

SOUTH AFRICA / JUDGMENT

**Cipla Medpro (Pty) Ltd v H Lundbeck A/S and
Another In re: H Lundbeck A/S and Another
v Cipla Medpro (Pty) Ltd (89/4476) [2010]
ZACCP 6; 2010 BIP 80 (CP) (24 May 2010)
[2010] ZACCP 6**

COURT

Court of the Commissioner of Patents

BEFORE

B.R. Southwood

CASE / FILE NUMBER

89/4476

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IN

**THE COURT FOR THE COMMISSIONER OF PATENTS
(FOR THE REPUBLIC OF SOUTH AFRICA)**

Date: 2010-05-24

Case Number:

89/4476

In the matter between:

CIPLA MEDPRO
(PTY) LTD
Applicant
and
H LUNDBECK A/S
1st
Respondent
LUNDBECK SA
(PTY) LTD 2nd
Respondent

In re: H LUNDBECK A/S
 1st
 Applicant
 LUNDBECK SA
 (PTY) LTD
 2nd
 Applicant
 CIPLA MEDPRO
 (PTY) LTD
 Respondent

JUDGMENT

SOUTHWOOD J

- [1] The applicant has brought two applications in terms of Rule 42(1)(b) of the Uniform Rules in which it seeks to vary the court orders in two urgent applications dismissing the applications with costs including the costs consequent upon the employment of two counsel. In each application the applicant seeks an order that the costs order include the qualifying fees of the respondent's expert witness, Dr. Roland Collicott. Both urgent applications related to South African patent number 89/4476 ('the patent') and since the same issues arise in each application only one judgment is given.
- [2] The relevant part of Rule 42(1)(b) provides that the court may, upon the application of any party affected vary an order or judgment in which there is a patent error or omission. The respondent opposes the applications and contends that the Rule is not applicable because there was no patent error or omission; that the court is functus officio and cannot entertain the application and that the applicant is precluded from seeking the relief because of the long delay which occurred before the applicant instituted proceedings.
- [3] The applicant seeks final relief on notice of motion. Accordingly where there are disputes of fact in the affidavits final relief may be granted only in the circumstances set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984
- (3) SA 623 (A) at 634E-635C.
- [4] The relevant facts are as follows:
- (1) In May 2008 the respondents launched an urgent application against the applicant seeking an order correcting errors in the patent and an interim interdict;
- (2) The applicant opposed the application and lengthy affidavits were filed. These included affidavits by a number of expert witnesses. One of the applicant's expert witnesses was Dr. Collicott an analytical chemist with experience in the pharmaceutical industry;
- (3) This court (Southwood J) heard the application on 12 and 13 May 2008 and handed down judgment on 20 June

2008. The court dismissed the application and ordered the respondents, jointly and severally, to pay the costs of the application such costs to include the costs consequent upon the employment of two counsel;
- (4) In argument the applicant's counsel sought an order for costs, including the costs of two counsel, but did not request that the court allow the qualifying fees of any expert witnesses. When judgment was handed down on 20 June 2008 the applicant's counsel did not seek an order that the qualifying fees of any expert witnesses be allowed;
 - (5) The respondents unsuccessfully sought leave to appeal against the judgment handed down on 20 June 2008 and once again no mention was made of any qualifying fees;
 - (6) In August 2008 the respondents launched a second urgent application against the applicant seeking an amendment of the patent and an interdict;
 - (7) The applicant opposed the application and once again lengthy affidavits were filed which included affidavits by a number of expert witnesses. The applicant again relied on an affidavit by Dr. Collicott;
 - (8) This court (Hartzenberg J) heard the application on 5 and 6 November 2008 and handed down judgment on 12 November 2008. The court dismissed the application with costs including the costs consequent upon the employment of two counsel;
 - (9) Once again, in argument, the applicant's counsel sought an order for costs, including the costs of two counsel but did not request the court to allow the qualifying fees of any expert witnesses;
 - (10) In December 2008 the applicant's attorney, Mr. Ball, instructed a costs consultant, Ms. Van Dyke, to prepare bills of costs in respect of the two applications and provided her with the relevant papers. Ms. Van Dyke prepared drafts of the bills and submitted them to Mr. Ball at the end of March 2009. The final bills were served on the respondents' attorney on 23 June 2009 and it was arranged that they would be taxed on 18 August 2009;
 - (11) During the week before taxation Ms. Van Dyke informed Mr. Ball that the respondents' attorney, Mr. Whittaker, considered that the applicant was not entitled to the qualifying fees of Dr. Collicott, which were included in both bills, because the orders of court did not make provision for this. According to Mr. Ball this was the first time that he realised that there was a problem with the costs order;
 - (12) The attorneys then agreed that the taxation of the bills would be postponed so that Mr. Ball could obtain urgent legal advice as to the applicant's remedies;
 - (13) Mr. Ball instructed counsel to provide him with an opinion and in the mean time attempted, unsuccessfully, to obtain the respondents' agreement to accept liability for Dr. Collicott's qualifying fees;

