

SOUTH AFRICA / JUDGMENT

Mineral-Loy (Pty) Ltd v Highveld Steel & Vanadium Corporation Ltd Steel and Vanadium Limited and Another (34321/10) [2020] ZAGPPHC 618 (11 November 2020)

[2020] ZAGPPHC 618

COURT

North Gauteng High Court, Pretoria

BEFORE

AC Basson

CASE / FILE NUMBER

34321/10

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IN THE HIGH COURT
OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
(1)

REPORTABLE:

NO
(2)
OF
INTEREST TO OTHER JUDGES: NO
(3)
REVISED.
11/11/20

Case no:

34321/10
In the matter

between: MINERAL-LOY (PTY)
LTD
Plaintiff
and
HIGHVELD STEEL &
VANADIUM CORPORATION LTD
STEEL AND
VANADIUM LIMITED
First Defendant
TRANSALLOYS (PTY)
LTD
Second
Defendant

JUDGMENT

RECONSIDERATION OF COSTS

AC BASSON, J

- [1] The defendant applied for a reconsideration of the costs order in the above matter as provided for in rule 34(12) of the rules. The defendant does so on two grounds: Firstly, that this court was incorrect in finding that the plaintiff had been “substantially successful” and conversely ought to have found that the defendant was successful and consequently should instead have been awarded the cost of the trial. Secondly, should the court not be inclined to grant the defendant the costs of the trial, the defendant ought to be awarded its costs from the date of 3 September 2014 alternatively 10 December 2019 on the basis that the plaintiff failed to obtain an award which exceeded the amounts tendered by the defendant in two rule 34 notices.
- [2] This application must be considered against the background that this court has already granted leave to appeal against the entire judgment and order (which includes the costs order). In as far as the defendant seeks an order to reconsider the finding of this court in its judgment to the effect that the plaintiff had been “substantially successful”, I am in agreement with the plaintiff’s submission that the order cannot be reconsidered for the reason that this court is functus officio regarding that finding. I do not agree with the defendant’s submission that rule 34(12) should be read to extend the power to this court to reconsider a finding to the effect that a party was “substantially successful” and that costs should accordingly be awarded to the substantially successful party. I will thus confine myself to the question whether the defendant ought to be awarded its costs from the date of 3 September 2014, alternatively 10 December 2019 as per the two tenders made to the plaintiff.

- [3] The defendant made two tenders. Both tenders were not accepted and were rejected by the plaintiff. After judgement had been handed down, the defendant gave notice of the tenders in accordance with the provisions of rule 34(12).
- [4] The first notice was served on 3 September 2014 and tendered an amount of R298 850.94, with no tender to costs. The second notice was served on 10 January 2019 and tendered an amount of R1 000 000.00, with no tender to costs. Each tender contains the following wording (with emphasis added):

“BE PLEASED TO TAKE NOTICE THAT the Defendant tenders, without any prejudice or admission of liability, in full and final settlement the Plaintiffs claim of the amount of ...

TAKE NOTICE FURTHER that if the Defendant’s tender is accepted by the Plaintiff, payment will be effected within 15 (fifteen) days after such acceptance.

TAKE FURTHER NOTICE THAT no tender is made to costs.”

Do the two notices comply with the rules?

- [5] The relevant part of rule 34 reads as follows:

“34 Offer to settle

- (1) In any action in which a sum of money is claimed, either alone or with any other relief, the defendant may at any time unconditionally or without prejudice make a written offer to settle the plaintiff's claim. Such offer shall be signed either by the defendant himself or by his attorney if the latter has been authorised thereto in writing.
- (5) Notice of any offer or tender in terms of this rule shall be given to all parties to the action and shall state—
 - (a) whether the same is unconditional or without prejudice as an offer of settlement;
 - (b) whether it is accompanied by an offer to pay all or only part of the costs of the party to whom the offer or tender is made, and further that it shall be subject to such conditions as may be stated therein;
 - (c) whether the offer or tender is made by way of settlement of both claim and costs or of the claim only;
 - (d) whether the defendant disclaims liability for the payment of costs or for part thereof, in which case the reasons for such disclaimer shall be given, and the action may then be set down on the question of costs alone.

