

SOUTH AFRICA / JUDGMENT

Sutherland Transport (PTY) Ltd v Dirk Lotter Vervoer (PTY) Ltd (922/2022) [2023] ZAFSHC 6 (19 January 2023) [2023] ZAFSHC 6

COURT

Free State High Court, Bloemfontein

BEFORE

Naidoo

CASE / FILE NUMBER

922/2022

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

CASE NO. 922/2022

In the matter between

SUTHERLAND TRANSPORT (PTY) LTD

APPLICANT

versus

DIRK LOTTER VERVOER (PTY) LTD

RESPONDENT

JUDGMENT

CORAM:

NAIDOO J

HEARD ON:

17 JUNE 2022

DELIVERED ON: 19 JANUARY 2023

[1] This started out as an application brought by the Applicant, Sutherland Transport, for the liquidation of the respondent, Dirk Lotter Vervoer (Pty) Ltd, and a claim in the alternative for a money judgment in the amount of One Million Five Hundred and Forty Two Thousand

Seven Hundred Seventy Six Rand and Seventy Five Cents (R1 542 776.75). Shortly after the application was served on the respondent, the latter paid to the applicant an amount of One Million Two Hundred and Eighty Eight Thousand Three Hundred and Thirty Rand (R1 288 330.00), which was not accompanied by a tender for the payment of any interest or the costs of the applicant. I will deal more fully with this later. Adv S Tsangarakis represented the applicant in this court and Adv P Zietsman SC, represented the respondent.

- [2] It is common cause that the applicant and respondent conduct business in the transport industry, providing carriage services in respect of various goods. In this matter, the respondent engaged the applicant as a subcontractor for provision of carriage services, where the respondent was the main contractor. The applicant alleges that the respondent failed to make payment in respect of several invoices since October 2021, and made only part payment in respect of some invoices. Payment was demanded from the respondent as well as the surety, Coenraad Josephus Taljaard, but neither made payment. The appellant moved the hybrid application I referred to earlier. The application was issued on 2 March 2022 and served on the respondent on 4 March

2022. As indicated earlier, the respondent paid to the applicant, on 7 March 2022, an amount of One Million Two Hundred and Eighty Eight Thousand Three Hundred and Thirty Rand (R1 288 330.00), which by my calculation was R254 446.95 less than the claimed amount of R1 542 776.75.

- [3] Between 9 and 11 March 2022, it seems there were numerous discussions and a slew of correspondence between the parties, culminating in two such letters being referred to by the parties, and which are central to the current application. On 9 March 2022, the respondent's attorney wrote a response to an earlier email of the same date, sent by the applicant's attorney. I mention that not all the correspondence was attached to the papers, including the letter of 9 March 2022, sent by the applicant's attorneys to the respondent's attorneys. In the letter dated 9 March 2022, the respondent expressed disagreement with certain items on some of the invoices. It is not necessary for present purposes to deal in any detail with all these issues, save to say that, based on the contents of the correspondence by the applicant's attorneys, the respondent identified three issues in dispute, namely:

3.1 Standing charges

3.2 Interest

3.3 Costs.

- [4] The respondent was of the view that the standing charges related to an invoice dated 1 November 2021. The respondent disputed that the applicant was entitled to those charges and consequently could not claim interest on the standing charges until the dispute was resolved.

With regard to costs, the respondent averred that all invoices issued by the applicant were paid timeously, so there were no overdue amounts owing to the applicant. Therefore, the issue of the hybrid application was premature, as a result of which the respondent refused to pay any of the applicant's costs.

- [5] The applicant's response to the aforementioned letter by the respondent's attorney was sent on 11 March 2022. The most important part of that letter was the last paragraph which read:

"It is our instructions to institute an action for payment in the amount of R255 006.75, as well as the interest and that the costs of the present application, on the scale set out in the notice of motion, should be argued"

The respondent argues that this paragraph, properly interpreted, indicates that the action foreshadowed by the applicant would include the interest it claims and that only the costs of the hybrid application were to be argued in this current application. The applicant strenuously denied this, arguing that the respondent's interpretation of the relevant paragraph was wrong, and it was entitled to interest on the amount paid by the respondent, as interest and costs were claimed in the Notice of Motion. As indicated, payment was made after the application was served on the respondent and before the hearing of the matter.

