



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, GQEBERHA**

REPORTABLE / NOT REPORTABLE

Case No: 695/2021

In the matter between:

BRONSCOR CC

Applicant

and

KERRY ALLIN

First Respondent

STEWARTS AND LLOYDS PROJECTS (PTY) LTD

Second Respondent

In the matter between:

Case No: 852/2021

KERRY ALLIN

Applicant

and

BRONSCOR CC

Respondent

JUDGMENT

DA SILVA AJ:

[1] This judgment concerns itself with the issue of costs as the relief sought under case no. 695/2021 and case no. 852/2021 is now academic. It is trite law that in matters that have since become academic, the issue of costs is determined by having regard to the merits of the matter.¹

[2] Even though the consideration of costs does not always necessitate a full enquiry into the merits in all cases, a judgment for costs involves a decision on the merits and a claim for costs cannot be viewed in isolation.² Ordinarily, I would have had to apply my mind to the merits of the application which applicants instituted to see if they would have been successful in such application.³

[3] In view of the trite legal principle aforementioned, I shall now proceed to deal with the facts of the two applications that served before me.

[4] Bronscor CC (the applicant under case no. 695/2021 (*“the main application”*)), seeks to enforce a restraint of trade agreement against the first respondent, Kerry Allin (hereinafter referred to as *“Allin”*) and the second respondent, Stewarts and Lloyd Projects (Pty) Ltd (hereinafter referred to as *“the Projects”*).

[5] Bronscor CC contended that Allin and it had concluded a restraint of trade agreement for a period of one (1) year. The restraint of trade did not mention the geographical area to which it was applicable.

[6] Allin opposed the main application contending, amongst others, that Bronscor CC is not her employer more particularly that the restraint of trade agreement sought to be enforced was entered into between Bronscor Group and her. As such, Bronscor CC had not established that it had *locus standi*. Both Allin and the Projects also contended that Allin was employed by Stewarts and Lloyds Holdings (Pty) Ltd

¹ ***Nxumalo and Another v Mavundla and Another*** 2000 (4) SA 349 (D).

² See ***Cats v Cats*** 1959 (4) SA 375 (C) at 379H.

³ See ***First National Bank of G Southern Africa Ltd t/a Wesbank v First East Cape Financing (Pty) Ltd*** 1999 (4) SA 1073 (SE) at 1079I – J.

(hereinafter referred to as “*the Holdings*”). As such the Holdings was joined as a party to the proceedings.

[7] In reply to the contention relating to *locus standi*, Bronscor CC averred that Bronscor Group comprised of three legal entities, namely Bronscor CC, Bronscor (Pty) Ltd and the municipal tendering division which falls under Bronscor (Pty) Ltd. Bronscor CC, in reply, also averred that Allin was paid by Bronscor CC.

[8] Allin also opposed the application on the basis that the restraint of trade agreement was vague and unreasonable.

[9] Allin, in turn, launched an application (case no. 852/2021) (hereinafter referred to as “*the second application*”) against Bronscor CC seeking, in Part A to stay the main application pending the finalization of Part B. In Part B, Allin sought to set aside the restraint of trade on the basis of vagueness and unreasonableness. Allin also averred in the second application that Bronscor CC was not a party to the restraint of trade agreement.

[10] The second application was, in substance, more of a counter application, though not a conditional one.

[11] Having presented the above history, I now turn to deal with the merits of each of the applications.

[12] I am of the view that Bronscor CC has failed to establish its *locus standi* in the main application for the reason that it has not satisfactorily proved that it was a party to the restraint of trade agreement. Sight should not be lost of the fact that the agreement was between Bronscor Group and Allin. Having made this finding, I deem that it is unnecessary for me to deal with the merits of the enforceability of the restraint of trade agreement at the instance of Bronscor CC.

[13] Thus, regard being had to the above, the main application falls to be dismissed.

[14] What of the second application? In view thereof that the second application was against Bronscor CC, whom Allin alleged was not party to the restraint of trade agreement, it stands to reason that Allin, too, has failed to establish that Bronscor CC has *locus standi* in the second application, especially if regard is had to the fact that Allin alleges that the restraint of trade agreement as between her and Bronscor Group. As such, the second application also falls to be dismissed.

[15] What of the issue of costs of the respective relief sought by the parties?

[16] Regard being had to the above, namely that both applications would have fallen to be dismissed for lack of *locus standi*, I am of the view that each party should pay their own costs.

[17] I thus make the following order:

- (1) Each party is directed to pay their own costs in respect of the applications under case no. 695/2021 and 852/2021.

AM DA SILVA

Acting Judge of the High Court

Appearances:

On behalf of the Applicant: Adv NJ Mullins SC
Instructed by: GC Clark and Associates

On behalf of the Respondent: Adv CD Roux
Instructed by: RC Christie Incorporated
c/o Jacques Du Preez Attorneys

Date Heard: 21 July 2022

Date Delivered:

26 July 2022