

SOUTH AFRICA / JUDGMENT

Platinum Mine Investments 513 (Pty) Ltd v Freeman NO (13933/2005) [2005] ZAGPHC 326 (27 September 2005) [2005] ZAGPHC 326

COURT

High Courts - Gauteng

BEFORE

Van Rooyen

CASE / FILE NUMBER

13933/2005

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IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

27 September 2005

Case no: 13933/2005

UNREPORTABLE

In the matter between:

PLATINUM MINE INVESTMENTS 513 (PTY) LTD Applicant

and

AW FREEMAN NO Respondent

Costs order – interpretation of on application of the parties as a result of ambiguous nature of original order. Order rectified by Court to give effect to the true intention thereof.

Van Rooyen AJ

- [1] This is an application as to the meaning to be attached to a costs order which I made in an application for a temporary interdict, which was brought before me on the urgent roll in the first week of June 2005.
- [2] The application was for an order which would interdict the respondent, an executor of a liquidated estate, viz. that of First Tussock Properties CC [In Liquidation], from selling a property pending the outcome of litigation in this respect.

- [3] In deciding whether I could entertain this application and how I should exercise my discretion, I had regard to the leading authority of *Firestone SA (Pty) Ltd v Gentiruco* 1977(4) SA 298(A). At 306-7 Trollop JA states as follows:

"First, some general observations about the relevant rules of interpreting a court's judgment or order. The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. See Garlick v Smartt and Another, 1928 AD 82 at p. 87; West Rand Estates Ltd. v New Zealand Insurance Co. Ltd., 1926 AD 173 at p. 188. Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what is subjective intention was in giving it (cf. Postmasburg Motors (Edms.) Bpk. v Peens en Andere, 1970 (2) SA 35 (NC) G at p. 39F - H). Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise - see infra. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court a quo and its reasons therefor, can be used to elucidate it. If, despite that, the uncertainty still persists, other relevant extrinsic facts or evidence are admissible to resolve it. See Garlick's case, supra, 1928 AD at p. 87, read with Delmas Milling Co. Ltd. v Du Plessis, 1955 (3) SA 447 (AD) at pp. 454F - 455A; Thomson v Belco (Pvt.) Ltd. and Another, 1960 (3) SA 809 (D) .

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 pp. 176, 178, 186 - 7 and 192; *Estate Garlick v Commissioner of Inland Revenue*, 1934 AD 499 at p. 502.

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).....
- (ii) The Court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance"

of the judgment or order (see the West Rand case, supra at pp. 176, 186 - 7; Marks v Kotze, 1946 AD 29).....

(iii) The Court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention (see, for example, Wessels & Co. v De Beer, 1919 AD 172; Randfontein Estates Ltd. v Robinson, 1921 AD 515 at p. 520; the West Rand case, supra at pp. 186 - 7). This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance. KOTZÉ, J.A., made this distinction manifestly clear in the West Rand case, supra at pp. 186 - 7, when, with reference to the old authorities, he said:

‘The Court can, however, declare and interpret its own order or sentence, and likewise correct the wording of it, by substituting more accurate or intelligent language so long as the sense and substance of the sentence are in no way affected by such correction; for to interpret or correct is held not to be equivalent to altering or amending a definitive sentence once pronounced.’

....

(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 pp. 503 - 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 p. 505) to be subsequently heard on the appropriate order as to costs." (emphasis in italics added)

And at 308-9:

“None of the foregoing exceptions therefore applies [to the matter before the Court]. But the following further questions arise out of the arguments addressed to us: whether the above list of exceptions is exhaustive; whether a court, and especially this Court, being the final Court of appeal, has an inherent general discretionary power to correct any other error in its own judgment or order in appropriate circumstances, especially as to costs; and whether the present is a case in which that discretion ought to be exercised in Firestone's favour, according to the prayer in its application. Apparently this Court in Ex parte Barclays Bank, 1936 AD 481, considered that the list was not exhaustive and that a court retained a general discretionary power to alter its judgment or order, at any rate in regard to costs. For on p. 485 STRATFORD, J.A., said:

‘That the alteration of its order is a matter for the exercise of the Court's discretion seems to have been the view of SOLOMON, J.A.: ‘The matter is not one of principle or of substantive law, but purely one of procedure, and we are entitled to regulate the procedure of our own Courts’. (West Rand Estates Ltd. v New Zealand Insurance Co. Ltd., supra at p. 185). Indeed this discretion was exercised in (Estate) Garlick's case, supra, so as to adapt the general rule to modern exigencies.’

