

SOUTH AFRICA / JUDGMENT

Scheepers v Scheepers and Another

(270/2008) [2011] ZANWHC 54 (5 May 2011)

[2011] ZANWHC 54

COURT

North West High Court, Mafikeng

BEFORE

GURA

CASE / FILE NUMBER

270/2008

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NORTH

WEST HIGH COURT, MAFIKENG

CASE

NO. 270/2008

In

the matter between:

MARTIN

PETRUS ALBERTUS SCHEEPERSPLAINTIFF

and

JOHANNES

JACOBUS SCHEEPERS

.....1st

DEFENDANT

JOHAN

NEL

.....2nd

DEFENDANT

JUDGMENT

GURA J

- [1] The plaintiff sued the first and second defendants jointly and severally for payment of the amount of R298 000-00.

- [2] The dispute between the plaintiff and the first defendant was settled on 01 March 2011 as follows:

The first defendant will pay to the plaintiff an amount of R150 000-00 including costs in settlement of the plaintiff's claim against the first defendant ;

The first defendant's undertaking to pay R150 000-00 to the plaintiff is without admitting liability.

- [3] The plaintiff then withdrew his action against the second defendant. The issue which calls for decision is who should be saddled with an order of costs in favour of the second defendant.
- [4] The plaintiff and the second defendant submitted that the first defendant had to bear the second defendant's costs whilst the first defendant maintained that plaintiff himself was liable for such costs.
- [5] The award of costs is (unless expressly provided) a matter within the discretion of the judicial officer (*Ferreira v Levin NO. and others; Vryenhoek and Others v Powell N.O. and Others* [1996] ZACC 27; 1996 (2) SA 621 (CC)). The general rule is that costs follow the event.
- [6] It is trite law that a party which withdraws its action or application against another party is liable for costs of the successful party. See in this regard Rule 41 and *Setraboer Koöperatief Bpk v Mphaka* 1981 (2) SA 814 (O) at 818.
- [7] The plaintiff has withdrawn its action against the second defendant, and consequently, the latter is the successful party as against the plaintiff. It is worthy to note the provisions of Rule 10(3):

"Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action."

- [8] Rule 10(4) provides for the award of costs in terms of Rule 10(3) in favour of a successful defendant, provided that judgment is given in favour of such a successful defendant or provided that such defendant obtains absolution from the instance.
- [9] Mr Hitge, on behalf of the first defendant, submitted that "no judgment was given" in favour of the second defendant, since the action was withdrawn by the plaintiff. Therefore, so runs the argument, the provisions of Rule 10(4) do not apply to a situation where the action is simply withdrawn by the plaintiff. With this submission, I am unable to agree. Rule 10(4) must be given a purposive interpretation lest we lose the real objective thereof. Clearly, in my view, the end result in these two situations is the same – whether judgment is given in favour of the defendant or the action is withdrawn by the plaintiff, the fact remains that the plaintiff is an unsuccessful party as against that defendant. Therefore, the present matter falls squarely within the ambit of Rule 10(4).

- [10] The approach which the court has to adopt in applying Rule 10(4) was reiterated in *Parity Insurance Co Ltd v Van den Berg* 1966 (4) SA 463 (A) at 481 G-H. It was stated that the matter is essentially one of discretion; and that in deciding whether or not to exercise its discretion by making the special order contemplated in the rule, the Court shall have regard both to the reasonableness of the plaintiff having joined the successful defendant in the action, and to the reasonableness in the light of the particular circumstances of the case of directing the unsuccessful defendant to pay the whole or any portion of the successful defendant's costs. See *Verulam Fuel Distributors CC v Truck & General Insurance Co Ltd* 2005 (1) SA 70 (WLD).
- [11] At the cost of repetition, I have to emphasise that the plaintiff sued the defendants jointly and severally. His intention was not to recover from both of them simultaneously but from anyone of them. Taking into account the particulars of claim and the pleadings, I am of the view that it was essential to join the second defendant in order to avoid a plea of non joinder, and to avoid a multiplicity of actions which would lead to more costs. It would have been highly risky for the plaintiff to proceed against the first defendant only. Consequently, the court is satisfied that the two requirements as laid down in *Orphanides v Stratton* 1953 (1) SA 152 (SR) and further amplified in *Parity Insurance Co Ltd* (supra) have been satisfied.
- [12] The direct cause of the joinder of the second defendant was the first defendant's repudiation of any liability. The settlement by the first defendant of the plaintiff's claim was made at the last minute. At 10H00 on the date of hearing of the case the parties asked for an indulgence to negotiate. Some thirty minutes thereafter when the court resumed, the matter had been settled between the plaintiff and the first defendant. A lot of costs would have been avoided had this offer been made long before the date of trial. The summons was served on the first defendant on 22 February 2008 and the matter was finalised on 1 March 2011.
- [13] The plaintiff sued for R298 000-00 but he only recovered R150 000-00. The fact that he recovered a lesser amount does not alter the situation that he is a successful party (*Giuliani v Diesel Pump Injector Services (Pty) Ltd* 1966 (3) SA 451 (R)).
- [14] A proper case has been made out that the first defendant should bear the costs of the successful defendant. Consequently, the first defendant is directed to pay the costs of the second defendant.

SAMKELO GURA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING: 01 MARCH 2011

DATE OF JUDGMENT: 05 MAY 2011

COUNSEL FOR PLAINTIFF: ADV M. BOUWER

COUNSEL FOR 1ST DEFENDANT: ADV M. G. HITGE

COUNSEL FOR 2ND DEFENDANT: ADV J. S. GRIESEL

ATTORNEYS FOR PLAINTIFF: NIENABER & WISSING ATTORNEYS

ATTORNEYS FOR 1ST DEFENDANT: BOTHA COETZER SMITH ATTORNEYS

ATTORNEYS FOR 2ND DEFENDANT: SMIT STANTON ATTORNEYS

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Prepared on 9 October 2026 · Esheria