

SOUTH AFRICA / JUDGMENT

Forefront Presentation Media CC v Maredi Telecom and Broadcasting (2013/33462) [2017] ZAGPJHC 172 (3 May 2017)

[2017] ZAGPJHC 172

COURT

South Gauteng High Court, Johannesburg

BEFORE

Opperman

CASE / FILE NUMBER

2013/33462

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE NO: 2013/33462

Not reportable

Not of interest to other judges

Revised.

2/5/2017

In the matter

between:

FOREFRONT
PRESENTATION MEDIA
CC Applicant
and
MAREDI
TELECOM AND BROADCASTING (PTY)
LTD Respondent

JUDGMENT

OPPERMAN J

INTRODUCTION

[1] In this matter the court is called upon to make a determination on costs. It is well recognised that where legal proceedings are

settled, disposing of the merits excepting as far as costs are concerned, it may be very difficult indeed for a court to make a

proper allocation of costs. In this regard in *Jenkins v S.A. Boiler Makers, Iron & Steel Workers & Ship Builders Society* 1946 (WLD) 15, the following was held by Price J at p 18:

”When a case has been disposed of by an offer which concedes the main claim and the costs of the whole case have still to be decided, I think the Court must do its best with the material at its disposal to make a fair allocation of costs, employing such legal principles as are applicable to the situation. This is much to be preferred to laying down a principle which requires courts to investigate dead issues to see who would have won on such issues. In most such cases the litigants would be required to incur far greater costs than those at stake.

In my view the costs must be decided on broad general lines and not on lines that would necessitate a full hearing on the merits of a case that has already been settled.”

ORDER

[2] On 8 April 2014 Judge Mphahlele granted the following order:

“ 1. The 2nd Applicant, Lancelot Lenono Manala, shall pay to the Respondent an amount of R 562 439.45 with interest..... The

aforesaid amount is payable as follows:

1.1 The Second Applicant shall pay to the Respondent an amount of R 250 000 by no later than 16h00 on Friday, 11 April 2014;

1.2 The Second Applicant shall pay to the Respondent the remaining balance of the amount referred to in 1 above together with the

interest therein described, within 15 days from the date of this Order.

2. The Order granted by the Honourable Judge Boruchowitz on 17th March 2014 under case number 2013/33462 is set aside.

3. The First Applicant company is hereby placed under provisional winding up.

4. All persons who have a legitimate interest are called upon to put forward their reasons why this Court should not order the final winding-up of the First Applicant on the 20th day of May 2014 at 09h30 or so soon thereafter as the matter may be heard.

5. A copy of this order is to be:-

5.1 served on the First Respondent and its employees at 778 Richards Drive, unit 1, Halfway House, Extension 70, Midrand, 1682;

5.2 served on the Master of this Honourable Court;

5.3 published in the Government Gazette and The Star newspaper;

5.4 forwarded to each known creditor by prepaid registered post.

6. The costs of the provisional winding-up as well as the costs of the rescission application, including the urgency or not, are reserved

for determination on the return date. All parties are permitted in this regard to supplement their papers if necessary. ('the Order')

[3] The order was granted not after the matter had been argued before Judge Mphahlele, but after the parties had reached a settlement. It was thus a consent order.

ISSUES FOR DETERMINATION

[4] The issues which fall for determination (as per paragraph 6 of the Order) are as follows:

4.1 The costs of the provisional winding up; and

4.2 The costs of the rescission application including the urgency or not thereof.

[5] The further issues which the parties have requested be determined are:

5.1 The costs incurred for setting the matter down on the unopposed roll on 31 July 2014; and

5.2 The costs of the argument in respect of costs on 20 April 2017.

FACTS UNDERPINNING THE ORDER

[6] During February 2011 an oral agreement was concluded between the applicant ('Forefront') and the respondent ('Maredi'). During February 2011 to April 2011, Forefront supplied Maredi's clients with electronic equipment and installed such equipment at an address nominated by Maredi.