- (14) The applicant launched the applications on 11 December 2009. The respondents oppose the applications and have filed answering affidavits.
- [5] It is trite that an expert witness's qualifying fees will be allowed on taxation only if they are authorised by the court or if all interested parties consent thereto and that they will be allowed by the court if it appears to the court that it was reasonable for the legal representatives of the successful party to incur such expenses when they did so – see e.g. *Transnet Limited t/a Metrorail and Another v Witter* [2008] ZASCA 95; 2008
- (6) SA 549 (SCA) paras 15 and 18. It is therefore the duty of the party and/or the party's legal representatives to address the question of the qualifying fees of expert witnesses when the issue of costs is argued.
- [6] Whether or not, in these circumstances, the applicant is entitled to the relief sought is a matter of law. The relief sought can be granted in terms of Rule 42 or under the common law. While Rule 42 sets out exceptions to the general principle that once a Judge has made a final order which correctly expresses the true decision of the court, the court cannot alter that order because the court is *functus officio* – see *Tshivhase Royal Council and Another v Tshivhase and Another*; *Tshivhase and Another v Tshivhase and Another* [1992] ZASCA 185; 1992
- (4) SA 852 (A) at 862I - it has long been accepted under the common law that the strict rule that the final order cannot be altered can be relaxed under special circumstances so that although the main judgment cannot be altered it might be timeously supplemented in respect of consequential matters such as the award of the costs for which no provision is made – see *West Rand Estates v New Zealand Insurance Co Ltd* 1926 AD 174 at 176 and 178 (per Innes JA); at 184-5 (per Solomon JA) and at 186-7 (per Kotze JA); *Estate Garlick v Commissioner for Inland Revenue* 1934 AD 499 at 502-3; *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977
- (4) SA 298 (A) at 306F-308A.
- [7] In terms of Rule 42(1)(b) relief can be granted if the applicant can show that there was a patent error or omission: i.e. an error or omission as a result of which the judgment does not reflect the intention of the judicial officer pronouncing it and that such error was wholly or partly attributable to the court rather than the party affected or that party's legal representatives – see *First Consolidated Leasing Corporation Ltd v McMullin* 1975
- (3) SA 606 (T) at 608F; *Seattle v Protea Assurance Co Ltd* 1984
- (2) SA 537 (C) at 540E-541D and 542B-543C; *First National Bank of South Africa Ltd v Jurgens and Others* 1993
- (1) SA 245 (W) at 246F-H; *First National Bank of South Africa Ltd v Van Rensburg NO and Others*; in re *First National Bank of Southern Africa Ltd v Jurgens and Others* 1994

- (1) SA 677 (T) at 680I-681B – and the applicant seeks relief within a reasonable time after the order concerned was made – *First National Bank of South Africa Ltd v Van Rensburg NO and Others* supra at 681B-C; *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992
- (2) SA 466 (E) at 471E-F.
- [8] In *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977
- (4) SA 298 (A) the court dealt extensively with the common law position, the following parts of which are relevant -

‘The general principle, now well-established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased. See *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at pp176, 178, 186-7 and 192; *Estate Garlick v Commissioner of Inland Revenue* 1934 AD 499 at p502. (306F-G)’:

There are, however, a few exceptions to that rule which are mentioned in the old authorities and have been authoritatively accepted by this Court. Thus, provided the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it in one or more of the following cases:

- (i) The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the court overlooked or inadvertently omitted to grant (see the *West Rand* case, supra). (306G-H):

(ii) ...

(iii) ...

(iv) 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 supra, 1934 AD 499). The reason is (see pp503-5) 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 – see p505) to be subsequently heard on the appropriate order as to costs.

But, of course, if after having heard the parties on the question of costs either at the original hearing or at a subsequent hearing (as happened in the present case), the Court makes a final order for the costs, there can then be no such ‘implied understanding’; and such an order is as immutable (subject to the preceding exceptions) as any other final judgment or order.’ (307G-308A)

In the first passage quoted the court emphasised that the court must be approached within a reasonable time of its pronouncing the judgment or order. As pointed out in *First National Bank of South Africa Ltd v Van Rensburg NO supra* at 681E-F this is because it is in the interests of justice that there should be relative certainty and finality as soon as possible

concerning the scope and effect of orders of court. Persons affected by such orders should be entitled within a reasonable time after the issue thereof to know that the last word has been spoken on the subject.

[9] In the present cases the parties argued the question of costs and the courts made costs orders. There is no suggestion that these costs orders did not correctly express the intention of the court or that the court did not consider what was argued or omitted to order what was requested. It is clear from the facts that the court did not consider the qualifying fees of expert witnesses because it was not requested to include such fees in the order. As far as Rule 42(1)(b) is concerned the applicant has not established a patent error or omission attributable to the court. As far as the common law is concerned the qualification to exception (iv) referred to in the *Firestone*

judgment

applies. The application must therefore be refused on these grounds alone.

[10] A further reason for refusing the application is the long period of time which elapsed before the applicant sought the relief. Clearly it is the duty of the party's legal representatives to peruse the order when it is issued by the registrar to ensure that it correctly reflects the order made by the court. If the order omits certain relief (as the two orders clearly did) the applicant's attorney should have brought this to the attention of the court immediately and requested that the order be rectified. The applicant waited from 20 June 2008 until 11 December 2009 (about 18 months) in respect of the first order and from 12 November 2008 until 11 December 2009 (13 months) in respect of the second order before launching the applications. This delay was primarily, if not solely, due to the fact that Mr. Ball did not peruse the orders when they were issued or, if he did, that he did not appreciate that the orders had to allow the qualifying fees of the applicant's witnesses if the applicant wished to recover those fees. It is not clear why it was necessary for Mr. Ball to obtain counsel's opinion before launching the application. The legal position is readily ascertainable in the legal text books. In my view the applications were not brought within a reasonable time after the orders were given.

Order

[11] The applications are dismissed with costs.

B.R. SOUTHWOOD

JUDGE OF THE HIGH COURT

CASE NO: P89/4476

HEARD ON: 24 May 2010

FOR THE APPLICANT: ADV. J.A. DU PLESSIS

INSTRUCTED BY: Mr. Tim Ball of Brian Bacon Inc.

FOR THE RESPONDENT: ADV. E.P. VAN RENSBURG

INSTRUCTED BY: Mr. Whittaker of Spoor & Fisher Inc.

DATE OF JUDGMENT: 24 May 2010

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