

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

CASE NUMBER: 67942/2013

In the matter between:

TIME CLOTHING (PTY) LTD

|                                          |                                 |
|------------------------------------------|---------------------------------|
| DELETE WHICHEVER IS NOT APPLICABLE       |                                 |
| (1) REPORTABLE: YES/NO.                  |                                 |
| (2) OF INTEREST TO OTHER JUDGES: YES/NO. |                                 |
| (3) REVISED.                             |                                 |
| 28/2/2018<br>DATE                        | <i>[Signature]</i><br>SIGNATURE |
|                                          | PLAINTIFF                       |

And

SCHOOL STUFF (PTY) LTD

FIRST DEFENDANT

IZAK JOHANNES CROUCAMP

SECOND DEFENDANT

In re:

SCHOOL STUFF (PTY) LTD

FIRST APPLICANT

IZAK JOHANNES CROUKAMP

SECOND DEFENDANT

---

JUDGEMENT- LEAVE TO APPEAL

---

TLHAPI J

[1] The action related to the supply of school uniform to the defendants and the fact that it was alleged that defective garments had been delivered by the plaintiff. A certain amount remained owing to the plaintiff and action was instituted against the defendants. The main

agreement provided for the return of the defective goods and how the returns would be accounted for in reducing the amount owed by the defendants to the plaintiff. The defendant counterclaimed for the amount by which it had suffered loss as a result of the defective goods. There was a further agreement concluded by the parties on 7 October 2013.

Furthermore, there was no objection to the late filing of the condonation application and condonation was granted.

[2] The agreement of 7 October 2013 confirmed the status of the dispute between the parties and further provided:

1.  
sCool Stuff returns the stock listed in annexure A to Time.
2.  
The stock is returned for the values stated in Annexure A
3.  
Time reserves the right to recover any other amounts due by sCool Stuff.
4.  
sCool Stuff reserves the right to recover damages from Time.
5.  
The parties agree that should either party exercise its right in terms of paragraph 3 and 4 hereof, legal action should be taken against the other party (either by service of a summons or service of an application) on or before 1 November 2013. The parties agree that any right to claim against the other party, will prescribe on 1 November 2013."

The above agreement was discovered by the plaintiff on 5 February 2016,

[3] On 16 February 2017 the plaintiff filed a notice in terms of Rule 28(10) to amend its replication to their plea by inserting subparagraphs 3.5A and 3.5B under section 3.4 to reflect that the parties had prior to the institution of the action concluded a further written agreement relating to any legal action which the parties would institute regarding the dispute.

"3.4 Moreover, the plaintiff further pleads that any damages, which is denied, are specifically excluded by virtue of the provisions of the written agreement concluded between the parties.

3.5A Further, on or about 7 October 2013, the parties concluded a further written " agreement in terms of which it was agreed that any legal action should be taken on or before 1 November 2013. A copy of the agreement is attached and marked as annexure "TIME1".

3.5B The first defendant failed to institute its claim against the plaintiff before 1 November 2013 and as a result is barred from doing so now. "

[4] The applicant applies for leave to appeal a costs order on the following grounds:

"1. That the... court materially misdirected itself alternatively failed to exercise a Judicial discretion or a proper judicial when it ordered the applicant to pay the respondent's costs which costs included the costs of defending the counterclaim. The said costs order was motivated on the basis that the respondent was successful in respect of the counterclaim.

2. The court materially erred by failing to consider the following facts and misdirected itself in respect of the respondent's success by not considering the following:

2.1 The counterclaim was withdrawn on Friday, 17 February 2017, after the respondent was granted leave on 16 February 2017 to amend its plea to the applicant's counterclaim (after the closure of the respondent's case)

2.2 The amendment resulted in the insertion of a plea that the first applicant's counterclaim was time barred due to the fact that the parties had previously agreed in writing that the first respondent's action had to be instituted on or before the 1 November 2013.

2.3 The first applicant's counterclaim was withdrawn as a result of the aforesaid amended plea.

2.4 The said agreement was discovered by the respondent on 5 February 2016 and if the respondent had filed the said plea at that stage, that the first applicant would have withdrawn its counterclaim.

2.5 The ... Justice failed to consider that the costs of the expert reports of Ms Sanet Beyleveld and Mr Zeeman (auditor) and their preparation and reservation for trial: the applicant's discovery (in respect of its counterclaim) and the trial bundle (in respect of the counterclaim), and the costs from the second day of trial, i.e from 10 February to 17 February 2017 were wasted. (The said costs would not have been incurred had the respondent raised the aforesaid plea timeously)

3. It is contended that the ... court's failure:

3.1 to consider the withdrawal of the first applicant's counterclaim (and thus the respondent's "successful opposition "to the first applicant's counterclaim) in the aforesaid context; and/or

3.2 to consider the afore said facts at all or adequately resulted in a grossly unreasonable costs order.

4. ....

4.1 .....

