



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Not Reportable

Case no: 17470/2014

In the matter between:

TECHNICAL SYSTEMS (PTY) LTD

First Applicant

LAVIRCO BELEGGINGS (PTY) LTD

Second Applicant

and

RTS INDUSTRIES

First Respondent

C QUIPTECH (PTY) LTD

Second Respondent

CGC INDUSTRIES (PTY) LTD

Third Respondent

CHRISTIAAN ARNOLDUS KURTZ

Fourth Respondent

Neutral citation: *Technical Systems (Pty) Ltd and Another v RTS Industries and Others* (Case no 17470/2014) [2025] ZAWCHC 287 (14-07-2025)

Coram: NUKU J

Heard: 17 April 2025

Delivered: 14 July 2025

Summary: Costs – Generally - application was settled on a basis that disposed of the merits except for costs - court should not have to hear evidence to decide the disputed facts in order to decide who is liable for costs, but it must make a proper allocation as to costs based on the material at its disposal – respondents ordered to pay costs on a party and party scale.

ORDER

1. The respondents are ordered to pay, jointly and severally, the costs of:
 - 1.1 the preparation and completion of the joint report, which costs shall include the qualifying expenses of the applicants' expert, Mr Nick Broekhuizen;
 - 1.2 the costs of the hearing set down for 14 April 2025, which costs shall include the qualifying fees of the experts, Mr Nick Broekhuizen and Mr Andries Daniel Du Plessis, in respect of whom a Rule 36(9) notice had been filed;
 - 1.3 the applicants' costs relating to the respondents' application filed in March 2025.

2. The above costs shall be paid on a party and party scale and include, where applicable, the costs of two counsel, on Scale C as contemplated in Rule 69.

JUDGMENT

Nuku J

[1] The parties to this matter are involved in the manufacturing of flat wire as well as auger. Alleging that the first, third, fourth and fifth respondents had engaged in unlawful use of their confidential information in the manufacturing process, the applicants instituted interdictory proceedings which culminated in order that was taken by agreement during 2015 (2015 order). The second respondent who was not a party to that application agreed to be bound by the terms of the 2015 order.

[2] The 2015 order restrained the respondents from manufacturing any flat wire or auger for a period of 3 years. After the expiry of the 3-year period, the respondents could set up a manufacturing plant on condition that it does not infringe on the applicants' confidential information and copyright. To this end, any manufacturing plant that was to be set up by the respondents was to be inspected prior to it being put into production. This was to ensure that it does not infringe on the applicants' confidential information and copyright.

[3] In the event of disputes between the parties on whether the manufacturing plant infringes on the applicants' confidential information and copyright, the 2015 agreement provides for a mechanism by which those disputes must be resolved prior to the said manufacturing plant being put into production.

[4] During 2018, the respondents advised of their intention to commence with the production of flat wire and auger. This necessitated the inspection of the respondents' manufacturing plant to ensure that it does not infringe on the applicants' confidential

information and copyright. In this regard, the applicants engaged the services of Mr Nicolaas Theodorus Broekhuizen (“Mr Broekhuizen”) to conduct the inspection. For their part, the respondents engaged the services of Mr Hellmut Bowles (“Mr Bowles”).

[5] Mr Broekhuizen and Mr Bowles delivered the final report during November 2021 (“final report”). The final report recorded their disagreement with Mr Broekhuizen, on the one hand, holding the view that some of the constituent parts of the respondents’ manufacturing plant infringed on the applicants’ confidential information and copyright and Mr Bowles, on the other hand, holding the view that none of the constituent parts of the respondents’ manufacturing plant infringed on the applicants’ confidential information and copyright.

[6] The disagreement led to the applicants approaching this court during November 2021, seeking procedural relief to determine the process of resolving the aforesaid differences of opinion (“November 2021 application”). The application was opposed by the respondent. In addition, the respondents launched an interlocutory application, during November 2023, for leave to file a further affidavit in which they alleged that it was no longer necessary to resolve the disputes between Mr Broekhuizen and Mr Bowles because they no longer intended to use the manufacturing plant.