- [6] The respondent indicates that the disputed amount of R255 006.75 is in respect of "standing charges", on which interest is not recoverable. The respondent does not deal at all with the reason for its payment of R1 288 330.00, but baldly denies, in its Opposing Affidavit, that it is indebted to the applicant. The

respondent further asserts that it complied with all statements issued by the applicant and made all payments timeously. It further

fails to deal meaningfully with the applicant's assertion in Founding that the respondent's breach initially occurred in October 2021. The applicant sets out in paragraphs 34 to 43, how the amount of the respondent's indebtedness to it arose and attached the relevant documentation to support its allegations.

- [7] It is not in dispute that the written agreement between the parties specifically stipulates that payment of amounts due to the applicant must be made to the applicant thirty days after the date of the statement and must be received by the 25th of each month. The amounts due to the applicant for October 2021, as set out in the Founding Affidavit, as well as payments for November 2021, December 2021 and January 2022 were not paid as they fell due. The respondent paid a partial amount on 17 January 2022, which was applied to the outstanding amounts for October 2021 and partially for November 2021. The applicant argues that the respondent had breached the agreement entered into between the parties, causing the applicant to demand from the respondent the full amount due to it by the respondent, which became immediately due and payable upon breach of the agreement.

- [8] In spite of the payment provisions of the agreement, which I have mentioned above, the respondent appears not to have complied with the stipulated thirty- day period, but alleged in the Opposing Affidavit that there was an arrangement between it and the applicant that all invoices issued by the applicant up to the 25th of the month will be reconciled at the end of that month and despatched to the respondent. The latter would then have one month and seven days to pay. The respondent alleges that it in fact did so. The applicant clearly disputes this, alleging that as far as it is concerned, its business relationship with the respondent was regulated by the written contract entered into between them. I note that the respondent has not attached any documentation, evidencing the arrangement it alleges to have been in place between it and the applicant, and its compliance with such arrangement. It is also evident that the payments for October were not made as required. The payment made in January 2022 was applied to the respondent's debts in accordance with the age of the debt, the oldest debts being credited first. Therefore, payments for October were very much out of time, even on the respondent's version.
- [9] I mention that after the applicant's Replying Affidavit was filed, the respondent filed an application to strike out certain portions of the affidavit, on the basis that it was irrelevant and constitutes inadmissible evidence based on similar facts and also constitute new facts put up in reply. I will deal further with this aspect later.
- [10] After the respondent made payment of a portion of the amount claimed in the money judgment, the applicant asserts that it no longer had locus standi to proceed with the application for liquidation and informed the respondent accordingly as early as March 2022. The applicant asserted that it would not liquidate the respondent for just over R22 000.00 in respect of interest, as that would be malicious. With regard to monetary judgment, the applicant advised the respondent that it would proceed by way of action to recover the amount disputed by the respondent, namely R255 006.75. I pause to note that the dispute raised by the respondent was done after this

application was launched and after payment by it of the amount of R1 288 330.00. This latter amount represents 83,5% of the amount originally claimed. According to the written agreement between the parties, under the heading "Conditions of Credit", paragraph h provides as follows:

"It is specifically agreed and recorded that all amounts reflected on monthly statements issued by "Sutherland Transport" will be deemed to be correct in every respect, unless objected to in specific detail and in writing within 7 (seven) working days from date of issuing of the said statement and that the indebtedness of the "Applicant" to "Sutherland Transport"

shall at any time be determined and proved by the contents of such statement, which shall be binding on the "Applicant" and be conclusive proof of the amount of the indebtedness of the "Applicant" to "Sutherland Transport" and will be valid as a liquid document against the "Applicant" in any competent Court".

[11] The respondent has not provided any proof that it complied with the abovementioned provision, other than to make a bald statement that it complied timeously. The applicant in fact raised the point that the respondent did not do so, only raising the dispute after the service of this application upon it. The respondent's response to the application was to pay 83.5% of the amount claimed within two days of service of the application, from which it can be inferred that it acknowledged its indebtedness to the applicant, at the time this application was launched, in the amount paid. The respondent did not tender the costs of application as is the practice. Furthermore, if the respondent had made timeous payments, rendering the application

premature, as it alleged in the Answering Affidavit, it begs the question why it chose to pay 83.5% of the amount claimed, instead of opposing the application.

