

SOUTH AFRICA / JUDGMENT

Master Blaster (Pty) Ltd v Sasol Dyno (Pty) Ltd (8313/2004) [2020] ZAGPPHC 376; 2021 BIP 3 (GP) (26 May 2020)

[2020] ZAGPPHC 376

COURT

North Gauteng High Court, Pretoria

BEFORE

T.J Raulinga

CASE / FILE NUMBER

8313/2004

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

REPORTABLE:

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

Case

No: 8313/2004

In

the matter between:

MASTER

BLASTER (PTY) LTD

APPLICANT

and

SASOL

DYNNOBEL (PTY) LTD

RESPONDENT

JUDGMENT

RAULINGA J,

1. In 2011 Master Blaster (PTY) LTD ("Master Blaster") had an application for the revocation of south African Patent no 2004/8312

in respect of which Sasol Dyno Nobel (PTY) Ltd ("SDN") was and is the patentee. In October 2017, before the matter was set down, Master Blaster withdrew its revocation application without consenting to pay SDN's costs. SDN then delivered a notice of application in terms of rule 41(1) (c) for an order that Master Blaster pay the costs of the revocation application.

2. The Rule 41(1) (c) application was set down for hearing on 6 March 2018.

Having heard counsel for the parties, the Court ordered SDN to pay the costs of the revocation application including other ancillary

costs.

3. When the matter was called, the Court was advised to rely only on the heads of argument as prepared and filed by counsel for the parties.

4. It is the submission of Master Blaster that due to the fact that SDN brought two applications for the amendment of the revocation application, both of which were granted in its favour; therefore,

that reduced the scope of its claims making the patent narrower and more limited even than after the first amendment. Furthermore, that the second amendment was necessary to cure the fact that the patent was still Invalid.

5. The SDN believes that It is entitled to costs of the revocation

proceedings that were instituted because its patent is "validly remaining on the register". It also argues that there is nothing that constitutes exceptional circumstances that may be raised by Master Blaster which may warrant the Court to deny it (SDN) its costs in the withdrawn revocation application.

6. As is apparent from what I have said in this judgment above, this Court granted the order on 6 March 2018. SDN filed a notice of application in terms of Rule 49(1) (c) dated 16 March 2018, as well as the application for leave to appeal dated 28 March 2018. However, the matter was only brought to my attention in October 2019 while I was on long leave, I only reported for duty in January 2020. I recognise that there has been an inordinate delay in providing reasons for judgment and for that I must apologise profusely.
7. There is no need to regurgitate the chronology of events in the revocation of the patent. I intend to deal only with the reasons for my order granted on 6 March 2018.

8. SDN patent which Master Blaster sm1ght to have revoked by way of the revocation application, South African Patent No 2004/8313 ("the patent") is titled "Dual Detonator Assembly". The invention of the patent relates to a detonator assembly, a detonator system, and a method of printing a plurality of holes at a blast site.
9. The patent in its original form was considered by this court in February 2015 pursuant to an amendment application brought by SDN and again in May 2017 pursuant to a further amendment application of SDN ("the second amendment")
10. Except for rehashing the chronology of procedures in the application for the revocation of the patent, SDN does not add any flesh In their heads of argument, in dealing with the merits of the case. They only refer to a few cases pertaining to withdrawal of an action of application, one of which being, ABSA Bank and Others v Robb 2013(3) SA 619 (GSJ) 621 FG dealing with exceptional circumstances. Therefore, their main argument is that the patent Is validly remaining on the register.
11. The relief that was sought by Master Blaster was an order revoking the South African Patent no 2004/8313 and that SDN is "to pay costs of suit in the event of the application being opposed". Master Blaster sought a revocation of the patent as it was registered as at30 September
12. SDN prayed for an order that the application for the revocation of its patent be dismissed, it sought costs and, it was so considered that its patent as it was registered at the time was indeed valid and asked fora certificate in respect of the contested validity patent be issued in terms of section 74(1) of the Act.
13. For Master Blaster to succeed in its contention that the Court must deviate from the ordinary position that an unsuccessful litigant must pay the costs, it must prove that exceptional circumstances exist entitling it to costs to be paid by SDN.
14. In ABSA Bank and Others v Robb supra, the issue in the case was whether a debt counsellor under the National Credit Act 34 of 2005, who had withdrawn an application for debt review, had to pay the opposing party's costs.
15. The Court in ASSA at 621.F-G recognised that, it is trite that a party who withdraws an action or application or who abandons a defence Is In the same position as an unsuccessful litigant, and therefore the other party is ordinarily entitled to costs. A departure from the principle, that costs must be awarded to the party which has been put to the expense of defending withdrawn proceedings, is only warranted in exceptional circumstances. See also Germishuys v Douglas Besproliingsread 1973 (3) 299 nc at 3000.

16. In casu, one is Inclined to agree with the submissions of Master Blaster. At the time when the first amendment was effected, the patent was invalid and the reason for the amendment. Regarding the second amendment, Master Blaster did not oppose it on the basis of continuing invalidity. The logic is simple, SDN had no reason to amend the status of the patent if it were valid. The amendment was sought because the patent was invalid.
17. In my view the exceptional circumstances were that, whilst the patent in suit is still in existence on the register, it has been curtailed in its ambit, not once, but twice. It is clear that SDN had filed and registered an in valid patent and that but for the revocation proceedings such invalid patent would have remained on the register.
18. To the extent that one may condone the first amendment because It might have been necessary to do so, the second amendment is not excusable in that SDN ought to have been diligent when applying for the first amendment in order to detect the defect that necessitated the second amendment. By so doing, it dragged Master Blaster into protracted proceedings leading to both parties incurring unnecessary costs.
19. It is my considered view that Master Blaster has been substantially successful in the revocation proceedings in that it managed to curtail the ambit of the patent. My order of 06 March 2018 stands.
20. It is ordered that:
 - 20.1 The SND, that is the Patentee, is to pay the costs of the revocation;
 - 20.2 Costs of the hearing related costs;
 - 20.3 Costs of senior counsel; and
 - 20.4 Costs of the applicant's expert witness.

T.J RAULINGA

JUDGE OF THE HIGH COURT

Appearances:

Applicant's Counsel

: Adv. R Michau SC

Applicant's Attorneys : Adv. B Du Plessis SC

Respondent's Counsel

: DM Kisch Inc t/a Kisch IP

Respondent's Attorneys : Hahn & Hahn Attorneys

Date of hearing

: 06 March 2018

Date of judgment

: 26 May 2020

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Prepared on 9 October 2026 · Esheria