

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 5890/2008

In matter between:

THE SPAR GROUP LIMITED

Applicant

and

CHRISTO NEL KLEYN N.O.

First Respondent

LILIAN KLEYN N.O.

Second Respondent

HEARD ON: 16 OCTOBER 2008

JUDGMENT BY: MOLOI, AJ

DELIVERED ON: 30 OCTOBER 2008

[1] The applicant sought an order in terms of which the Trust (the Eben-Haeser Trust, herein represented by its trustees for the time being, being the respondents) is ordered to pay the applicant's costs of the application launched to perfect its security in terms of a notarial general covering bond ("the covering bond") registered by the Trust in favour of the applicant.

[2] The application was set down for hearing on 18 September 2008. The respondents filed an answering affidavit on 17 September 2008. In the answering affidavit the Trust admitted its indebtedness to the applicant albeit for a lesser amount still to be calculated and provided the details of the payments made to applicant since 2 June 2008 as per agreement between the applicant's representatives and the respondents. The main purpose of the answering affidavit, however, was to secure a postponement of the application to 2 October 2008 and contained reasons for the Trust's failure to pay the applicant; details of its asset-base; correspondence between the respective legal representatives and more specifically details of the interim arrangement made with the applicant's representatives regarding payment of the debt.

[3] On 18 September 2008 the application was postponed to 2 October 2008 by agreement and the respondents were ordered to file their answering affidavit by close of business on Tuesday, 23 September 2008 and the applicant to file its replying affidavit before close of business on Friday, 26 September 2008. It was further ordered that, pending the

final conclusion of the matter, the applicant would be entitled to place a representative in the business premises of the respondents during business hours which representative would be afforded full access to the business. Most importantly for the purposes of this judgment, the costs of the proceedings on that day were ordered to be costs in the application.

- [4] On 2 October 2008 the application was further postponed to 16 October 2008 and costs were to stand over.
- [5] On 16 October 2008 the original application to perfect the covering bond was not proceeded with. Only the issue of the granting of a cost order was argued before me.
- [6] For the applicant it was contended that the applicant was entitled to the costs of the application as at the time of the launch of the application to perfect the covering bond. It was contended that the applicant was entitled to do so on the grounds of the respondents failure to comply with their obligations to the applicant; the respondents having failed to file answering affidavits as ordered on 18 September 2008

and the indebtedness to applicant not being denied in the affidavit filed on 17 September 2008.

[7] For the respondents it was argued that the applicant is not entitled to the costs as no order was obtained in terms of the application for perfecting the covering bond. It was further argued that an arrangement was made with the representatives of the appellant prior to the launching of the application and that the applicant had no reason to launch the application. It was also averred and argued in terms of that arrangement certain periodic payments were made to applicant before the application was launched. These facts were uncontroverted.

[8] It is trite that the granting of cost orders is in the discretion of the court. See **BOLTON METROPOLITAN DISTRICT COUNCIL AND OTHERS v SECRETARY OF STATE FOR THE ENVIRONMENT** [1996] 1 ALL ER 184 at 184 where the following was stated. Also see in **Law of Costs**, A.C. Cilliers, Butterworths, 3rd Edition, 1 – 6 (issue 17) the following was stated:

“The courts are required to make such orders as appear ‘just’ in the particular circumstances.”

[9] The order of 18 September 2008 stated that the costs of that day would be costs in the application. The order of 2 October 2008 stated the costs would stand over i.e. would be argued when the application is heard. The application was not pursued as the respondent had in the meanwhile discharged his obligations against the applicant as per arrangement referred to above.

[10] Regard being had to the particular circumstances of this matter, I am of the view that it is fair and just to order that each party pay its own costs.

K.J. MOLOI, AJ

On behalf of the applicant: Adv. H.J. Smith
Instructed by:
Webbers
BLOEMFONTEIN

On behalf of the respondents: Adv. S.J. Reinders
Instructed by:
Honey Attorneys
BLOEMFONTEIN

/sp