[12] In the Notice of Motion, the applicant claimed interest on the amount claimed, and costs on an attorney and client scale (as provided for in the written agreement between the parties). The respondent's argument in this regard is that the applicant clearly foresaw that it would be unsuccessful in obtaining a liquidation order or a money

judgment

against it by way of application, and therefore decided not to proceed with the liquidation application and to proceed by way of

action for the recovery of the disputed amount. This is an obfuscation of the true position, which continues in the respondent's

argument that if a party no longer wishes to proceed with a matter, he must withdraw it and tender the costs of the other party. The applicant, so the respondent argues, wants to withdraw the application but does not want to pay the respondent's costs,

and this is the reason it opposed this application.

[13] The respondent chose to pay a very substantial portion of the amount claimed in the alternative claim, making it unnecessary for the applicant to proceed with the liquidation application, it offered no reason why it paid the amount it did and disputed a very small portion of the original claim, after the launch of the application. I should perhaps mention, without dealing at length with this point, that in my view, the applicant did show, on a balance of probabilities, that the applicant committed an act or acts of insolvency by failing to pay monies due to the applicant after demand was made for such amounts to be paid. In my view, this would justify an inference that the respondent was unable to pay its day-to-day debts. The applicant would have, in all probability, succeeded in obtaining a provisional liquidation order against the respondent, had the latter not paid the amount mentioned earlier. It is remarkable that the respondent now embarks on the argument that the applicant should withdraw the application and pay the respondent's costs. Such an argument lacks merit and cannot be sustained. The argument that the applicant chose not to proceed

because it foresaw that it could not succeed on either the liquidation claim or the money

judgment

is equally without merit and cannot be sustained. The respondent's actions have only served to escalate the costs in this matter by opposing the application for interests and costs.

- [13] As I mentioned earlier, the applicant gave notice to the respondent by way of its letter dated 11 March 2022 that it would proceed by way of action to recover the disputed amount of R255 006.75 together with interest, and that the costs of this application would be argued. It appears that in the numerous interactions between the from 9 to 11 March 2022, they were unable to agree on the issue of costs, hence the intention to argue that aspect. The respondent also took issue with the payment of interest on the amount of R1 288 330.00. Both parties advanced argument in this respect, with the respondent arguing that the applicant "belatedly" claims interest, in Reply. This argument is also without merit as the interest was claimed from the outset, albeit on a different amount. If a respondent pays a large part of the claim, then, in my view, he acknowledges his indebtedness in that amount and as a matter of common sense, will be liable for interest (which is claimed) on the amount he acknowledges that he owes the applicant. The respondent's recalcitrance and intransigent attitude in this respect is unfortunate, and militates against the court coming to its assistance.
- [14] With regard to costs, it is trite that the award of costs is in the discretion of the court. In exercising its discretion, it takes into account all relevant factors and makes an award based on fairness and equity. As a matter of general practice the rule is that a party who is successful or substantially successful will be entitled to his costs. Substantial success does not mean he has to win the whole case but obtains materially what he seeks. This has been established in a long line of cases for well over 60 years. [See *Herold v Taxing Master* 1958(1) SA 812 (A), which was cited with approval in *Llama Restaurant Franchising Co (Pty) Ltd v Ivano (Pty) Ltd* 1990 (1) SA 474 (C); *Norwich Union Fire Insurance Society Ltd v Tutt* 1960 (4) SA 851 1960 (4) SA p854 D (A) and *Jacobs v Chairman, Governing Body, Rhodes High School, and Others* 2011 (1) SA 160 (WCC)].
- [15] In considering whether the applicant was substantially successful in the application, this court takes cognizance of the well-established guidelines set out in our case law. In summary, a court must consider whether it was necessary for the applicant to resort to litigation in order to obtain relief, and the measure of the applicant's success and failure. The history of the matter as appears from the papers indicates that the applicant made numerous efforts to recover the monies owed to it. The correspondence indicates that the sole director of the respondent, Mr Dirk Lotter, acknowledged that the monies were due to the applicant and made several promises to pay, but failed to do so. The applicant was clearly obliged to seek the assistance of the court for relief. It is the service of the application upon the respondent that resulted in the payment it made. In my view, the payment of 83.5 % of the applicant's claim, while the disputed amount represents 16.5%, indicates that the

applicant was substantially successful in the matter. There is no reason to depart from the general rule that costs follow the result.