[7] Forefront, during such period, supplied, delivered and installed equipment to Maredi in the total amount of R 871 602.69. Maredi made partial payment to Forefront in the sum of R 309 163.24. Maredi however failed to pay the balance.

- [8] On 29 January 2013 a letter was served on Mr Lance Manala ('Mr Manala'), a director of Maredi, and the second applicant referred to in the Order. This letter was a demand in terms of section 345(1)(a)(i) of the Companies Act 61 of 1973 ('the old Companies Act'). On 29 January 2013 Mr Manala responded in an email and advised Forefront that:

"I received a visit from the sheriff's office. I am attaching a letter that indicates that I have not been sitting doing nothing

about your situation. But I guess it is too late now."

- [9] It is important to record that which is contained in paragraph 4 of such letter:

"We draw your attention to section 345 (1)(a)(i) of the Companies Act 61 of 1973, which remains in force at present, which provides that if your company neglects to pay the sum or to secure or compound for it to the reasonable satisfaction of our client, within the said period of three weeks, your company shall be deemed to be unable to pay its debts and our client will be entitled to and will indeed apply for the winding up of your company" (emphasis provided).

- [10] When Mr Manala says: 'I guess its too late now...', he clearly anticipates legal action and an application for the winding up of Maredi as expressly indicated in Forefront's letter.
- [11] Notwithstanding this, no payment was received by Forefront and on 9 September 2013, it launched a final winding up application against Maredi.
- [12] On 18 October 2013 the winding-up application was served at 778 Richards Drive, Unit 1, Halfway House Ext 70, Midrand (being the business address of Maredi 'the principal place of business') upon 'Mr Max, Security Officer, a person not less than sixteen years of age and apparently employed there.'
- [13] On 17 March 2014, Boruchowitz J granted a final winding up order.
- [14] On 25 March 2014 Maredi became aware of the final winding up order from a potential credit provider.
- [15] On 2 April 2014, Maredi launched an urgent rescission application contending that the rescission was urgent as Maredi could not trade or conduct business anymore. It explained that it had applied for Vodacom's telecoms infrastructure roll-out tender for Gauteng, that it was part of a consortium and that the change in its status has jeopardised its prospects.
- [16] The rescission was opposed.
- [17] The rescission application was brought by Mr Manala purporting to act on behalf of the liquidated company, Maredi, and Mr Manala, as an employee representing himself and ten other employees.
- [18] On 8 April 2014, the parties agreed to the Order.

[19] The Order included the setting aside of the final winding up order and included an order that Maredi be placed under provisional winding up.

[20] On 26 May 2014 the provisional order was discharged and costs were reserved.

MAREDI'S ARGUMENT IN RESPECT OF COSTS

[21] Maredi's argument in respect of costs is essentially that the service of the winding-up application was defective and had such deficiency been drawn to the attention of the court, the order would not have been granted. It thus argues that the final winding up fell to be set aside in terms of rule 42 as it was erroneously sought and granted.

FOREFRONT'S ARGUMENT IN RESPECT OF COSTS

[22] Forefront contends that service was good and that it was entitled to the order placing Maredi in final liquidation.

ASSESSMENT

[23] I am not called upon to make an order in respect of the costs relating to the final winding up application. That being so, it is unnecessary for this court to determine whether or not the service of the application on 18 October 2013 had complied with the provisions of section 346 (4A) of the Old Companies Act and if not, whether such non-compliance would have entitled Maredi to rescission in terms of rule 42 of the rules of this court.

[24] Such an enquiry might have been required to determine the costs in respect of the urgent rescission application had the liquidators launched such application or had the Master authorised Mr Manala to launch such application. Mr Manala had no locus standi to launch the rescission application. This defect had not been remedied by the time the parties consented to the terms of the Order. Although it is something that might have been remedied, it was not. I am to adjudicate this matter on the facts as they are at the hearing hereof, see Jenkins (*supra*). The opposition to the rescission application on this basis alone, was clearly reasonable and Forefront would be entitled to its costs by virtue thereof.

