



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: 1283/2021
Heard: 31/01/2022
Delivered: 25/02/2022

In the matter between:

DEBBIE O' DONOVAN

Applicant

and

KURUMAN RADIATORS CC

Respondent

In re:

KURUMAN RADIATORS CC

Applicant

and

DEBBIE O' DONOVAN
BSSC RADIATORS (PTY) LTD

1st Respondent
2nd Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

Mamosebo J

[1] On 17 September 2021 I confirmed the interim order (rule *nisi*) issued out of this Court by Lever J on 29 June 2021 by:

- 1.1 Interdicting and restraining Ms O'Donovan for a period of 12 (twelve) months from 01 June 2021, and within a radius of 200km from Kuruman, to accept and hold any employment with any person, firm, group, partnership or association, including the second respondent (BSSC Radiators (Pty) Ltd) which competes with the business of the applicant.
 - 1.2 Interdicting and prohibiting Ms O'Donovan from performing any of her duties in terms of her employment with BSSC Radiators during the period and within the area as stated in the preceding paragraph.
 - 1.3 Interdicting and prohibiting Ms O'Donovan from directly or indirectly disclosing any confidential information with respect to the business of the applicant, to any other person or business, including BSSC Radiators.
 - 1.4 Ordering both Ms O'Donovan and BSSC Radiators to pay the costs of the application, including costs of 29 June 2021, jointly and severally the one paying the other to be absolved.
- [2] Ms O'Donovan is now seeking leave to appeal to the Full Bench of this Division against the whole of my judgment and orders. Kuruman Radiators, did not oppose the application but filed a Notice to Abide the decision.
- [3] The application is brought in terms of s 17(1)(a) of the Superior Courts Act¹ Counsel submitted in argument that the appeal would have reasonable prospects of success. It is trite, following the *Mont Chevaux Trust (IT2012/28) v Tina Goosen and 18 Others*² confirmed by the Supreme Court of Appeal in *MEC for Health,*

¹ 10 of 2013

² LCC14R/2014 at para 6

*Eastern Cape v Mkhitha*³ that the bar has been raised and the word 'would' indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.

[4] The grounds upon which Ms O'Donovan relies as set out in the notice of appeal in seeking leave are that I erred in:

- 4.1 Failing to properly apply the test set out in *Plascon-Evans* in regard to disputes of fact which arose in the papers;
- 4.2 Following the approach set out by Wallis AJ in the matter of *Den Braven SA (Pty) Ltd v Pillay & Another* 2008 (6) SA 229 (D) regarding the court being permitted to insert what it considers to be reasonable terms into an agreement rather than the approach set out by the Supreme Court of Appeal in the 2012 matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA);
- 4.3 Failing to give appropriate consideration to the decreasing value of the trade connections established by the application during the period of her employment;
- 4.4 Failing to consider the nature of the proprietary interest claimed by the respondent;
- 4.5 Failing to consider the nature of the arrangements entered into between the respondent and its clients when assessing the value of the proprietary information claimed by the respondents;
- 4.6 Failing to appreciate the considerable differences in the businesses of BSSC Radiators (Pty) Ltd and Kuruman Radiators; and
- 4.7 granting a cost order against the second respondent (BSSC Radiators (Pty) Ltd) notwithstanding that it did not oppose the application.

³ [2016] ZASCA 176 (25 November 2016) at paras 16 – 17

Ground 1: Failing to apply the Plascon-Evans principle

- [5] As early as para 5 of the main judgment I referred to the Plascon-Evans principle and the fact that it was common cause between the parties that disputes of fact existed. However, they were soluble on the papers as they stood. This follows that when I dealt with the matter I was mindful of such existence and the approach to be followed and duly applied the principle.

Ground 2: Following *Den Braven* and not the *Natal Joint* approach

- [6] At the commencement of his submissions for leave to appeal Mr Whitcutt SC, for the Applicant, conceded the existence of the restraint of trade agreement between Kuruman Radiators and Ms O'Donovan. The main judgment has dealt with Ms O'Donovan's denials pertaining to whether the contract existed or not. Mindful of the principle that a party seeking to enforce a contractual right in restraint of trade bears the *onus* to prove the existence of a contract and infringement of such a right, I was persuaded by the explanation furnished on behalf of Kuruman Radiators in respect of the existence of a contract. Mr Whitcutt also conceded that there is competitiveness and urged this Court to consider the overlap carefully in determining the kind of restraint required.
- [7] The *Supreme* Court of Appeal, per Wallis JA, in the *Natal Joint* judgment⁴ cautions judges as follows to when interpreting documents or statutes:

"[18] Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be

⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)

weighed in the light of all these factors. The process is objective not subjective.”

The issue before me regarding the restraint of trade agreement did not pertain to its interpretation but whether it existed or not for purposes of its enforcement. Therefore, Mr Whitcutt’s argument that I did not observe the principle of *stare decisis* when following *Den Braven*⁵ and not the *Natal Joint* judgment has no merit.

