

SOUTH AFRICA / JUDGMENT

**Bruwer and Another v Pholosa Asset
Management (Pty) Ltd and Another
(A5002/08, A5003/08) [2008]
ZAGPHC 356 (18 November 2008)
[2008] ZAGPHC 356**

COURT

High Courts - Gauteng

BEFORE

FHD van Oosten, M Jajbhay, CD de Jager

CASE / FILE NUMBER

A5002/08, A5003/08

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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO A5002/08

& A5003/08

In the matter between

MARCEL BRUWER FIRST APPELLANT

CHARLES SCHREUDER SECOND APPELLANT

and

PHOLOSA ASSET MANAGEMENT (PTY) LTD FIRST RESPONDENT

MAYIBUYE GROUP (PTY) LTD SECOND RESPONDENT

J U D G M E N T

THE COURT

- [1] This is an appeal with leave of the Supreme Court of Appeal against the judgment and order of this Court (Moshidi J) in essence by way of interdict protecting the applicant's confidential information and intellectual property (described in the order quoted below). The first appellant, who is a qualified non-practicing attorney and the respondents are all involved in the debt recovery industry, which now is regulated in terms of Debt Collectors Act 144 of 1998. The second appellant was employed as an attorney at JM Attorneys in Randburg. The

respondents and JM Attorneys are interrelated in several ways: the deponent to the affidavits on behalf of the respondents is an attorney and director of JM Attorneys as well as a director of both the respondents. JM Attorneys act on behalf of both the respondents in legal matters requiring the services of attorneys. The second respondent is the holding company of the first respondent and the owner of the intellectual property used by the first respondent which the respondents sought to protect.

- [2] The first appellant with an employment history from December 1996 as professional assistant at two firms of attorneys and legal manager at a Bank, during November 2001 joined Mayibuye Legal Services (Pty) Ltd as collection manager, whose main business was taken over by the first respondent resulting in the first appellant becoming its employee from 1 March 2003. He was promoted a number of times while in the first respondent's employ and attended a number of computer courses aimed at improving his computer skills which were required for promotion and effective debt recovery. The second appellant joined JM Attorneys on 1 March 2004 as professional assistant. He was subsequently promoted to an associate of the firm having qualified as an attorney. Part of his

duties and functions at the firm was to carry out mandates from the first respondent in debt collection matters. On 2 February 2006 both respondents resigned from their respective employments and thereafter from 1 March 2006 jointly started their own debt collecting business in competition with the respondents. A string of correspondence flowed inter alia seeking certain undertaking from the appellants which they refused to furnish. On 7 April 2006 the respondents launched the application

which is the subject matter of this appeal. Full sets of affidavits were filed and the matter came up for hearing before Moshidi J, who granted the following order:

The First and the Second Respondents jointly and severally are hereby interdicted and restrained from, whether directly or indirectly and whether personally or through an individual, company or other entity, utilising or disclosing whether the whole or any portion of or any combination of the First and/or Second Applicant's intellectual and/or confidential information consisting of:-

Intellectual property

the registered patent under serial number PCT/1B00/01129 known as "Data processing System";

the "RRR" computer programme, which creates scoring profiles of an individual based on various behaviour patterns and which creates a risk profile in relation to such individual;

the "Internal Behaviour Profile" ("IBP") computer programme, a profile mechanism used to create a profile

on behaviour scoring to determine collection behaviour campaigns;

the "Employed/Unemployed" computer program, which is a model that, based on certain criteria and scoring, predicts

an individual's employment/unemployment status;

The "Ready for Legal" computer programme, which is a model which predicts the probability of success with legal

action;

The "Dollar" computer programme, which creates pecking orders designed to sort payments into different categories;

The "Affordability Models", which enables a logical segmentation of an individual's budget against income for

the purposes of debt recovery and loan granting.

1.2 Confidential information

the strategies, methodologies, analytics, and procedures utilised by the First Applicant in conjunction with the intellectual property referred to in 1.1 above as well as associated data and application thereof.

