

SOUTH AFRICA / JUDGMENT

SecureBT (Pty) Ltd v Norris and Another (21699/2021) [2023] ZAGPJHC 1037 (15 September 2023) [2023] ZAGPJHC 1037

COURT

South Gauteng High Court, Johannesburg

BEFORE

Strydom

CASE / FILE NUMBER

21699/2021

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG LOCAL
DIVISION, JOHANNESBURG

Case Number: 21699/2021
In

the matter between: SECUREBT
(PTY) LTD
Applicant
And
QUINTON
NORRIS
First
Respondent
UNITY
TECHNOLOGY SOLUTIONS (PTY) LTD
Second
Respondent
In

re: SECUREBT
 (PTY) LTD
 Applicant
 And
 QUINTON
 NORRIS
 First
 Respondent
 UNITY
 TECHNOLOGY SOLUTIONS (PTY) LTD
 Second
 Respondent

JUDGMENT

STRYDOM, J

Introduction

[1] This is an opposed application for variation of a court order as contemplated in Rule 42(1)(b) of the Uniform Rules of Court, alternatively in terms of the common law in which the applicant, SecureBT (Pty) Ltd (Applicant), seeks to vary a court order dated 04 May 2021, granted by the Honourable Judge Lamont, regarding costs.

[2] The applicant brought an ex parte Anton Pillar application (the main application) in two parts: Part A for interim relief, and Part B for final interdictory relief. The interim relief was granted on 4 May 2021 in terms of a court order made by Lamont J. In paragraph 16 of the court order, the following was ordered:

“The costs of Part A are reserved to be determined at the hearing of Part B of the notice of motion.”

[3] On 30 August 2021, Part B of the main application was considered by Tsautse AJ on an unopposed basis. A draft order handed to court was made an order of court (Part B order). In the opening sentence of this Part B order, it was stated as follows:

“Having considered the documents filed of record and hearing counsel for the Applicant, an order is made in the following terms:”

[4] Then in paragraph 16 of the Part B order it provided for the award of cost as follows:

“The first respondent is ordered to pay the costs of this application.”

[5] The relief sought in the notice of motion in this variation application to vary the Part B order is as follows:

“1. That the cost of Part A of the main application under the abovementioned case number, reserved by the court order dated 04 May

2021, granted by the Honourable Judge Lamont, are hereby unreserved.

2. That the First and Second Respondents are ordered to pay the costs of Part A of the main application under the abovementioned case number jointly and severally the one paying the other to be absolved.
3. That, to the extent necessary, the Applicant is granted leave to present its bill of costs pertaining to Part A of the application under the above case number afresh via notice of taxation to the Respondents, to be taxed by the taxing Master of the Honourable Court.
4. That any Respondent opposing the relief sought herein shall pay the costs of this application on an attorney-and-client scale; provided that, should both Respondents oppose this application, both Respondents shall be liable for the costs of this application on an attorney-and-client scale, jointly and severally, the one paying the other be absolved
5. Further and/or alternative relief as deemed just.”
- [6] The application before this court is thus for a variation of the Part B court order in two respects. First, to specifically award the previously reserved costs, and second, to expand the previous cost order to include the second respondent to be jointly and severally, the one paying, the other to be absolved, liable for the costs of Part A of the application. Accessory to these variations further relief is sought.
- [7] As stated hereinabove, Part B of the application was set down for hearing on an unopposed basis and the judge granted the order in terms of the draft order handed to court. After this court order was granted, the applicant proceeded to draft a bill of costs.
- [8] After the bill of costs was drawn up by the applicant’s costs consultant and delivered to the respondent, the taxation became opposed.
- [9] On 31 May 2022, the matter served before the Taxing Master who taxed the bill of costs. The Taxing Master disallowed costs pertaining to Part A of the application as these costs were not, according to the Taxing Master, included in the cost order when the court made its order pertaining to Part B of the application.
- [10] The applicant’s attorney attempted to resolve this issue pertaining to the reserved costs with the first respondent’s attorney but to no avail. The first respondent’s attorney was of the view that the issue of costs had been finally disposed of by the court hearing Part B of the main application. Further, that the taxation was final unless reviewed.