Ground 3: the decreasing value of trade connections; Ground 4: the nature of the proprietary interest; Ground 5: the nature of the arrangements entered into between the respondent and its clients when assessing the value of the proprietary information and Ground 6: the considerable differences in the businesses of BSSC Radiators (Pty) Ltd and Kuruman Radiators.

- [8] I deal with grounds 3-6 collectively. For the submission pertaining to the decreasing value of trade connections see the main judgment para 24 and 46. In as far as the nature of the proprietary interest is concerned, refer to the main judgment paras 29, 30, 32 and 34.
- [9] When counsel made submissions for confirmation of the rule nisi extensive arguments were advanced in respect of the differences in operations of the two companies, namely, Kuruman Radiators and BSSC Radiators. The averment that 95% of Kuruman Radiators’ income was derived from the mining industry, which business is acquired on tender and that BSSC Radiators has no interest in battery rooms as well as the rest of the differences as set out in the affidavits were comprehensively argued in the opposed motion and now repeated when leave to appeal is sought. Mr Whittington, for the Respondent, conceded the overlapping in his submissions which

⁵ Den Braven SA (Pty) Ltd v Pillay and Another 2008 (6) SA 229 (D)

is also conceded by Mr Whitcutt. In invoking *Den Braven Van Niekerk* SC had submitted that nowhere is it said that the overlapping must be 100% for the Court to find that the companies are competitors, a submission I found to be persuasive.

Ground 7: Costs

[10] On 20 August 2021 when Mr Van Niekerk SC appeared as counsel for Kuruman Radiators, seeking confirmation of the rule *nisi*, a draft order was handed up contingent upon the applicant being the successful party. Consequently an order of costs was made against both respondents though BSSC Radiators did not oppose the application. The cause of action was a contractual claim against Ms O'Donovan. This finding is attacked by the Applicant, Ms O'Donovan, when applying for leave to appeal.

[11] The following remarks by Harms JA in *Thompson v South African Broadcasting Corporation*⁶ are instructive:

"[6] *It is also necessary to have regard to the object of the rule permitting a party to have the costs reconsidered if costs were not argued at the oral hearing. This appears also from Firestone at 307G – H:*

'Where counsel has argued the merits and not the costs of a case (which nowadays often happens since the question of costs may depend upon the ultimate decision on the merits), but the Court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order (see Estate Garlick's case 1934 AD 499). The reason is (see 503 -5) that in such a case the Court is always regarded as having made its original order "with the implied understanding" that it is open to the mulcted party (or perhaps any party "aggrieved" by the order – 505) to be subsequently heard on the appropriate order as to costs.'"

⁶ 2001 (3) SA 746 (SCA) at 749 para 6

- [12] The position as spelt out in *Firestone South Africa (Pty) Ltd v Gentiruco AG*⁷ goes as follows:

"The Court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention.... This exception is confined to the mere correction of an error in expressing the judgment or order; It does not extend to altering its intended sense or substance. Kotze JA made this distinction manifestly clear in [West Rand Estates Ltd v New Zealand Insurance Co Ltd 1926 AD 173 at 186 – 7], when, with reference to the old authorities, he said:

'The Court can, however, declare and interpret its own order or sentence, and likewise correct the wording of it, by substituting more accurate or intelligent language so long as the sense and substance of the sentence are in no way affected by such correction; for to interpret or correct is held not to be equivalent to altering or amending a definitive sentence once pronounced.'"

- [13] Regard being had to the aforementioned authorities and principles, the Court can always be approached for the reconsideration of the part of the order where it ordered costs to be paid jointly and severally the one paying the other to be absolved, particularly since the BSSC Radiators was not a party to the proceedings and cannot be mulcted in costs. This can be done on mere notice to the other parties (as opposed to a substantive application) by BSSC Radiators (Pty) Ltd in Chamber. The intention was to order costs against Ms O'Donovan as the opposing party.

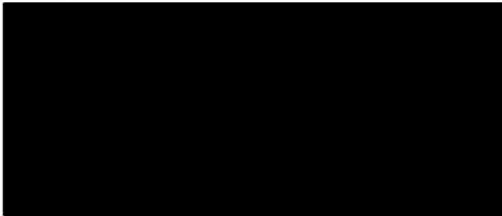
- [14] However, this ground alone cannot be the premise from which the appeal must succeed. It therefore follows that this application stands to fail.

- [15] The respondent, Kuruman Radiators, did not oppose the application for leave and I therefore make no order as to costs.

⁷ 1977 (4) SA 298 (A) at 307C - G

[16] Resultantly, I make the following order:

1. The application for leave to appeal is dismissed.
2. BSSC Radiators (Pty) Ltd, if so advised, may bring an application on notice to the affected parties to have the costs order against it corrected.



M.C.MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

For the Applicant:	None
On record:	c/o Engelsman, Magabane Inc
For the Respondent:	Adv. C Whitcutt SC Adv. Dean Whittington
Instructed by:	LVH Attorneys c/o Duncan & Rothman