The First and Second Respondents, jointly and severally, are interdicted and restrained from whether directly or indirectly and whether personally or through an individual, company or entity, unlawfully competing with the First Applicant through the use by him/them of any of the intellectual property or confidential information referred to in 1 above. Interdicting and restraining the First and Second Respondents, jointly and severally, from, whether directly or indirectly and whether personally or through an individual company or any other entity, soliciting credit recovery/debt collection business from any of the Applicants' clients and potential clients consisting of:-

Telkom SA Ltd;

MTN SP (Pty) Ltd;

Cell C (Pty) Ltd;

Home Choice;

Truworhs;

Foschini (Potential);

Presles;

Edgars (Potential);

Woolworths (Potential);

3.10 ABSA Bank Ltd

Ordering the First and Second Respondent jointly and severally, the one paying the other to be absolved, to pay the costs of this

application on the attorney and own client scale.

- [3] The relief granted by the Court a quo was a final interdict aimed at protecting the respondents' intellectual property and confidential information and therefore not a restraint in the true sense. Both the confidentiality and protectability of the intellectual property and information which was the subject matter of the application were disputed by the appellants. The learned Judge a quo found that they were indeed proprietary and protectable. In the view we take of this matter it is not necessary to decide this issue and it is accordingly not further dealt with.
- [4] The requirements for succeeding in respect of a final interdict are well-established (Setlogelo v Setlogelo 1914 AD 121; Joubert (ed) The Law of South Africa vol 11 in para [309]): the applicant for relief has to establish a clear right; an injury committed or reasonably apprehended; and that there is no satisfactory alternative remedy (Waste Products Utilisation (Pty) Ltd v Wilkes and Another 2003
- (2) SA 515 (W) 586D). It is common cause between the parties that no direct evidence (or as the respondents would have it, conclusive evidence) exists to show that the appellants are either using or abusing the respondents' confidential information or that they have threatened to do so. In the founding papers it is stated thus:

Although I on behalf of the Applicants am not at this stage in a position

to place any evidence before the Honourable Court conclusively indicating that the Respondents have downloaded or in any other way caused to be copied Applicants' intellectual property and/or any of the captured data, they and more especially the First Respondent having, as a result of his exposure as outlined hereunder to intellectual property and confidential information, is privy to the basic ingredients/content of the various computer programs making up the intellectual property and is also familiar

with much of the First Applicant's confidential information which would result in his being in a position to convey to a third party sufficient information regarding the intellectual property and confidential information in order to enable such third party to utilise same in the production of similar or possibly even identical computer programs. Once this is achieved, the First Respondent knowing First Applicant's strategies, methodologies, analytical approach, etc, as well as its existing confidential information, would be in a position to utilise same as a springboard at a relatively low cost and thus unfairly compete with the business of the First Applicant."

The above quoted passage must be considered against the appellants' denial that they used or intended to use the respondent's confidential information and their tender made to the respondents to inspect their computers and homes for search thereof, which the respondents did not avail themselves of. Counsel for the respondents however submitted that the denial of the respondents in view of what was said in the quoted passage is of cold comfort to the respondents.

The possibilities raised in the passage so the argument continued, show the real risk of the appellants using confidential information by copying it and using it in a new business in competition with the respondents, which in turn serves to confirm the respondents' reasonable apprehension. We find the argument unpersuasive. The possibilities raised by the respondents relating to copying and the involvement of a third party in the reproduction of computer programmes do not transcend speculation: there is simply no evidence remotely pointing in that direction.

[5] The absence of "conclusive" evidence showing the appellants' use of the confidential information counsel for the respondents submitted is not fatal to their case. Counsel proceeded to identify three building blocks which he submitted objectively justified "a real and justified" apprehension on the part of the respondents. The first is the appellants' intention to join a rival in competition with the respondents, as expressed in so many words in their letters of resignation. In the final concluding paragraph of his letter of resignation the first appellant states:

Finally take note that I am joining a newly found collection company, as a shareholder and director immediately after termination

of my employment.

In similar vein the second appellant concluded in his letter of resignation:

In closing please be advised that I will be a shareholder in a company that will be operational in similar areas to those of JM Attorneys and Pholosa Asset Management.

Based on these letters the Court a quo found:

Prior to their simultaneous and similar resignations, both the Respondents' conduct compelled the Applicants to reasonably believe that the Respondents intend to use the confidential information and intellectual property which they had jointly gained in the employ of the First Applicant and JM Attorneys, respectively, in competition with the Applicants. In proof thereof, the Respondents set up a company for such purpose. The Respondents' bare denial that such was not their intention, is insufficient comfort for the Applicants. The Respondents declined to furnish the Applicants with the necessary undertaking in this regard.