[7] The November 2021 application came before Bishop AJ, who made an order referring the disputes and differences of opinion, as set out in the final report, to oral evidence. By agreement between the parties, which was made an order of the court by Mabindla-Boqwana JP on 27 January 2025, the matter was then set down for hearing to commence on 14 April 2025.

[8] On 26 March 2025, the respondents launched an interlocutory application seeking, in the main, the applicants’ co-operation in respect of the preparation of a fresh report in respect of another manufacturing plant that the respondents had commissioned in the place of the one which had been the subject of inspection by Mr

Broekhuizen and Mr Bowles (March 2025 interlocutory application). The application was opposed by the applicants.

[9] The parties ultimately reached agreement, except for costs, regarding both the November 2021 application and the March 2025 interlocutory application. That agreement was made an order of the court on 15 April 2025. I heard argument in relation to costs on 17 April 2025, pursuant to which the parties filed post hearing notes, the last of which was delivered on behalf of the applicants on 6 May 2025.

[10] Both parties accept that the ordinary rule, when the court determines the issue of costs, is that costs follow the event. Their difference, on the main, was on whether there is a party that can be regarded as having been successful in the present matter.

[11] It was submitted on behalf of the respondents that the appropriate order as to costs in the circumstances is to order each party to bear its own costs. This was because determination of the main dispute has been rendered moot in circumstances where it is not possible to determine which party has achieved substantial success.

[12] It was submitted on behalf of the applicants that the respondents should be ordered to pay the applicants' costs on an attorney and client scale, jointly and severally, one paying the other to be absolved. These costs should include: (a) the costs for the compilation of the joint expert report, including qualifying expenses of Mr Broekhuizen, (b) the costs of proceedings relating to the hearing set down to commence on 14 April 2025, including the qualifying expenses of the experts Mr Broekhuizen and Mr Du Plessis (for whom a Rule 36 (9) notice had been filed in these proceedings) and (c) the costs relating to the March 2025 interlocutory application.

[13] The gist of the applicants' submissions was summarised in the heads of argument filed on their behalf as follows:

- 13.1 The compilation of the final report was necessitated by the respondents' transgressions which gave rise to the 2015 order, and further, the respondents' announcement in 2018 that they wished to start manufacturing flat wire and auger;
- 13.2 Compiling the final report, and referring it to oral evidence, were necessary steps that the respondents required to enable them to start manufacturing lawfully;
- 13.3 Steps taken after the delivery of the judgment by Bishop AJ to prepare for the hearing and set the matter down were all necessary because the respondents had failed to take the steps that Bishop AJ had stipulated as requirements to avoid having to proceed to a hearing;
- 13.4 Only at the very last minute, on 14 April 2015, did the respondents finally capitulate, which gave rise to the settlement; and
- 13.5 The March 2025 interlocutory application was (1) not necessary, (2) ill-conceived and (3) respondents sought to amend the relief they sought at the 11th hour.

[14] Having regard to the order that was taken by agreement between the parties on 15 April 2025, it was further submitted that the applicants have achieved substantial success, when one has regard to the fact that the respondents effectively conceded that they are not entitled to put their manufacturing plant into production. That concession, the argument goes, implies that the respondents' manufacturing plant contained constituent parts that infringed on the applicants' confidential information and copyright. Thus, effectively, the respondents have abandoned their defence and on the basis of the trite principles, the respondents are in the same position as an unsuccessful litigant. There being no exceptional circumstances warranting departure from the principle that costs should be awarded to the party which has been put to the expense of defending

withdrawn proceedings, it was submitted that the respondents should be ordered to pay the applicants' costs.

