



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

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE:

11 June 2021

Case no: 56338/2019

In the matter between:

ANTONY LOUIS MOSTERT

First Applicant

ANTONY LOUIS MOSTERT N.O.

Second Applicant

A L MOSTERT & CO. INCORPORATED

Third Applicant

And

SIMON JOHN NASH

First Respondent

MIDMACOR INDUSTRIES LIMITED

Second Respondent

FINANCIAL SECTOR CONDUCT AUTHORITY

Third Respondent

JUDGEMENT

NE NKOSI AJ

[1] The applicants seek an order declaring that, properly interpreted, the cost order granted against the applicants and three other third parties was granted against them jointly and severally, and further that the applicants are absolved from liability for the cost order as a result of the first and second respondents abandoning their cost order against the three other parties. The application is opposed by the respondents.

[2] It is common cause that:

2.1 On 5 April 2017, Tuchten J handed down judgment in a matter involving the parties to the present application. In respect of costs, the judgment records:

“104 As to costs: although the applicants sought in the notice of motion as originally framed an account from Mr Mostert, the curator and ALM Inc, counsel for the applicant’s conceded that the duty to account was on these papers restricted to the curator only. On that issue, therefore, Mr Mostert and ALM Inc were successful. But the key issue in the case, on which all the respondents except the Sable Fund joined issue with the applicants, related to the question whether the remuneration agreement could survive scrutiny. On that issue the applicants were successful and thus substantially successful in the case. The applicants sought no relief against the Sable Fund. On this basis, I shall order the respondents other than the Sable Fund to pay the applicants’ costs. All the parties used the services of two counsel and the papers and the issues involved certainly justified their employment¹.”

2.2 The order in respect of costs records:

¹ Caselines 001: p54, para 104.

The first, second, fourth, fifth, sixth and seventh respondents must pay the applicants' costs of suit in relation to this application, including the costs consequent upon the employment of both senior and junior counsel².

2.3 The effect of this order on the parties to the present application is that the applicants, who were the first, second and fourth respondents, and the Financial Sector Conduct Authority ("Conduct Authority"), who at the time was the fifth, sixth and seventh respondents, were ordered to pay the costs of Nash and Midmacor, who were the applicants.

2.4 On 8 February 2019, Nash and Midmacor withdrew a pending appeal in the Supreme Court of Appeal involving the Conduct Authority. It was agreed that each party would bear their own costs in the matter withdrawn. This was subject to Nash and Midmacor agreeing to abandon the *aliquot* liability of the Conduct Authority in the Tuchten J costs order, which they did. The applicants launched the present application being aggrieved by the abandonment of the cost order.

[3] The issues to be determined by this court are:

3.1 Whether the court order by Tuchten J, in respect of costs, properly interpreted, was granted against the applicants and the three other parties "jointly and severally" (my emphasis); and

² Caselines 001: p56, para 7.

3.2 Whether the applicants are absolved from their liability for costs as a result of the first and second respondents abandoning the cost order against the three other parties.

- [4] Regarding the first issue, Mr. Wasserman, appearing for the applicants, submitted that the cost order should be understood to mean jointly and severally. Mr. Wickins, for the first and second respondents supported that view. He further submitted that it was always the respondents understanding that the costs were granted on joint and several basis and that there was never a need for an order to clarify the cost order.
- [5] Mr. Theron, representing the third respondent disputed that the cost order of Tuchten J caters for several liability of the respective parties. The third respondent is of the view that although the court has authority to clarify its order, the declaratory order sought by the applicants amount to a variation of the cost order of Tuchten J and the applicants have not made out a case for variation of the order.
- [6] The applicants and the first and second respondents' submissions find support from the following passage in *Herbstein and Van Winsen*³:

"In Minister of Labour v Port Elizabeth Municipality⁴ the Appellate Division, considering that a party is compelled to join all other parties who have a direct interest in the proceedings, expressed the view that if one of those other parties is not in a financial position to pay his aliquot share of the costs awarded, an order simply for costs would result in the successful party not being able to recover all his taxed costs, which would be inequitable in cases where the parties condemned to pay costs make common cause with one another. The Appellate Division dismissed the

³ Herbstein and Van Winsen – The Civil Practice of the High Court of South Africa 5th Edition, Volume 2 at page 992.

⁴ Minister of Labour v Port Elizabeth Municipality 1952 (2) SA 522 (A) at 537G – 538A. Also see Maclean v Haasbroek 1957(i) SA 464 (A).

appeal, ordering the appellants to pay the respondent's costs of appeal jointly and severally, the one paying the others to be absolved. This case has been followed since by the Appellate Division. Orders to pay costs jointly and severally where the litigants concerned had made common cause with one another have subsequently been granted."

- [7] Rule 10 (4)(c) of the Uniform Rules of Court confirms that a "joint and several" cost order is a competent order in circumstances similar to the case at hand and it provides that:

"4....

(a)...

(b)...

(c) If judgment is given in favour of the plaintiff against more than one of the defendants, the court may order those defendants against whom it gives judgment to pay the plaintiff's costs jointly and severally, the one paying the order to be absolved, and that if one of the unsuccessful defendants pays more than his pro-rata share of the costs of the plaintiff, he shall be entitled to recover from the other unsuccessful defendants their pro-rata share of such excess."

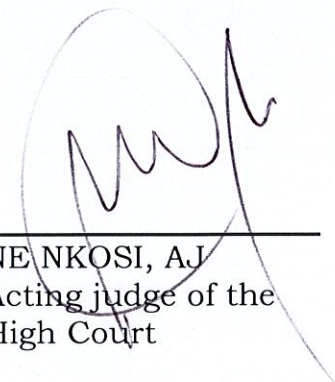
- [8] An order against unsuccessful defendants to pay costs jointly and severally is prevalent and this has been the approach of our courts since the decision in the Minister of Labour v Port Elizabeth Municipality. Although the cost order by Tuchten J is not explicit, it should still be understood in light of a principle which has now become a widely accepted practice. In the circumstances of this case, understanding the cost order to mean jointly and severally does not amount to a variation of the said order.

[9] As regards to the second issue, and in accordance with a proper interpretation of Rule 10 (4)(c), the abandonment of the cost liability of the three parties does not extinguish the entire cost liability. The applicants are excused from paying the pro-rata share of the three parties in whose favour the costs were abandoned. The applicants remain liable to pay their respective pro-rata share jointly and severally, the one paying the other to be absolved.

[10] It was certainly not the intention of the respondents to abandon the entire cost order. In my view, the abandonment of the cost order does not in any way prejudice the applicants to an extent that they would be expected to pay more than they would be required, had there been no abandonment.

[11] In the circumstances, I order that:

1. The application is dismissed;
2. The applicants, jointly and severally are to pay the first and second respondents' costs inclusive of costs of two Counsel if so employed.



NE NKOSI, AJ
Acting judge of the
High Court

Date of hearing: 31 May 2021
Date of Judgement: 11 June 2021

For the Applicants:

Adv JG Wasserman SC

Instructed by:

Assheton – Smith Ginsberg Incorporated
Cape Town

For the Second
Respondent:

Adv GD Wickins SC

Instructed by:

KWA Attorneys
Johannesburg

For the Third
Respondent:

Adv EL Theron SC

Instructed by:

Rooth & Wessels Incorporated
Pretoria