

SOUTH AFRICA / JUDGMENT

African Bank Limited t/a ab Commerce v Covmark Marketing cc t/a Covmark Marketing and Others (9238/2005, 10785/2005) [2008] ZAKZHC 65; 2008 (6) SA 46 (D); (6 August 2008) [2008] ZAKZHC 65

COURT

High Courts - Kwazulu Natal

BEFORE

Moosa AJ

CASE / FILE NUMBER

9238/2005, 10785/2005

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NON-REPORTABLE

IN

THE HIGH COURT OF SOUTH AFRICA

DURBAN

AND COAST LOCAL DIVISION

CASE

NO 9238/2005

(together

with Case No. 10785/2005)

In

the matters between

AFRICAN

BANK LIMITED t/a AB COMMERCE Applicant

and

COVMARK

MARKETING CC t/a COVMARK MARKETING

(Registration

No. CK2000/022539/23) Respondent

and: VISHNUDUTH
SOODHOO First
Respondent
ROSHINA
SOODHOO Second
Respondent
LOVIS
SALES CC Third
Respondent
COVENENT
MARKETING CC Fourth
Respondent
(Registration
No. CK1994/032138/23)

JUDGMENT

ON COSTS Delivered on: 6 AUGUST 2008

MOOSA AJ

This matter was heard by me over the 23rd, 24th, 25th and 26th of April 2007 and Judgment was delivered on 4 April 2008.

On making the Order which I did I recorded the following:-

“In regard to the question of costs, I will make an Order in regard thereto after hearing argument on the issue and, being an accessory Order on which I have not heard argument and which I expressly refrain from dealing with, I will duly supplement the Order which I have already made in order to deal with the issue of costs.”

Pursuant thereto the matter was set down by the Registrar for argument on the question of costs. This argument I heard on 30 July 2008 with the parties being represented as they were at the time of the original hearing.

Mr Tobias argued that the Respondents were entitled to the costs in regard to both the argument re the Rule 33(4) separation as well as in regard to the merits of the matter. He argued that even if the matter had not been allocated to me and there had been no restriction on the amount of time available for the hearing of the matter, the Respondents would still have brought an application for a separation of issues. This on the basis that the matter which was sought to be determined discreetly could have been dispositive of the entire proceedings. As the Respondents were successful in their application for a separation as well as on the merits of the matter, he urged that I grant costs in favour of the Respondents in respect of both. He argued, however, that my granting of costs on the one leg in one fashion did not necessarily preclude my dealing with costs on the other leg in a different manner.

Mr Voormolen, on behalf of the Applicant argued that costs should best be reserved for determination by the Court hearing the oral evidence. Although the Respondents had been successful on the cause of action based on the Applicant being a holder in due course, it might well transpire, he said, that at the end of the day the Respondents are found liable to the Applicant. As to the separation, he said that the answer was to be found in my Judgment of 4 April 2008 where I held that were it not for the practical exigencies of the matter and its fortuitous allocation to me in my capacity as an acting Judge I would have been disinclined to have granted the Rule 33(4) separation.

I am not persuaded that I should leave it to the Court hearing oral evidence to determine the question of costs in respect of the hearing before me. It is my view that I am best placed to dispose of the question.

It is so that I did find that were it not for the exigencies of the matter and its allocation to me, I would have been disinclined to grant the Rule 33(4) application. If, in those circumstances, I were to saddle the Applicant with the costs of that application then I would be burdening the Applicant with such costs in circumstances where the matter was allocated to me through no fault of the Applicant. While it is so that Mr Tobias could well have made the same application before a permanent Judge, it will be pure speculation on my part as to whether or not such application would have been granted by such permanent Judge. The fact is that I granted the application but reluctantly. At the same time it is so that the Respondents were successful in that application before me. In those circumstances to saddle them with such costs would appear to be inequitable. In the premises, I am constrained to find that each party should carry its own costs in regard to the Rule 33(4) application. In order to ease the difficulty of the Taxing Master, I further find that it took one day to determine the Rule 33(4) application and that neither side is entitled to any costs in respect of the first day of the hearing before me, that is for the 23rd of April 2007.

As to the costs in respect of the 24th to the 26th of April 2007, both days inclusive, it is my finding that the Respondents are entitled to such costs. While it is correct, as argued by Mr Voormolen, that of the two legal issues presented to me for determination the Applicant was successful in one while the Respondents were successful on the other, the net result, however, is that the Respondents were successful in demonstrating that the Applicant could not be a holder in due course of the instruments relied upon. The Respondents only had to win the case by establishing, at the lowest, success on one of the two legal points. Mr Voormolen accepted, fairly it must be added, that it was always open to the Applicant to abandon its reliance on being a holder in due course. In persisting in that cause of action, it is clear that that issue would have had to have been determined whether by me or by the Court hearing the oral evidence. That being so and the matter being decided in favour of the Respondents, it follows that the Respondents are entitled to the costs of determining the question in issue.

The matter was never without complexity which is why I, inter alia, pursuant to my granting of the Rule 33(4) application, required the parties to prepare an Order setting out what was to happen depending on my finding. It was inherent therein that following on the finding which I

made, the question of costs would have to be argued. In the circumstances and considering that the Respondents have been substantially successful on the question of costs it is only right that the Respondents be awarded the costs of the argument re costs which was tendered on 30 July 2008.

In the final analysis, I make the following Orders:-

The Applicant on the one hand and Respondents on the other are to carry their own costs in regard to the hearing on 23 April 2007.

The Applicant is directed to pay the Respondents costs occasioned by the hearing on 24, 25 and 26 April 2007 as well as the costs of 30 July 2008.

DATE OF HEARING: 30 July 2008

DATE OF JUDGMENT: 6 August 2008

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Prepared on 10 October 2026 · Esheria