

SOUTH AFRICA / JUDGMENT

Drywonder (Pty) Ltd and Another v Carpet Dryclean CC and Others; in re: Carpet Dryclean CC and Another v Drywonder (Pty) Ltd and Another (75564/2015) [2017] ZAGPPHC 323; 2017 BIP 189 (GP) (15 June 2017) [2017] ZAGPPHC 323

COURT

North Gauteng High Court, Pretoria

BEFORE

C J Van der Westhuizen

CASE / FILE NUMBER

75564/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO.: 75564/2015

DATE:

15/6/2017

In

the matter between:

DRYWONDER
(PTY) LTD
FIRST
APPLICANT
ROY
SELWYN
BERMEISTER
SECOND APPLICANT
and
CARPET
DRYCLEAN CC
FIRST
RESPONDENT
WAYNE
HALLIDAY SECOND
RESPONDENT
TWO
OCEANS MARKETING (PTY) LTD

THIRD RESPONDENT
IN

RE:

CARPET
DRYCLEAN CC
FIRST
APPLICANT
WAYNE
HALLIDAY
SECOND APPLICANT
DRYWONDER
(PTY) LTD ROY
FIRST RESPONDENT
SELWYN
BERMEISTER
SECOND RESPONDENT

JUDGMENT

VAN DER WESTHUIZEN, A J

- [1] This is an application, albeit it interlocutory, for the determination and awarding of wasted costs following on the alleged aborting of all relief in the main application between the parties, including the scale thereof.
- [2] The relationship between the parties is akin to a love triangle in the sense that the first applicant (in this application for wasted costs), Carpet Dryclean CC (Carpet Dryclean), and the first respondent Drywonder (Pty) Ltd (Drywonder) were parties to a distribution agreement in terms whereof a product was effectively distributed through Two Oceans Marketing (Pty) Ltd (Two Oceans), and the inevitable fall out. Mr Halliday is the manufacturer of chemical products and in particular carpet drycleaning products. One of those products, branded "Drywood", is the subject of the aforementioned distribution agreement.
- [3] The said fall out resulted due to the direct supply by Mr Halliday to Two Oceans, thereby ending the distribution agreement and excising Mr Bermeister as middleman. Mr Bermeister, dissatisfied with his ousting, launched the main application by way of urgency and sought various interim interdicts, as well as two final interdicts, against Mr Halliday, Carpet Dryclean and Two Oceans.
- [4] The aforesaid urgent application was opposed. In the opposing papers, the grounds upon which the urgent application was premised were comprehensively dealt with and defences were raised. The matter (the main application) eventually came before Ranched, J. Undeterred, Mr Bermeister soldiered on persisting in the application and the relief sought therein. However, at the hearing of the main application, Mr Bermeister abandoned all

relief to the interdicts, bar one of the interim interdicts . The Honourable Judge, Ranchod, J., hearing the main application, said in respect of the said abandonment, "[t]o make matters worse, in casu I was informed only at the commencement of the hearing that the applicants were abandoning a substantial part of their claim."

- [5] The interim relief that was persisted with in that application related to an interim interdict restraining

Mr Halliday from alleged passing off. In that regard Ranchod, J., held that the " applicants have not established the requisites for the granting of an interim interdict ... " finding that there was serious doubt in respect of the prima facie rights of Mr Bermeister. Ranchod, J., referred the main application, or that which remained thereof, to trial. It was further directed that a declaration was to be filed within fifteen days of the order. The costs were reserved.

- [6] The aforesaid declaration was duly filed. However, the relief sought in the declaration is independent of, and different from, the relief sought in the urgent/main application. No interdict is sought as envisaged in the urgent/main application. It follows that the remaining relief in the main application, i.e. the relief in respect of alleged passing off, has now also been abandoned. A new cause of action has been raised in the declaration. A different kettle of fish presents in the declaration.

- [7] It follows that the substratum and purpose of the urgent/main application has fallen away. That application has thus come to an end. The issues underlying the relief sought in the urgent/main application are not continued with in the trial action.

- [8] In the main application Mr Bermeister relied on an oral agreement as opposed to a concluded written agreement, the defence raised in the main application. The dispute in that regard also swayed Ranchod, J., in referring the remaining issue to trial. The underlying causa of the pending trial solely requires a determination of

the said written agreement, its validity or otherwise. Mr Bermeister has clearly abandoned any reliance on the

alleged oral agreement. Mr. Tredoux, appearing on behalf of Mr. Bermeister, conceded that much.

- [9] In view of the foregoing, Mr Halliday contends that the costs of the urgent and main application

were incurred unnecessarily. He further contends that as the, urgent application has no continuance in the pending trial action, the costs reserved in that application fall to be decided separately from the costs in the trial action.