[25] On 29 January 2013 Mr Manala was called upon to pay the amount of R 562 439.45 ('the debt'), which was due and payable to Forefront as at 31 October 2012. Maredi paid Forefront nothing. It was only on 8 April 2014, some 14 months later, that Mr Manala agreed to pay such amount, together with interest calculated from 1 November 2012 to date of final payment. On such day, it was agreed that a provisional order should remain in place. Undoubtedly this was done to ensure that payment of the debt was to be made as agreed.

CONCLUSION

- [26] The rescission application, without any supplementary affidavits being received by the court hearing such application, was fatally defective as Mr Manala lacked locus standi, as discussed hereinbefore. The opposition to such application in terms of which such point, amongst others, was raised, was clearly reasonable and accordingly, assuming, without deciding, that the application to rescind had merit on all the other grounds, would have resulted in Forefront being entitled to its costs.
- [27] It follows that I need not consider whether Maredi had made out a case for urgency as the lack of locus standi would, in any event, have posed insurmountable difficulties.
- [28] By 8 April 2014, Maredi had not paid its debt. The Order embodies a consensual provisional winding up order, which, after the debt was paid, was discharged. In my view and on this basis, Forefront is clearly entitled to these costs as well.
- [29] The matter was set down on the unopposed roll of 31 July 2014 for a decision on the costs issues dealt with herein. This was served on Maredi's attorneys of record on 4 July 2014. It is unclear whether a notice of opposition was filed but the matter was postponed sine die on 31 July 2014 and costs of such day were reserved. Why the parties could not reach agreement about the further conduct of the matter is unclear. Be that as it may, from the facts before this court, it is clear that the issue of costs ought to have been enrolled on the opposed roll and Forefront should accordingly pay the costs of the postponement of the unopposed application incorrectly enrolled on 31 July 2014 on the unopposed motion roll.
- [30] Maredi made no tender in respect of costs to avoid incurring costs to argue costs. In my view it should have. I find that Forefront has been substantially successful in this costs argument and the costs order for the hearing of the argument, should reflect as much. I accordingly intend ordering that Maredi pay the costs of the argument on 20 April 2014.
- [31] In the end, costs are in the courts discretion and generally the successful party is entitled to its costs. Although Forefront might have stumbled both procedurally and substantively here and there (I don't find that it in fact did), the fact remains that for 14 months Maredi did not pay Forefront and it was compelled to resort to drastic measures to secure payment of a debt which was due, owing and payable as at 31 October 2012. I cannot see why Forefront should be out of pocket for using the machinery of the law to secure payment. Maredi had ample opportunity to avoid the predicament it found itself in on 25 March 2014 when it got knowledge of the winding up order. It had 14 months during which time it could have paid its admitted debt. It did not pay a cent during this time.
- [32] I accordingly grant the following order:
- 32.1. The respondent (Maredi) is ordered to pay the costs of the application for rescission of the final winding up order granted on 17 March 2014 by Borochowitz J, brought urgently and enrolled for 8 April 2014;

32.2. The respondent (Maredi) is ordered to pay the costs of the Provisional Winding up application consented to on 8 April 2014 and discharged on 26 May 2014;

32.3. The respondent (Maredi) is ordered to pay the costs of the argument in respect of costs on 20 April 2017;

32.4. The applicant (Forefront) is ordered to pay the unopposed costs of the hearing on 31 July 2014.

I OPPERMAN

Judge of the High Court

Gauteng Local Division, Johannesburg

Heard: 20 April 2017

Judgment

delivered: 3 May 2017

Appearances:

For Applicant: Adv Van Der Haer

Instructed by: Craig van der Merwe Attorneys

For Respondent: Adv AM Mtembu

Instructed by: Mashiane, Moodley and Monama Inc.

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