

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

15/11/13

CASE NO: 41775/2012

	DELETE	WHICHEVER	IS	NOT
	APPLICABLE			
(1)	REPORTABLE:	YES/NO		
(2)	OF INTEREST TO OTHER JUDGES:	YES/NO		
(3)	REVISED	DATE: 15 Nov 2013		
	SIGNATURE: [Signature] anen			

In the matter between:

RETAIL MOTOR INDUSTRY ORGANISATION

Applicant

and

**THE SOUTH AFRICAN MOTOR BODY
REPAIRERS ASSOCIATION NPC**

1st Respondent

COMPU CORNER CC

2nd Respondent

**THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION**

3rd Respondent

EBEN JANSEN

4th Respondent

WILLEM GOUWS PIENAAR

5th Respondent

JOHANNES MAGHIEL BOTH

6th Respondent

MOSES JOHN WILLIAMS

7th Respondent

STEPHEN DE BEER

8th Respondent

JAMES BARRY STEWART

9th Respondent

ANDREW JULIAN PRETORIUS

10th Respondent

GIDEON JOHANNES SMITH

11th Respondent

ALEESHEN DEVINDERAN KISTEN

12th Respondent

JUDGMENT

Nature of Application:

- [1] This application deals with costs only. The applicant obtained substantive relief in the urgent court on 28 August 2012 and the issue of costs was postponed *sine die*. The issue to be decided is whether the costs of the two counsel were justified and on which scale the costs should be taxed.
- [2] In the instant case the first, second and fourth to twelfth respondents all noted their opposition to the application on 24 July 2012.
- [3] A dispute arose as to whether Robert H Kanarek Attorneys (the first and second respondents' firm of attorneys) acted on behalf of the first, second and fourth to twelfth respondents, or only on behalf of the first and second respondents when notice of intention to oppose was given. Only the first and second respondents filed an answering affidavit. However, the affidavit was filed outside the time period prescribed in the notice of motion. The first and second respondents alluded to the fact that the first respondent, after service of the application but before the date of hearing, had already applied to have its name changed so that it no longer fell foul of section 11(2) of the Companies Act 71 of 2008. Furthermore, the first and second respondents, in their answering affidavit, tendered the applicant's taxed party and party costs, with costs of one counsel in respect of the costs it would have been

entitled to as at that point in time.¹ They further disputed that the applicant was entitled to the punitive cost order that was sought and the application warranted the employment of two counsel.

[4] Furthermore, it was argued on behalf of the applicant that the respondents disclosed no *bona fide* defence in their answering affidavit and effectively only challenged the applicant's attorney of record's authority to act on behalf of the applicant's board. It was also contended, on behalf of the applicant, that the respondents failed to disclose a *bona fide* defence in the correspondence preceding litigation. The court was urged to penalise the improper conduct of the respondents.

[5] It was argued on behalf of the applicant, that before launching an urgent application, it served a written demand on the respondents.

[6] It was further argued on behalf of the applicant that the respondents were, at all times, actuated by malice demonstrative of grave misconduct on the part of the respondents towards the applicant. It was also emphasised that the fourth to twelfth respondents withdrew their opposition twenty one (21) days after filing their notice of opposition which notice of opposition on the basis that it was erroneous, in that Robert H Kanarek Attorneys were not authorised to represent them. It was argued that Robert H Kanarek Attorneys' withdrawal was deliberate in order to avoid a costs order, leaving the applicant with an order against a newly

¹ Practice Manual of the North Gauteng High Court, Chapter 13.10 paragraphs 1-2.

formed non-profit company only. The withdrawal also took place shortly before the hearing. Nonetheless the court made an order against all twelve respondents.

[7] The application deals with Section 34 of the Trade Marks Act (194 of 1993), section 11(2) of the Companies Act 71 of 2008, and the publishing and dissemination of injurious falsehoods and defamatory matters pertaining to the applicant.

[8] It was also emphasised that the respondents' defamatory statements and unlawful conduct threatened to impugn the applicant's reputation, and placed its finances in jeopardy.

Costs of two counsel:

[9] Costs of two counsel are awarded where an important interest or principle is at stake or legal difficulties warrant the employment of two counsel.

[10] It was contended on behalf of the applicant that the costs of two counsel were justified, on a consideration of the factors which the court has to consider.