[15] Regarding the scale at which the costs should be recoverable, it was submitted on the applicants' behalf that these should be on an attorney and client scale because (a) the applicants have been put through unnecessary trouble and expense which they ought not to bear, and they should not be left out of pocket, (b) the respondents' conduct in continuing to manufacture and sell flat wire and auger prior to the compilation of the final report warrants this court's rebuke, and (c) the respondents had it in their hands to avoid further litigation after the judgment that was delivered by Bishop AJ.

[16] This application was settled on a basis that disposed of the merits and on the authority of **Jenkins**¹ this court should not have to hear evidence to decide the disputed facts in order to decide who is liable for costs, but it must make a proper allocation as to costs based on the material at its disposal.

[17] The material at the court's disposal is that (a) the respondents announced their intention to put their manufacturing plant into operation, which necessitated an inspection, (b) the inspection culminated in a disagreement between the parties' respective experts on whether regarding the infringement of the applicants' confidential information and copyright, and (c) such dispute had to be resolved before the respondents' manufacturing plant could be put into production. As such, despite the respondents' contestation to the contrary, the main application was necessary.

[18] The respondents opposed the application on the basis that the manufacturing plant that they had commissioned did not infringe on the applicants' confidential information and copyright. During the course of the litigation, however, the respondents advised of their intention to abandon that manufacturing plant in favour of another one that they intended to commission. It was submitted on behalf of the applicants, correctly so in my view, that the respondents' abandonment of the manufacturing plant is akin to

¹ Jenkins v SA Boilermakers, Iron & Steel & Ship Builders Society 1946 WLD 15

abandonment of proceedings or withdrawal of the application. The result, in my view, is that the respondents should be liable for costs.

[19] The applicants were forced to incur the costs in relation to the inspection of the respondents' manufacturing plant and there is no reason why the respondents should not be held liable for these costs.

[20] There is a part of the application that was determined by Bishop AJ, in respect of which he made a cost order. The costs that are a subject of this judgment excludes any of those costs that are covered by the order made by Bishop AJ.

[21] The applicants should also pay the costs relating to the March 2025 interlocutory application. This is because the March 2025 interlocutory application was unnecessary and unrelated to the issue that brought about the main application, namely the difference of opinion between Mr Broekhuizen and Mr Bowles.

[22] As to the scale of the costs, I am not persuaded that the costs on an attorney and client scale are warranted. It was as early as prior to the hearing of the matter by Bishop AJ, that the respondents indicated their intention to abandon the manufacturing plant, a fact that should have resulted in the discontinuation of the application. That the litigation continued beyond that point is a matter that cannot be laid at the doorsteps of only the respondents.

[23] The complexity of the application justified the costs of two counsel where so employed, as well as costs of counsel on scale C.

Order

[24] In the result I make the following order:

24.1 The respondents are ordered to pay, jointly and severally, the costs of:

24.1.1 the preparation and completion of the joint report, which costs shall include the qualifying expenses of the applicants' expert, Mr Nick Broekhuizen;

24.1.2 the costs of the hearing set down for 14 April 2025, which costs shall include the qualifying fees of the experts, Mr Nick Broekhuizen and Mr Andries Daniel Du Plessis, in respect of whom a Rule 36(9) notice had been filed;

24.1.3 the applicants' costs relating to the respondents' application filed in March 2025.

24.2 The above costs shall be paid on a party and party scale and include, where applicable, the costs of two counsel, on Scale C as contemplated in Rule 69.

L G NUKU
JUDGE OF THE HIGH COURT

Appearances

For applicants:	J A Van Der Merwe SC and M de Wet
Instructed by:	D Swart and Associates Inc t/a Swart Attorneys, Stellenbosch
Care of:	De Klerk & Van Gend Inc t/a DKVG Attorneys, Cape Town

For respondents:

G Myburg SC

Instructed by:

Faure and Faure Inc,

Care of:

Michalowsky, Geldenhuys and Humphries, Cape Town