagree. The *Oudebaaskraal* case is distinguishable. . . . In the present matter the appeal is against a judgment in motion proceedings and the appeal record consists of eight volumes. The *Oudebaaskraal* case and the present appeal are not comparable at all.'

[21] The present case is comparable to *Radio Pretoria* and *Oudebaaskraal* is distinguishable. The appeal in this instance too is against a judgment in motion proceedings. The notice of motion and affidavits consist of a few volumes. Furthermore, ZEAG agreed that should the appeal be dismissed in terms of subsection 16(2)(a), the related costs order should be set aside and substituted with an order that each party pays its own costs. (See *Nordengen v Vanguard Rigging (Pty) Ltd* 2014 JDR 1371 (GJ), paras 6.)

[22] I am in all the circumstances of the view that there is no longer (to borrow the words of Moseneke DCJ in *Director-General Department of Home Affairs v Mukhamadiva* 2013 JDR 2860 (CC), para 45) any 'live dispute that cries out for resolution' and no order of the court *a quo* to upset on appeal. No practical effect or result can be achieved by an order of this court, not on the parties nor the public at large. This is, therefore, a proper case in which to order a dismissal of the appeal in terms of subsection 16(2)(a).

[23] Finally, the matter of costs of the appeal. Prior to 1 October 2015, the pending applications for leave to appeal and the order granting Mr Fletcher and SKIDATA leave to appeal suspended the operation and execution of the order of the court *a quo*, and their persistence in the appeal until that stage is understandable. But by 1 October 2015 the period contemplated in the order of the court *a quo* had expired and the relief sought in the notice of motion had been rendered redundant. By then it must have been abundantly clear that no purpose would be served by persisting in this appeal.

[24] ZEAG was brought to this full court of appeal as an unwilling party. It objected and raised the mootness point *inter alia* in correspondence addressed to the attorneys of Mr Fletcher and of ZEAG. No cause exists for departing from the normal rule that costs follow the result, at least as far as the costs of the appeal incurred during the post 1 October 2015 period are concerned. (See *Coin Security Group (Pty) Ltd v SA National Union for Security officers and others* 2001 (2) SA 872 (SCA), para 12; *Kenmont School v D M* 2013 JDR 1365 (SCA), para 14; *Atholl Development v The Valuation Appeal Board for the City of Johannesburg* [2015] ZASCA 55 (30 March 2015).) It is not in issue that it was a wise and reasonable precaution for each party to engage two counsel.

[25] In the result the following order is made:

- (a) The appeal is dismissed.
- (b) Paragraph 3 of the order of the court *a quo* is set aside and replaced with the following order:

‘3. Each party is to pay its own costs of the application.’
- (c) The appellants are to pay all costs in relation to the appeal incurred after 1 October 2015, jointly and severally, the one paying the other to be absolved, including the costs of two counsel.

SATCHWELL, J

MEYER, J

MAKUME, J

Date heard: 8 June 2016
Date of judgment: 24 June 2016
Counsel for appellants: Andrew Kemack SC (assisted by T Ossin)
Instructed by: Wertschröder Inc., Darrenwood, Johannesburg
Counsel for respondent: I Miltz SC (assisted by WH Pocock)
Instructed by: Fluxman's Inc., Rosebank, Johannesburg