[11] Amongst the relevant considerations to be taken into account in considering whether to award costs of two counsel are the following: —

- [12] The volume of evidence (oral or written) dealt with by counsel or which he/she or they could reasonably have expected to be called upon to deal with;
- [13] The complexity of the facts or the law relevant to the case;
- [14] The presence or absence of scientific or technical problems, and the difficulty if they were present;
- [15] Any difficulties or obscurities in the relevant legal principles or in the application thereof to the facts of the case;
- [16] Whether the court took time to consider its judgment;
- [17] The importance of the matter in issue, insofar as that importance may have added to the burden of responsibility undertaken by counsel.²
- [18] The test is objective and the issue is whether it was proper and reasonable to brief senior counsel with a junior in a matter and not in light of what the court thinks of the ability and experience of the particular counsel.³
- [19] The enquiry in any specific case is whether, in all the circumstances, the expenses incurred in the employment of more

² *Koekemoer v Parity Insurance Co Ltd & Another* 1964 (4) SA 138 (T) at page 144; *Cf De Lange v Transvaal Lewende Hawe Ko-Op Bpk and Others* 1958 (1) SA 17 (T) 22E-F.

³ *Rand Townships and Smallholdings (Pty) Ltd v Griebenow* 1956 (2) SA 42 (W) at pp 44-45.

than one counsel were “necessary or proper for the attainment of justice or for defending the rights of the parties”, and were not incurred through “over-caution, negligence or mistake”.⁴

[20] Costs, particularly at present, play a very important role in litigation and the presiding judicial officer should, in the court’s view, discourage parties to incur unnecessary costs by making an appropriate order in this respect. A party must pay such costs as have been unnecessarily incurred through his failure to take proper steps, or through his taking wholly unnecessary steps: see Herbststein and Van Winsen *The Civil Practice of the High Courts of South Africa* Fifth Edition Volume 2 at page 961 *et seq.*; *De Villiers v Union Government (Minister of Agriculture)* 1931 AD 206 at 214.⁵

[21] As was stated in the case of *Rand Townships and Smallholdings (Pty) Ltd v Griebenow* 1956 (2) SA 42 (W) “... when it is borne in mind that the claim was by no means for a trivial sum it cannot be said that the engaging of two counsel by the plaintiff’s attorney was anything but a prudent and proper step. The fact that the eventual investigation of the facts proved perhaps more simple and expeditious than it might have been is not relevant.”

⁴ *Koekemoer v Parity Insurance Co Ltd & Another* *supra* at p 44.

⁵ *Gamlan Investments (Pty) Ltd and Another v Trilion Cape (Pty) Ltd and Another* 1996 (3) SA 692 (C).

[22] In the instant case, it cannot be stated that the issues involved did not warrant two counsel. The issues involved, namely trade mark infringement and defamation are not straightforward issues and can become highly intricate. However, after the notice of withdrawal of the third to twelfth respondents and the tender contained in the answering affidavit, there was no necessity for the involvement of two counsel. The length of the affidavits is not important. What is important is the intricacy or otherwise of the facts and law.

[23] Hence, up until 13 August 2012 when the firm of attorneys, namely Robert H Kanarek Attorneys withdrew as attorneys for the fourth to twelfth respondents, the employment of two counsel was warranted. However, upon receipt of the answering affidavit of the first and second respondents on 14th August 2012 the employment of only one counsel was warranted, as argued by counsel for the respondent. Clearly the respondents capitulated on the merits, which is an important factor to be taken into account when assessing which party should pay the costs of the application.

[24] In *Gamlan Investments (Pty) Ltd and Another v Trillion Cape (Pty) Ltd and Another* 1996 (3) SA 692 (C) at page 701 the following was stated: —

“Even where the decision in respect of costs is 'separate' from the merits, as is the case where a decision on the merits is no longer sought, this does

not mean that the decision on costs must of necessity be totally isolated from the merits. Indeed, in an appeal against a costs order, the Court's decision, in the absence of other relevant factors, would in the normal course be largely based on whether or not the appellant would have been successful on the merits: see Erasmus v Grunow en 'n Ander 1980 (2) SA 793 (O) at 797B-H and 798D-H."

[25] On the facts set out above, both parties were at fault for the manner in which the case was conducted – the respondents should have tendered the relief sought earlier, thus obviating the necessity of an urgent application being launched (particularly in view of the mediation which took place which should have alerted them to the fact that they had no defence) and the applicant should have refrained from filing a lengthy replying affidavit dealing, in the main, with costs only. Fact remains, however, that it was necessary to set the matter down for a judgment and order in respect of costs.

Order

In the event, the following order is made: —

1. The respondents are ordered to pay the costs of the application on a party and party scale until the filing of the first and second respondents' answering affidavit, namely the 21st of August 2012, such costs to include the employment of two counsel.

2. The applicant to pay all costs incurred thereafter, including the costs of the hearing of the urgent application on an opposed basis and the costs incurred in the hearing of this application pertaining to costs.



Jansen

MM JANSEN AJ
ACTING JUDGE OF THE HIGH COURT

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