It is not in dispute that the appellants were to and did indeed go into business together as debt collectors in competition with the first respondent. What seems to have been overlooked is that the appellants were not bound by a covenant in restraint of trade. Had the respondents wanted to secure that kind of protection, they should have done so by way of an express stipulation restraining their employees from competing with them. A similar flawed approach was followed by counsel for the respondents in relying on the judgments in *Rawlins v Caravantruck (Pty) Ltd* [1992] ZASCA 204; 1993 (1) SA 537 (A) 543D and *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) 499F in support of the respondents' case that the appellants having gained knowledge in their employ of the respondents' confidential information and then entering into competition with a rival, was sufficient to show they were using such information. In the

judgments referred to the Court dealt with specific performance of covenants in restraint of a restraint of trade and in view thereof considered the covenantor's proprietary interest worthy of protection. On that basis as correctly pointed out by counsel for the first appellant, those cases are clearly distinguishable from the present matter where the requirements of a final interdict are at stake.

[6] The knowledge, skills and experience which the appellants in the words of the learned Judge a quo "jointly gained in the employ of the first applicant and JM Attorneys" must have been in their heads when their employment

terminated. They were in law after terminating their employment, entitled to freely use for their own benefit the knowledge, skills

and experience they had acquired before their employment with the respondents as well as during their employment, unless such knowledge

could not lawfully be used for anyone's benefit but the employer's (See *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) 502-4; *Meter Systems Holdings Ltd v Venter and Another* 1993

(1) SA 409 (W) 429-432; *Arrow Altech Distribution (Pty) Ltd v Byrne and Another* [2007] ZAKZHC 33; [2008] All SA 356 (D) par [20]-[24]).

[7] As for the appellants' operating a business in competition with the respondents, again in the absence of a stipulation restraining them to do so, the law moreover allows them to use their skill and knowledge for their own benefit to partake in a business in competition with their former employers (*Schultz v Butt* 1986 (3) SA 667 (A) 678F; *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981

(2) SA 173 (T) 192; *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* supra 505G; *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA); and *Arrow Altech Distribution (Pty) Ltd v Byrne and Another* supra par [20], [21]). It follows therefore that these factors do not assist the respondents in discharging the onus.

[8] The second building block counsel relied on concerns a conversation the second appellant had with Guy Lavender, who rendered legal advisory services to the respondents, during which he said "that he and the first respondent (the first appellant) intend to improve on First and Second Applicants' systems and information". From this the respondents surmise the appellants intended using their confidential information. Leaving aside for the moment the first appellant's response hereto, the inference the respondents seek to draw from the statement in our view is unsustainable (See *AA Onderlinge Assuransie Bpk v De Beer* 1982 (2) SA 603 (A) 620E-G): improvement certainly does not, as counsel for the respondents would have it, by inference as opposed to assumption, denote "take those (ie the respondents' confidential information) and improve upon it". Its ordinary Oxford Dictionary meaning is "to

produce something better” without implying the use or possession of that improved upon. But, as I have mentioned the first

appellant’s response need to be considered. He states:

The Second Respondent and I have had to procure the use of other systems at our own cost and are currently utilising same, entirely

independent of any systems utilised by the Applicants. As stated before, all the available systems operate on the same systems or similar information.

The learned Judge a quo criticised the appellants for not disclosing particulars of the system they were using. Counsel for the respondents studiously defended those as well as the adverse findings concerning their credibility which the learned Judge found warranted a punitive costs order against them. We are unable to agree. The particulars of the system the appellants were using, in our view, would not have taken the matter any further. The onus to prove the requirements for the granting of a final interdict was on the respondents. Significantly they were less than frank with the description of their confidential information which they sought to protect. The reason given by the respondents for not disclosing full details thereof, ie that it would compromise the confidentiality thereof, or as the learned Judge a quo referred to it, for obvious security reasons, was less than satisfactory. The procedures available to a party to bring that kind

of information before Court on the basis of preserving its confidentiality, are well-known. As for the Court a quo’s adverse credibility finding it merely needs restatement that such findings should not readily be made in motion proceedings, unless clearly warranted. This in our view was not such a case. We do not however consider it necessary to deal with this aspect any further. The second building block therefore also crumbles down into oblivion.