Legal principles on reserved costs

- [11] If a court reserves costs to be argued and adjudicated upon at a later stage, it cannot be taxed until the court has made a ruling on who is ultimately liable for the reserved costs.[1]

- [12] In AA Mutual Insurance Association Ltd v Gcanga[2] it was held that a reserved costs order does not become attached to the main judgment and that it “remained separate from and independent of that judgment and did not necessarily follow the result of the action between the parties.”
- [13] When this legal position is considered in the context of the facts of this matter it becomes apparent that the Part B court order only awarded the costs of the “application” which would be a reference to the application for final relief and not the reserved costs. This being the case, in my view, the applicant became entitled to ask this court to determine who should be responsible for the reserved costs.
- [14] The applicant obtained final relief on the same terms of as the interim relief on an unopposed basis. In such circumstances, an applicant would in normal cause be entitled to the costs which was reserved. It was argued on behalf of respondents that in this case the applicant handed the court a draft order which failed to deal with the reserved cost and, consequently, the opportunity to ask for the reserved costs, has come and gone. The court order as far as costs are concerned cannot now belatedly be varied. From this line of attack, it becomes clear that the submission is not that the applicant would not have been entitled to the reserved costs but, rather, that it cannot now make such a claim.
- [15] Counsel for both parties referred this court to the matter of Cipla Medpro (Pty) Ltd v Lundbeck A/S and Another In re: H Lundbeck A/S and Another v Cipla Medpro (Pty) Ltd[3]. The respondents relied on this case for authority that the reserved costs cannot be claimed at this stage. In this matter, Southwood J dismissed an application to vary court orders to include the qualifying fees of experts. When costs were argued counsel omitted to argue for relief to obtain the costs of the qualifying fees of experts. In Cipla, the court made a final order as to cost in the matter and a variation of the cost order was sought pursuant to Rule 42(1)(b). The court held as follows:

“In the present cases the parties argued the question of costs and the courts made cost orders. There is no suggestion that these cost orders did not correctly express the intention of the court or that the court did not consider what was argued or omitted to order what was requested. It is clear from the facts that the court did not consider the qualifying fees of expert witnesses because it was not requested to include such fees of expert witnesses because it was not requested to include such fee in the order. As far as Rule 42(1)(b) is concerned the applicant has not established a patent error or omission attributable to the court. As far as the common law is concerned the qualification to exception (iv) referred to in the Firestone judgment applies. The application must therefore be refused on these grounds alone.”[4]

- [16] The situation is different in this case where the cost of the A Part of the application was specifically reserved. Costs was never argued. The order reserving the costs stood unaffected. Even if the counsel for the applicant neglected to inform the court about the reserved costs it would not mean that the reserve costs may never be argued subsequently. By not reminding the court, which made the B Part order, that court never considered the reserved cost but only cost of the application. In my view, this court is not functus officio to

deal with the reserved costs. No variation as contemplated in Rule 42(1)(b) is required as a separate cost order can be made by this court. Reserved costs are on a different footing as costs pertaining to the qualifying costs of experts which cannot be taxed, in terms of Rule 70(3) of the Uniform Rules of Court, unless specifically ordered. These costs cannot be severed from a cost order, as reserved costs, to be decided later by the same court.

- [17] Should I be wrong I in my finding that the court is not functus officio, it must then be considered whether Rule 42(1)(b), or the common law, can be applied to assist the applicant. The court will have to consider the legal position in any event as the current relief sought goes beyond the reserved costs as costs is also now sought against the second respondent, jointly and severally, with the first respondent.

When can a court order be varied by the same court?

- [18] Rule 42 of the Uniform Rules of Court deals, inter alia, with the variation of court orders and the relevant portion of this Rule provides as follows:

“(1) The court may, in addition to any other powers it may have, mero moto or upon the application of any party affected, rescind or vary:

- (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
- (b) an order or judgment in which there is ambiguity, or patent error or omission, but only to the extent of such ambiguity, error or omission;
- (c) an order or judgment granted as a result of a mistake common to the parties.”

- [19] It is a fundamental principle of our law that a court order must be effective and enforceable, and it must be formulated in language that leaves no doubt as to what the order requires to be done. Not only must the order be couched in clear terms, but its purpose must also be readily ascertainable from the language used.

- [20] The general principle 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 the court thereupon becomes functus officio: its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased.