4.2 The costs order should with respect, have read as follows:

"4. The defendant's are ordered to pay the costs of the plaintiff in respect of the main claim. The plaintiff is hereby ordered to pay the first defendant's costs in respect of the first defendant's counterclaim from 31 March 2016 which costs shall include the following:

- (a) The costs of the expert reports of Ms Sanet Beyleveld and Mr Zeeman (auditor) and their preparation and reservation for trial;
- (b) The applicant's discovery in respect of its counterclaim and the preparation of the trail bundle in respect of the counterclaim;

(c) The costs from the second day on trial, i.e. from 10 February 2017 to 17 February 2017."

[5] The gist of argument on behalf of the applicants is that had the amendment been sought earlier on or had the issue relating to the agreement been raised earlier the parties would not have been involved in a lengthy trial. It was contended that unnecessary costs had been incurred by the applicant in preparation for the trial and in conducting the trial as well as other incidental costs as indicated in the grounds of appeal. Several authorities were referred to and only a few shall be referred to.

[6] The effect of the amendment as conceded for the applicants had the result of brining to an end the counterclaim of the applicant. He contended that if the agreement had been discovered at pleading state there would never have been a counterclaim and that all the costs were wasted, that a costs order against the plaintiff should have been made, at worst an order that each party pay his or her costs. It was argued further, that a litigant was not entitled to wasteful costs by raising a defence late and that there were reasonable prospects that another court might find differently. It was argued that the court when dealing with the costs of the counterclaim in its judgement apart from pronouncing the order nothing was said.

[7] It was argued for the respondent that the grant of the costs order fell within the discretion of the court. The test for upsetting an award for costs on appeal was more stringent. The appeal court was entitled to interfere where it had acted capriciously or upon wrong principle. It was contended that a proper case was not been made out for the grant of leave to appeal. The reason for the amendment was to attach a copy of an agreement that had been discovered and was within the knowledge of the applicant.

[8] It is trite that the award of costs lies within the discretion of the trial court and that a court of appeal would only interfere if the discretion was not exercised judicially, or if it failed to act for good reasons or if the decision was based on wrong principles.

I have read the authorities cited on behalf of the applicant and am of the view that the

facts are distinguishable from the present matter. The quotation cited in counsel's heads of argument in *Algoa Milling Company v Arkell & Douglas* 1918 AD 145 at 159 was considered again in *Ashcor Secunda (Pty) Ltd v Sasol Synthetic Fuels (Pty) Ltd*(624/10) [2011] ZSCA 158 at paragraph 15 where it was stated:

" But as Greenberg JA made it plain in *Cohen v Hayward* 1948(3) SA 365 (A) at 374

" I do not think, however that it was the intention of the Court in the cases quoted to lay down an inflexible rule which would deprive the Court of its discretion in regard to costs and disentitle it, in a proper case from departing from the Rule"

In both matters the issue was that one of the parties could have avoided the leading of unnecessary evidence by having excepted because of the lack of averments to sustain a cause of action.

In *Barclays Bank (D.C.D & O) and another v Riverside Dried Fruit Co Ltd* 1949 (1) SA CPD 937 at 951 again the facts were distinguishable. The hearing had lasted for five full days and it's was only on the third day where there was indication that the applicant's claim against the respondent had been ceded to the bank, and here the respondents had prior knowledge about the cessions to the Bank. The court found that had the issue of the sessions been taken at an earlier point the hearing would have been shortened by two or three days,

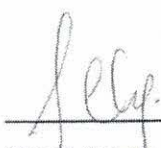
[9] The agreement in this matter that was discovered on 5 February 2016 and listed as item 30 of schedule 1. It was a product of both the applicant and the respondents and it was not something that the applicants did not know about. There was always a denial in the pleadings to liability on the counterclaim. The agreement in evidence was entered into after a series of backwards and forwards between the parties in their attempt to resolve the problems. It is not a defence that is new.

[10] It is also apposite to revert to the purpose of discovery. A party discovers to the other side all documents in its possession likely to be used as evidence during the trial and the party to whom discovery is made is placed in a position to inspect such documents well in advance in preparation for the trial. It is my view that the agreement which was annexed

through the amendment was not such that the defendants were prejudiced thereby because it had been discovered. It would have been something else if the document had not been discovered and listed or if it constituted new matter altogether. Between the 5 February 2016 and the first day of trial had the applicants prepared they would have realized that their pursuance of the counterclaim in the presence of the agreement would have served no purpose, they had bound themselves to time frames within which to institute action for the loss they had suffered. I am therefore of the view that no other court would arrive at a different conclusion regarding the award of costs.

[11] In the result the following order is given:

1. The application for leave to appeal is dismissed with costs.



TLHAPI VV

(JUDGE OF THE HIGH COURT)

|                             |   |                                                 |
|-----------------------------|---|-------------------------------------------------|
| MATTER HEARD ON             | : | 22 JUNE 2017                                    |
| JUDGMENT RESERVED ON        | : | 22 JUNE 2017                                    |
| ATTORNEYS FOR THE PLAINTIFF | : | ALLAMS ATTORNEYS<br>C/O GILDENHUYS MALATJI INC. |
| ATTORNEYS FOR THE DEFENDANT | : | IZAK J CROUKAMP ATT.                            |