

**FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA**

Appeal No. : A457/2007

In the appeal between:

**BLOOMBERG ORTHOPAEDICS &
NEUROSCIENCES**

Appellant

and

MARIZE VERMAAK

First Respondent

FLUOROVIZION (PTY) LIMITED

Second Respondent

CORAM: HANCKE, AJP *et* RAMPAL, J *et* C.J. MUSI, J

HEARD ON: 20 APRIL 2009

JUDGMENT BY: HANCKE, AJP

DELIVERED ON: 23 APRIL 2009

[1] This appeal is against the judgment of Ebrahim J delivered on 12 October 2008 and pursuant to which leave was granted to the appellant to appeal to the Full Bench of this Court. The appeal arises from an application launched by the appellant to enforce a restraint of trade undertaking given by the first respondent in favour of the appellant.

- [2] On 18 August 2005 the appellant obtained an interim interdict, in terms of the restraint undertaking, which *inter alia* restrained the first respondent from, *inter alia*, “being involved or engaged in” the business of the second respondent in competition with appellant for a period of six months. The interim interdict furthermore interdicted and restrained the second respondent from employing the first respondent in its business for a similar period of time.
- [3] The application was postponed several times until the matter was finally argued on 28 September 2006. That is more than a year after the launch of the application.
- [4] As far as the first respondent is concerned, it appears that she did not oppose the application and never entered into an employment contract with the second respondent, although discussions relating to possible employment took place.
- [5] It is important to note that having regard to the first respondent’s date of resignation being 10 August 2005, as well as a six month restraint period calculated as from date of termination of her employment, the six month restraint

period was to expire on 10 February 2006. It is therefore clear that the judgment on appeal would be of academic value only and Mr. Fischer, on behalf of the appellant, conceded that costs had since become the only issue.

- [6] It is therefore necessary to have regard to section 21A of the Supreme Court Act, 59 of 1959, which deals with the powers of a Court of Appeal, which reads as follows:

“(1) When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

.....

(3) Save under exceptional circumstances, the question whether the judgment or order would have no practical effect or result, is to be determined without reference to consideration of costs.”

- [7] The said section is aimed at alleviating the heavy work load of Courts of Appeal. It breaks away from the vague concepts of “abstract”, “academic” or “hypothetical” as criterion for the

exercise of the power of a Court of Appeal not to hear an appeal. It sets a positive test namely, whether the judgment or order will have a practical effect or result? **PREMIER,**

PROVINSIE MPUMALANGA, EN 'N ANDER v

GROBLERSDALSE STADSRAAD 1998 (2) SA 1136 (SCA)

at 1141 D – F. See also **RAND WATER BOARD v ROTEK**

INDUSTRIES (PTY) LTD 2003 (4) SA 58 (SCA) at 61 D – E;

COIN SECURITY GROUP (PTY) LTD v SA NATIONAL

UNION FOR SECURITY OFFICERS AND OTHERS 2001

(2) SA 872 (SCA) at 875 A – B.

- [8] In **PORT ELIZABETH MUNICIPALITY v SMIT** 2002 (4) SA 241 (SCA), Brand JA stated the following at 246 – 247 par.

[7]:

“[7] It can be argued, I think, that s 21A is premised upon the existence of an issue subsisting between the parties to the litigation which requires to be decided. According to this argument s 21A would only afford this Court a discretion not to entertain an appeal when there is still a subsisting *issue* or *lis* between the parties the resolution of which, for some or other reason, has become academic or hypothetical. When there is no longer any issue between

the parties, for instance because all issues that formerly existed were resolved by agreement, there is no 'appeal' that this Court has any discretion or power to deal with. This argument appears to be supported by what Viscount Simon said in *Sun Life Assurance Company of Canada v Jervis* [1944] AC 111 (HL) at 114, when he said, with reference to facts very similar to those under present consideration:

' . . . I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.'

Consequently, he found that in a matter where there was no existing *lis* between the parties the appeal should be dismissed on that ground alone."

- [9] Mr. Fischer submitted, on behalf of the appellant, that exceptional circumstances as envisaged by section 21A(3) existed in view of the dilatory manner in which the second respondent dealt with the whole application knowing fullwell that, by the time not only the application to compel had been finalised, but also the date by which the answering affidavit had been filed, the six months restraint period would have expired. He submitted that the second respondent was

entirely responsible for such delay and/or postponements resulting in the eventual arguing and finalising of the merits of the application no longer having any practical effect and/or result.

[10] As far as the second respondent's application in terms of Rule 35(12) is concerned and although it delayed the finalisation of the application, it appears from the papers that it was substantially successful. It is not clear from the papers that the second respondent was entirely responsible for all the postponements. However, the Court *a quo* implicitly found that the second respondent was not. Mr. Fischer's argument that there was *mala fides* present on the part of the second respondent is therefore not justified.

[11] Be that as it may, it is clear from the papers that there is no longer any "subsisting issue" or "*lis*", or "a matter in actual controversy" or "a living issue" to be decided. See **PORT ELIZABETH MUNICIPALITY v SMIT**, *supra*, at 247 par. [7]. The appeal can, therefore, not succeed.

[12] Consequently the appeal is dismissed with costs.

S.P.B. HANCKE, AJP

I agree.

M.H. RAMPAL, J

I agree.

C.J. MUSI, J

On behalf of the appellant:

Adv. P.U. Fischer
Instructed by:
McIntyre & Van der Post
BLOEMFONTEIN

On behalf of the respondent:

Adv. A.J.R. van Rhyn SC
Instructed by:
Lovius Block
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/sp