- [21] An ambiguity or a patent error or omission has been described as an ambiguity or an error or omission as a result of which the judgment

granted does not reflect the real intention of the judicial officer pronouncing it, in other words, the ambiguous language or the patent error or the omission must be attributable to the court itself. In the matter of Goldsworthy (born Marshall) v Goldsworthy[5] where the divorce decree issued made no provision for the reserved costs of a previous postponement. The applicant brought an application seeking an order for costs to be determined in her favour. The respondent opposed same on the basis that there was no patent error or omission attributable to the court

and the court is functus officio. The court held that:

“[I]t was common cause that the aspect of reserved costs constituted a bona fide omission on the part of all concerned. The reserved costs were overlooked by the legal representatives of the parties, and consequently were not brought to the attention of the trial judge”

[22] In many cases the common law principle that there are exceptions to the functus officio rule, which allows a court to vary its own judgment, have been restated. For purposes of this judgment the court will only refer to a few cases starting with the oft-quoted judgment in *Firestone South Africa (Pty) Ltd v Gentiruco AG*,^[6] where the court, considering common law, recognised a number of exceptions to the functus officio rule. These are:

20.1 Supplementing of a judgment. The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, cost or interest on the judgment debt, which the court overlooked or inadvertently omitted to grant.

20.2 Clarification of the judgment. A court may clarify a 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 or substance” of the judgment or order.

20.3 Correction of errors in a judgment. The court may correct a clerical, arithmetical or other error in the judgment or order so as to give effect to its true intention. 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.

20.4 When costs were not argued. Although a party has the right to have a costs order reconsidered if costs were not argued at the oral hearing, its argument relating to costs had to be based upon the finding of the court and not upon argument that a court was wrong in its finding; and

20.5 General powers of the court. It further appears that a court may have a general discretionary power to correct other errors in its judgment or order, but this power should be exercised sparingly.

[23] The Supreme Court of Appeal (SCA) in *HLB International (South Africa) v MWRK Accountants and Consultants*^[7] was faced with an appeal concerning an alteration made by a court to one of its orders. The SCA reiterated and affirmed the principles

governing the variation and interpretation of judgments and orders as follows:

“Rule 42(1)(b) of the Uniform Rules of Court provides that the high court may, in addition to any other power it may have on its own initiative or upon the application of any party affected, rescind, or vary an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission. In Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape), the interpretation of rule 42(1)(b) was placed in its proper context. It was held that the context was the common law before the introduction of the Uniform Rules and that the ‘guiding

principle of the common law is certainty of judgments', with the effect that generally speaking, when a judgment has been given, it is final and unalterable: the judge becomes functus officio and may not ordinarily vary or rescind his own judgment. There are, however, exceptions that relate to 'the correction, alteration and supplementation of a judgment or order'. It was, the court held, 'against this common law background, which imparts finality to judgments in the interests of certainty, that Rule 42 was introduced', catering for the rectification of the same types of mistakes that the common law had recognised."[8]

[24] The SCA further stated that:

"The exceptions recognised in the pre-constitutional case law are referred to in Firestone South Africa (Pty) Ltd v Genticuro. They include the exceptions that the court may: (a) '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'; and (b) '... correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention', which '... exception is confined to the mere correction of an order in expressing the judgment or order so as to give effect to its true intention' and 'does not extend to altering its intended sense or substance'. This Court elaborated on this exception thus: 'KOTZÉ, J.A., made this distinction manifestly clear in the West Rand case, supra at pp. 186- 187, 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."' [9]

[25] When applying these common law principles and the terms of Rule 42(1)(b) to the facts of this matter it becomes clear that the reserved cost was not considered. The court order relating to Part B starts with the words: "Having considered the papers filed of record and hearing counsel for the Applicant, it is ordered that:" By making only a cost order in the Part B application the court must have overlooked the previously reserved cost order. Counsel on behalf of applicant has not drawn the attention of the court to the reserved cost order. In my view, whatever the situation was, this was caused by an error causing an omission in the order which can be varied to correct this omission.

[26] In my view, there exist an alternative basis upon which the cost order could be varied. In paragraph 6 it was ordered that the first respondent had to pay the costs of "this application". The Taxing Master interpreted this costs order only to include the costs of Part B of the application and not the costs of the interim order sought in Part A. This approach is in line with the case law referred to in this judgment above. In my view, despite the legal position, if cost of the "application" is granted, it may very well be interpreted, applying the rules of interpretation, to include costs of the entire application, which could mean the costs in Part A and Part B, which is all part of one application.