- [16] I turn now to deal with the respondent's application to strike out portions of the applicant's Replying Affidavit and certain annexures thereto. Such portions deal with an application by the respondent's erstwhile accountants for the liquidation of the respondent, arising out of the latter's failure to pay the fees due to its accountant. That liquidation application was issued after the current application was launched by the applicant (2 March 2022) and appears to have been issued on the same day that the respondent filed its Answering Affidavit in this matter (30 March 2022). The applicant could not have referred to it in Founding as it had not come into existence on 2 March 2022. One of the grounds for the striking out relied upon by the respondent is that this amounts to similar fact evidence, which is impermissible.
- [17] The striking out application was issued on 17 May 2022, more than two months after the respondent had paid the R1 288 330.00. The respondent was, by the time it issued the striking out application, well aware that such payment resulted in the applicant requiring only payment of the interest on R1 288 330.00 and the costs of this application. The respondent was aware that the applicant would not be pursuing the liquidation application and that it would proceed to recover the disputed amount by way of action proceedings. Therefore the striking out application would serve no purpose and would be of academic interest only, should the respondent succeed in such application. The respondent appears to have missed the point of the applicant's reference to the liquidation application by the respondent's accountants, or chose to ignore it.
- [18] The respondent in its Answering Affidavit went to great lengths to explain that the respondent is a financially healthy company with assets that far exceed its liabilities, that the applicant was aware of this but nonetheless pursued an application for liquidation against it. The respondent denied that it was either factually or commercially insolvent, or that it was indebted to the applicant. The applicant was entitled to deal with these allegations in Reply, which it did. It was only at that stage that it was able to refer to the accountants' liquidation application to refute the respondent's

allegation that it was a financially healthy company. Even a cursory reading of the Replying Affidavit, giving the contents their ordinary grammatical meaning, would yield the result that the applicant was replying to allegations made by the respondent and to fortify the case that it made in Founding. While it may be regarded as new material, such liquidation application was not in existence at the time this application was launched and could not have been referred to by the applicant in Founding. One of the purposes of referring to such liquidation application was simply to refute the respondent's allegations that it was financially healthy and that the applicant was not entitled to bring an application for the liquidation of the respondent.

[19] In my view, it would serve little purpose to determine the striking out application as it does not bear on the issues that this court was called on to adjudicate. Courts are discouraged from giving orders which have academic value only and are slow to come to the assistance of litigants who raise technical defences, where such defences impact negatively on issues of fairness and the interests of justice. It is also my view that striking out application falls into this category and was unnecessary. It served merely to escalate the costs in this matter. Both the applicant and respondent sought costs on an attorney

and client scale. As I indicated earlier, the written agreement between the parties provided for the payment of costs on that scale.

It is also in the court's discretion to grant costs on the attorney and client scale when it wishes to express its displeasure

at the manner in which a party has conducted the litigation before it. This is one such case, where the respondent proceeded in a manner that has caused the applicant to incur unnecessary costs. The respondent has chosen to misinterpret or place an interpretation on the assertions of the applicant both in the papers and annexures thereto, which are disingenuous and opportunistic. The costs in this matter could have been curtailed in March 2022, when the parties were attempting to settle the matter, but the respondent failed or refused to do so, thus forcing the applicant to seek the assistance of the court for relief.

[20] In the circumstances the following orders are made:

20.1 The respondent's application to strike out is dismissed with costs on the attorney and client scale;

20.2 The respondent is ordered to pay interest in the amount of R22 336.59 (Twenty Two Thousand Three Hundred and Thirty Six Rand and Fifty Nine Cents);

20.3 The respondent is ordered to pay the costs of the application, on an attorney and client scale.

S NAIDOO J

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