In fact, in the Barclays Bank case this Court refused to exercise the above-mentioned discretion in favour of the applicant by altering the orders as to costs made by the T.P.D. and itself. But in *Poggrund v Yutar*, 1968 (1) SA 395 (AD) at pp. 397D - F and 398B - C, this Court, relying on the Barclays Bank and West Rand cases, purported to exercise that discretion by subsequently altering its order of costs by directing that the tariff of maximum fees for counsel prescribed in the Rule of Court 69(3) should not apply. However, on my reading of the judgments in the West Rand case, I think that a clear distinction was drawn between a Court's jurisdiction to correct, alter or supplement its judgment or order and the time limit within which the application for such relief has to be brought; that this Court held that the former is a question of substantive law and the latter one of procedural law; and that a court has a discretion, not in regard to the former, but only in regard to the latter (see pp. 178, 179 in fin., and especially pp. 193 and 194). The dicta of SOLOMON, J.A., referred to above relate to the procedural and not the substantive aspect of the problem. It is indeed difficult to reconcile the idea of a court's retaining a general discretionary power to correct, alter or supplement its own judgment or order with the fundamental concept of its being *functus officio* when it pronounces it. True, this Court in the *Estate Garlick* case, *supra*, 1934 AD 499, did add para. (iv) to the above-mentioned list of exceptions to the general principle of the finality and immutability of a court's judgment or order (pp. 503 - 4). But in doing so it did not purport (in my respectful view) to exercise any general discretion; it seems merely to have adapted the general Roman-Dutch substantive law *ex necessitate rei* to meet the modern exigency caused by the practice of our courts of making orders as to costs without having heard any argument thereon. However, I need not pursue and express any final view on this inquiry; the correctness or otherwise of the approach in the Barclays Bank and Poggrund cases was

not debated before us; that aspect can be left for future consideration, since, for the immediate purpose in hand, it suffices

merely for me to assume without deciding in Firestone's favour that a court does retain a general discretion to correct, alter or supplement its judgment or order in appropriate cases other than those listed above. But, I should add, the assumed discretionary

power is obviously one that should be very sparingly exercised, for public policy demands that the principle of finality in litigation

should generally be preserved rather than eroded - *interest reipublicae ut sit finis litium*."

[4] In the present matter the parties agreed to bring the matter before me and, given the fact that I was informed about the dispute

as to the meaning of the costs order about a month ago, I do not believe that it is too late to interpret the wording of the order.

The order reads as follows in so far as costs are concerned.

“1. THAT pending the adjudication of an action to be instituted by the applicant for a declaration that the respondent...had elected to abide by the written agreement of sale...the respondent is interdicted from disposing (of) the property...”

2. THAT the action referred to in one above be instituted within thirty (30) days of date of granting of the order, failing which this order would lapse.
3. THAT the costs of this application be costs in the action referred to in 1 above, in the event of its being unopposed and, in the event of its being opposed, that the respondent pay the cost thereof.” (emphasis in italics added)”

[5] Attorney for the respondent argued that the costs of this initial application should only go against the respondent if he opposed the action and, of course, if the declarator went against him. The attorney for the applicant, on the other hand, argued that the meaning of the order was obvious: if the application for the interdict was opposed, as it was, the respondent had to pay the costs of the application for the interdict if it were granted against it. The parties, however, agreed that the order was ambiguous in that the word “its’ could very well have a bearing on the action as well or the application for an interdict.

[6] The order as to costs was based on the wording of the prayer in this regard in the Notice of Motion, except that I amended the word “it” to “its” where it appears twice in the prayer. This amendment was made for the sake of what I regarded to be correct grammar. However, the grammatical amendment did not assist me in interpreting the order now. I have come to the conclusion that the order, on an objective reading thereof within the context of the application for an interdict pendente lite, meant that if the application for an interdict were to be opposed and the application were granted by the Court, the respondent was liable to pay the costs of the application for the interdict. I am further convinced, on having read the papers again, that it was my intention to order costs against the opposing respondent if the application for the interdict were to be granted. To my mind that was compatible with the prayer as to costs and also made good sense within the parameters of such an application, which was for a temporary interdict. Absence of opposition would not mean that the respondent had no further remedy and the prayer of the applicant was understandable

within this context. The application for the temporary interdict was granted and, accordingly, since it was opposed, the respondent had to pay such costs as were foreshadowed in the prayer. I was, of course, not bound by the prayer, but regarded such a costs order as appropriate in the circumstances, where the application was granted. I could find no reason why the matter should stand over for determination in the main action, if it were to follow. The applicant had shown a prima facie right to exist and the other requirements for a temporary interdict were also satisfied.

In the interests of clarity, I substitute order 3 to read as follows:

“The costs of this application for a temporary interdict must be paid by the respondent in his capacity as liquidator of the estate of First Tussock Properties CC (in liquidation).”

JCW van Rooyen

Acting Judge of the High Court

Council for the Applicant: Adv B H Swart SC, Brooklyn Chambers,
Pretoria.

Instructed by: KlagsBrun De Vries & Van Deventer, Hatfield Plaza, Pretoria.

Council for the Respondent: Adv C Lamont SC, Village Chambers,
Sandown Village, Sandton.

Instructed by: Daly Incorporated, c/o Coetzer & Partners,
Arcadia, Pretoria.

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