- [27] This is however not how the Taxing Matter saw the position as a specific order to “unreserve” previously reserved costs was required for taxation purposes. For this reason, clarification of the judgment is required as the meaning of the words “to pay the costs of this application” led to ambiguity or, at least, uncertainty. The uncertainty lies in the fact that “costs of this application” can be interpreted to mean either costs of the entire application or costs of Part B, which is only the application for final relief. In my view, this uncertainty allows this court, which is not the same court which made the order, the competence to clarify the order. Another judge can consider a variation application and order a variation. [10]
- [28] There can be no doubt that the applicant would have been entitled to the costs of Part A and Part B of the application. If this court now accepts that the reserved cost order was not considered and made as a result of an error or omission the Part B cost order can be varied to include the reserved costs of Part A, reserved on 4 May 2021.
- [29] Two further issues should be dealt with. The applicant is seeking a variation to include a cost order against the second respondent. In the applicants notice of motion the applicant sought costs only against first respondent and in the alternative, should the second respondent oppose the application, then against the first and second respondent jointly and severally, the one paying the other to be absolved. The second respondent never opposed the main application. The court making the Part B order, in line with the notice of motion and the draft order, only made a cost order against the first respondent.
- [30] In my view, the court order cannot be varied because this relief was never sought. Moreover, neither the common law nor Rule 42(1)(b), as discussed hereinabove allow for such a variation. What is now sought is alternative relief and not a variation to correct an error or omission.[11]
- [31] The last issue is whether the variation application was launched within a reasonable time after it was established that the Part B court order contained an error or created an uncertainty. It became known to the applicant on 31 May 2022 that the taxing master would not allow the cost of Part A as these costs remained reserved. On 8 December 2022 this variation application was launched.
- [32] After the A part costs was not allowed the applicant took legal advice as to what the legal position was and what steps were needed to correct the situation. On 23 August 2022 applicant engaged with the respondent’s attorney in an attempt to resolve the situation. The respondents’ attorney indicated that any variation of the court order would be opposed. Within just over 3 months thereafter this application was launched.

[33] The court is cognizant of the fact that it is in the interest of justice that there should be certainty and finality as soon as possible concerning the scope and effect of orders of court. In *First National Bank v Van Rensburg*[12], a 3-year period before a variation application was launched, was found to be unreasonably long.[13] In my view, the period in this case which transpired before this variation application was launched is less than 4 months, which does not constitute an unreasonable delay.

Costs of this application

[34] The applicant asks this court to order the costs of this application on an attorney and client scale. The court in the exercise of its discretion is of the view that a punitive costs order is not warranted.

[35] The second costs order was unclear and uncertain, and the respondent was entitled to challenge the variation thereof. Moreover, the applicant handed the draft order to the court to make an order of court which contained the uncertainty. Part of the relief sought by the applicant would not be granted.

[36] This variation application was opposed by the first and second respondents. Consequently, any cost order made as far as this application is concerned would be made against both respondents.

[37] The following order is made:

Order

1. Prayer 6 of the order of 31 August 2021 is varied to read as follows:

“6. The first respondent to pay the costs of this application, which costs include the costs reserved on 4 May 2021.”

2. The applicant is granted leave to present its bill of costs pertaining to Part A of the application under the above-mentioned case number afresh via Notice of Taxation to the respondents, to be taxed by the Taxing Master of this court.

3. The first and second respondents are ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

R. STRYDOM, J

JUDGE OF THE HIGH COURT

For the Applicant:

Mr. R. Van Schalkwyk

Instructed by:

EY Stuart Inc

For the Respondents:

Mr. A.P. Bruwer

Tuckers Inc

Date of hearing: 2 August 2023

Date of Judgment: 15 September 2023

[1] See, in this regard, the matter of *Martin NO v Road Accident Fund 2000*

[2] SA 1023 (W) where it was held at p1029 C-D as follows: “Returning to our own practice: where the judgment is given in a case where costs of earlier proceedings have been reserved, the Court should, and generally does, deal with any costs that were reserved. If it overlooks its task to do so, its attention is drawn to the oversight. If this is not done as the judgment is delivered,

the parties can approach the Court to deal with the outstanding issue. Costs that are reserved for the decision of the Court thereon

ought to be adjudicated upon by the Court unless the parties, by agreement, relieve the Court from that task.”

[2] AA Mutual Insurance Association Ltd v Gcanga 1980 (1) SA 858 (A) at 869 A-B.

[3] (CCP) (unreported case no 89/4476, 24-5-2010.

[4] Id at para 9.

[5] Goldsworthy (born Marshall) v Goldsworthy

[2009] JOL 23468 (ECG).

[6] Firestone South Africa (Pty) Ltd v Gentiruco AG 1977 (4) SA 298 (A) (“Firestone”).

[7] HLB International (South Africa) v MWRK Accountants and Consultants

[2022] ZASCA 52; 2022 (5) SA 373 (SCA).

[8] Id at para 19.

[9] Id at para 20.

[10] Geard v Geard 1943 CPD 409.

[11] See: *First National Bank of South Africa Ltd v Van Rensburg NO and Others* 1994 (1) SA 677 TPD.

[12] Id.

[13] At 681 E-G.

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