- [10] The order in respect of the costs in the main application merely reads that those costs are reserved. No qualification was attached. Mr Salmon SC, who appeared on behalf of the present applicants, agreed with Mr. Tredoux that the order reserving the issue of costs merely meant that a determination of the issue of costs was to be undertaken at a later stage. The scale of which is also in dispute
- [11] In that regard, Mr. Tredoux submitted that such determination would be better considered in the trial action, when all facts were considered and the action adjudicated upon. There is no merit in that submission for what follows.
- [12] The relief sought in the urgent application and the issues underlying that relief are no longer the subject of the pending trial action. A different cause of action is raised in the declaration and different and divergent relief is sought.
- [13] However, Mr. Tredoux submitted with reference to the unreported judgment in *Claudia De Villiers v Kapele J Holdings et al*,^[1] in which a dictum in *Macassar CC v Macassar Claims Committee et al*^[2] was referred to, that the costs of the urgent application are to stand over for determination by the trial court. I understood Mr Tredoux's submission to be to the quoted dictum of the SCA judgment where the following was said in paragraph [13]:

"Costs order are, in the absence of exceptional circumstances, not generally made in interlocutory interdict proceedings since the court finally hearing the matter is in a better position, after hearing all the evidence, to determine whether or not the application is well founded."

- [14] In *Claudia De Villiers*, *supra*, Sutherland, J., considered that dictum and distinguished the matter before him from that in the SCA judgment.

He opined as follows:^[3]

"It seems to me that there is a distinction to be made with reference to that decision. In many cases for interim relief, the final relief sought in subsequent proceedings, is in a very real sense, a re-run of what was ventilated at the interim stage. But that is not the case here. The particular circumstances which are immediately important, are whether or not urgent interim relief is required. That issue is not going to be revisited. The question of whether or not it was justifiable on the part of the applicant to seek relief in this form, seems to me to be the critical factor relevant to what is an appropriate costs order."

- [15] In the present matter, the issues raised in the urgent proceedings are not, as indicated in the declaration filed, to be revisited at the trial. A different *causa* will be considered and divergent relief is sought. The urgent application has clearly come to an end. The same underlying issues will not be revisited. In *casu* the critical factor is whether the relief sought in the urgent/main application is persisted with in the trial action, and hence whether it is justifiable.

- [16] In my view, the issue of costs in this matter does not require a determination of the existence of "exceptional circumstances". I agree with the reasoning of Sutherland , J., that where the particular immediately important circumstances of an interim matter would not involve a re-run or to be revisited at a later stage, the principle enunciated in Maccsand, supra, would not apply. In my opinion, the issues and relief sought in the main application in the context of the declaration in the action are not justifiable.
- [17] In that regard, the general principle is that costs follow the event, i.e. that the successful party is entitled to his or her costs. By abandoning all relief sought in the urgent/main application, that application has come to an end, akin to a withdrawal or a dismissal thereof. The issue of the costs of the urgent/main application stands to be decided.
- [18] It follows that the "successful" party is entitled to its costs. It further follows that the respondents in the urgent/main application are entitled to their costs.
- [19] There remains the issue of the scale on which the costs are to be awarded. Mr. Salmon submitted that the conduct of Mr. Bermeister (in his own capacity and through Drywonder) as reflected in the papers, clearly warrant a punitive cost order to be awarded. I have already recorded earlier in this judgment that a volte face occurred from the approach in the urgent-proceedings to that set out in the declaration. That about face is not explained, and in my view, could not have been explained in view of what has been stated by Mr. Bermeister in his various affidavits in the urgent/main application and in the present application.
- [20] It follows that the costs incurred in the urgent/main application have been wasted. Wasted, due to the volte face taken in the declaration. Such conduct is to be sanctioned by the court. A respondent has been dragged to court without finalising the issues raised in the urgent/main application, only to be abandoned and called upon to answer a new cause of action. In my view, the present applicants are entitled to a punitive cost order.

I grant the following order.

- (a) The applicants in the main application, jointly and severally the one paying the other to be absolved, are ordered to pay the costs of the application which was determined by Ranched, J., per his judgment dated 27 May 2016, including the costs reserved by the Urgent Court on 13 October 2015;
- (b) Such order for costs is on the attorney and client scale;
- (c) Such order for costs is to include the cost of two counsel where applicable;
- (d) The applicants in the main application are ordered, jointly and severally the one paying the other to be absolved, to pay the costs of this application (for the award of wasted costs), such costs to include the costs of counsel as employed.

C J VAN DER WESTHUIZEN

ACTING JUDGE OF THE HIGH COURT

On behalf of Applicants: O Salmon SC

Instructed by:

Rademeyer Attorneys

On behalf of Respondent: P Tredoux

Instructed by:

Deon Perold Attorneys

[1] Case Number 42781/3015, Gauteng Local Division , delivered on 18 February 2015 per Sutherland, J. at [29]

[2] 2 005(2) All SA 469 (SCA) at [13]

[3] At paragraph [32]

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