[9] The third and last building block concerns the events and conversation referred to by Petrus Visser, who at the time was the acting managing director of JM Attorneys as well as a director of the first respondent. Both appellants were well known to him and the respondents’ description of the events (as confirmed by him), is the following:

On the morning of the 2nd of February 2006 and at or about 08h20 and on passing Second Respondent’s office, he (Visser) noticed that both Second Respondent and First Respondent were seated therein.

Having entered the office, he greeted them, both of them appeared to be in high spirits. One of them (he cannot recall which) said

something along the lines that they may as well tell him that they both resigned.

As both of them were involved in projects or tasks that affected him, he indicated to them that there were a number of things and tasks to be completed before they leave. To this one of them (again he cannot recall which) stated that they do not think that this would be possible or would happen and when Visser enquired as to why not, he was told that in their notices of resignation they indicated that they were going into competition with both First Applicant and JM. When this was conveyed, it was done with

an underlying smile or fulfilled expression as though same was amusing or funny. Both of them had grins on their faces. One or both of them stated that they suspect that they will shortly both be asked to leave the premises having regard to the contents of their resignation letters. One of them (again he cannot recall which) stated that in light of this they had turned off their computers.

He then asked Second Respondent for a copy of the letter of resignation which he gave him. He then enquired from Second Respondent as to why he had stated his intention to go into competition in his resignation letter, to which he advised that he deemed it necessary to be open and honest and to prevent us from later finding out and accusing him of being dishonest.

He also asked whether they would be operating as a legal firm or as a debt collector, to which one of the Respondents replied that

they had not yet decided which enterprise to use.

From this conversation (the contents of which is disputed by the appellants) the respondents seek to infer that the appellants “intend to, whether directly or indirectly, compete with the First Applicant and JM and that they intend utilising the confidential information, strategies, methodologies and the same or similar intellectual property as well as details of the First Applicant’s clients and contact numbers and contact persons for purposes of so doing. (underlining added). There is plainly no justification for the inference underlined and counsel for the respondents was seemingly unable to take this aspect any further. One last observation: these being motion proceedings the respondents version must be accepted (Cf Automotive Tooling Systems (Pty) Ltd v Wilkens and Others 2007

(2) SA 271 (SCA) para [9]; and for the application of the Plascon-Evans-rule by the Supreme Court of Appeal in a recent judgment, see Digicore Fleet Management (Pty) Ltd v Steyn (722/2007) [2008] ZASCA 105 (22 September 2008) para [9]). It follows that the third building block suffers the same fate than the others.

[10] As for the second appellant it is unfortunate that in his analysis of the facts, the learned Judge in the court below failed to give effect to the practical differences inherent in the vocational positions occupied between the first and second appellants. Furthermore, his approach in having applied the same considerations for both appellants, in our view was incorrect. This in itself constitutes a misdirection. The simple factual situation was that the second appellant was not employed by either of the respondents at any time.

- [11] The learned Judge a quo conflated the respective positions of the two appellants by integrating their separate positions, the effect of which would be to constrain the appellants in their endeavours in competing (albeit lawfully) with the respondents. Such an order against the second appellant who was employed by a firm of attorneys, who were tasked to perform the legal functions of the respondents, and who were not joined as a party to the proceedings, has no valid basis in the circumstances of the present matter. It would further have the startling effect of effectively preventing the second appellant from lawfully competing with the respondents in respect of potential clients, and any other competition in the debt collecting industry.
- [12] The contention advanced on behalf of the second appellant to the effect that there is no evidence that he was ever in possession of, or intended using the respondents' computer programmes, is sound. This in effect means that there does not exist any factual or logical basis for apprehending that the second appellant would unlawfully compete with the respondents. The mere assertion of a fear, as we have pointed out in respect of the first appellant, likewise does not constitute a reasonable apprehension of harm.
- [13] Finally, as to the costs of this appeal, the issues canvassed in this matter were rather crisp and not too complex. This case did not reasonably warrant the employment of two counsel by each of the appellants. The application by both the appellants for the costs to include the costs of two counsel accordingly is not justified, and should therefore be refused.
- [14] For all these reasons the following order is made:
1. The appeal is upheld with costs.
 2. The order made by the Court a quo is set aside and substituted with the following:
"The application is dismissed with costs."

FHD VAN OOSTEN

JUDGE OF THE HIGH COURT

M JAJBHAY

CD DE JAGER

ACTING JUDGE OF THE HIGH COURT

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