- (6) A plaintiff or party referred to in subrule (3) may within 15 days after the receipt of the notice referred to in subrule (5), or thereafter with the written consent of the defendant or third party or order of court, on such conditions as may be considered to be fair, accept any offer or tender, whereupon the registrar, having satisfied himself that the requirements of this subrule have been complied with, shall hand over the power of attorney referred to in subrule (2) to the plaintiff or his attorney.
- (9) If an offer or tender accepted in terms of this rule is not stated to be in satisfaction of a plaintiff's claim and costs, the party to whom the offer or tender is made may apply to the court, after notice of not less than five days, for an order for costs.
- (10) No offer or tender in terms of this rule made without prejudice shall be disclosed to the court at any time before judgment has been given. No reference to such offer or tender shall appear on any file in the office of the registrar containing the papers in the said case.
- (11) The fact that an offer or tender referred to in this rule has been made may be brought to the notice of the court after judgment has been given as being relevant to the question of costs.
- (12) If the court has given judgment on the question of costs in ignorance of the offer or tender and it is brought to the notice of the registrar, in writing, within five days after the date of judgment, the question of costs shall be considered afresh in the light of the offer or tender: Provided that nothing in this subrule contained shall affect the court's discretion as to an award of costs."
- [6] The plaintiff contended that the defendant's rule 34 notices failed to comply with the requirements set out in rule 34(5) and consequently the plaintiff was entitled to ignore the notices. The plaintiff therefore sought an order dismissing the application

brought in terms of rule 34(12) with costs, including the costs occasioned by the employment of two counsel. The purpose of this rule was explained by the court in *Fox v Cango Wildlife Centre (Pty) Ltd*[1] as follows:

"The purpose of this sub-rule, as I understand it, is to give the court the opportunity to consider the effect of the plaintiff's

refusal to accept an offer of settlement, which could have put an end to the matter. Since the court could not have known of the

circumstances existing at the time the tender was made, it is now enabled, and required, to give all circumstances full consideration

and to decide afresh, in the exercise of its discretion, what an appropriate order as to costs would be."

- [7] The provisions of rule 34(5) are important and require that a notice of tender shall state:

- (i) Whether the [offer or tender] is unconditional or without prejudice as an offer of settlement;
- (ii) Whether it is accompanied to pay all or only part of the costs of the party to whom the tender is made, and further that it shall be subject to such conditions as may be stated therein;

(iii) Whether the offer or tender is made by way of settlement of both claim and costs or of claim only;

(iv) Whether the defendant disclaims liability for the payment of costs or for part thereof, in which case the reasons for such disclaimer shall be given, and the action may be set down on the question of costs alone.

- [8] The provisions of Rule 34(5) are peremptory.[2] In *Kruger and Another v MacGregor NO and Another*,[3] the court stated that a failure to comply with these requirements renders a notice of tender a nullity:

“As Wiechers Administrative Law (1985) points out, the fundamental question is whether non-compliance with a formal or procedural rule will result in nullity. At 198 - 199 he states:

“In the question whether non-compliance with a statutory provision results in nullity it is usually asked whether the rule in question is ‘peremptory’ or merely ‘directory’. If it is peremptory, failure to comply with it results in nullity; but if the rule is merely directory, non-compliance is not visited with nullity.”[4]

- [9] Returning to the two notices. I am in agreement with the submission that the two notices do not comply with the provisions of rule 34(5) in that they do not state -

- (i) whether the tenders were accompanied by an offer to pay all or only part of the costs of the plaintiff;

(ii) whether the tenders were made by way of settlement of both claim and costs or of the claim only;

(iii) whether the Defendant disclaimed liability for the payment of costs or for part thereof, and if so, the reasons for such disclaimer.

- [10] In fact, the two tenders pertinently state in its respective notices that “no tender is made to costs” which can, in my view, only be interpreted that the tender is not in respect of the plaintiff’s costs. By merely stating in the notices that “no tender is made to costs”, the defendant is not disclaiming liability for the plaintiff’s costs but serves only to state that the tender is not in respect of the plaintiff’s costs. The plaintiff was therefore unable to ascertain why no tender was made as to costs and the defendant’s reasons for not tendering costs. The plaintiff points out that it did advise the defendant why it (the plaintiff) held the view that the tenders did not comply with the requirements of rule 34(5). Although the defendant was free to send a compliant tender, it chose not to do so.

[11] Because the tenders did not comply with the requirements of rule 34(5), the two notices may not be taken into consideration under the provisions of rule 34(12).

Order

[12] In the event the application in terms of rule 34(12) is dismissed. The defendant is ordered to pay the plaintiff's costs of this application including the cost occasioned by the employment of two counsel.

A.C. BASSON

JUDGE IN THE HIGH COURT

Appearances

For the plaintiff: Adv G Kairinos SC

Adv A Schluep

Instructed by: Andrew Duff Attorneys

For the defendants: Adv J Daniels SC

Adv CT Vetter

Instructed by: Mervyn Taback Inc

[1]

[2004] ZAWCHC 32 (1 November 2004)

[2] Erasmus, "Superior Court Practice" OS, 2015, D1-447

[3]

[1999] 9 BLLR 935 (LC).

[4] At para [17].

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/unknown-plaintiff-v-unknown-defendant-costs-orders-agpphc-2020-34321-10>

Prepared on 9 October 2026 · Esheria