IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Case No: 51963/2007
Date: 08/08/2008

REPORTABLE

In the matter between:

PJ A N VAN NIEKERK	First Applicant
PJAN CONSTRUCTI CC t/a SA STEEL HOMES	Second Applicant
And	
CAB FROHBERG-SCHOENHEIRR	First Respondent
AR SCHOENHEIRR	Second Respondent

JUDGMENT

MAVUNDLA, J

[1] The only issue to be determined in this matter is the question of costs.

[2] The applicants brought a *rei vindicatio* action against the respondents for the return of certain goods that are specified in annexure "A" attached to the notice of motion. The applicants further seek ancillary relief including a costs order against the respondents. The respondents are defending the action.

[3] The applicants in their affidavit alleged that they are the owners of the moveable assets (a Toyota Hilux motor vehicle as well as the Mecer desktop computer and two sets of keys and remotes to the first respondent's residence as well as the construction equipment and the

tools listed in annexure "A". They further aver that the responders were in possession of the aforesaid goods at the time of the launch of the application.

[4] According to the applicant the respondents worked for the second applicant from 1 June 2006 until approximately 20-21 October 2007. The first respondent resigned on or about 20 October 20007 and second respondent resigned on about 21 October 2007.

[5] The second applicant appointed during about October 2006 the respondents in terms of a limited duration contract of employment to act as building contractors for and on behalf of the second applicant to complete the dwelling on the immovable property situated at erf 160 Boardwalk Meander. The second applicant provided to the respondents the necessary construction equipment and tools to carry on with the erection of the aforesaid dwelling. It is further averred that the applicant kept its tools in the first applicant's garage. The first applicant handed to the respondents two sets of keys and remotes to his residence situated at 78 Tugela Avenue Doringkloof Centurion, to enable the respondents access to the said tools and equipment. The respondents also used the motor vehicle mentioned herein above. The first and second respondent resigned from the employment of the second applicant on 20 and 21 October 2007. At the same time the owner of the property where the dwelling is being erected, one Victor,

terminated the contract of the second applicant to complete the construction of the dwelling. The applicants further aver that despite the termination of the contracts of employment and the termination of the construction for construction of the dwelling the respondents remained in possession of the goods set out in annexure "A" as well as of the keys, the remote controls, the motor vehicle and the Mecer desktop computer.. It is further averred that the respondents refuse to return the applicants' good notwithstanding demand.

[6] The return of service reflects that the notice of motion was served upon the respondents on 12 November 2007. On 16 November 2007 the respondents filed, through their attorney of record, their notice of intention to oppose the application. On the 7 December 2007 they filed their answering affidavit. The essence of their case is that after their resignation from the employment of the second applicant, they continued with the construction of the dwelling on erf 160 Boardwalk Meander Pretoria, which belongs to Victor. They say further that they had a verbal confirmation from the first applicant that they are allowed to keep the construction equipment and tools in order to enable them to complete the construction of the aforesaid dwelling and that they utilize the moveable assets forming the subject of this application. They have further attached as annexure "D" a copy of a letter dated 20 October 2007 from Victor addressed to the applicants. In this letter Victor confirms an agreement between himself and the first applicant

that the respondents with the applicants' equipment to complete the dwelling. They further aver that an agreement existed between the respondents and the applicants that the respondents were allowed to utilize the movables assets to finalize construction of the dwelling of Victor. In this regard the respondents have attached annexure "H" and annexure "I" which latter annexure they say it was signed by Victor and confirming that on or about 29 November 2007 the first applicant received from Victor the movable assets referred therein. The respondents deny that at the time of the launch of the application they were in possession of the goods in issue. The respondents have further attached a confirmatory affidavit of Victor as annexure "J". In his confirmatory affidavit he states that all the goods mentioned in the applicants' notice of motion were returned to the applicant on 29 November 2007.

[7] In his heads of argument, Mr. Krüger submits that although there is a dispute of the right of the applicants to seek the return of the goods, the respondents in due course returned the goods, as appears from their answering affidavit. He says that the respondents set the matter down for hearing on 4 August 2008. The attorney of the applicants then wrote[1] to the respondents indicating that it would serve no purpose to

1 The relevant letter is dated 6 March 2008 and it reads inter alia:

"Please take note that we do not see the usefulness to proceed with the placing of the application, seen in the light of the fact that first and second respondents returned the gods referred to in annexure "I" of their opposing affidavit on 29 November 2007 and the hearing of the application will result in unnecessary costs for both parties,

It is our client's instructions to proceed to sue your clients for damages he suffered and it is our intention to deal with the costs of the above mentioned application, during the action.

We trust that you find the above in order and we would like to know whether we can proceed have the application removed from the roll."

proceed with the application, as the applicants intend to issue summons for damages including the costs occasioned by the bringing the application. Despite the aforesaid letter the respondents failed to remove the matter from the roll. It is the applicants' contention that the costs could have been easily and properly have been determined in the envisaged action. It is further contended that the version of the respondents is improbable and that no contractor who has been dismissed by his former principal and replaced by his former employee would allow his tools and material to be used by his former employee. It is submitted that the issue of costs should stand over to determine in the envisaged trial. It is further contended that the respondents have failed to remove the matter from the opposed roll and that they are therefore liable for the wasted costs. It is further contended on behalf of the respondents that the applicants failed to file their replying affidavit and that in the premises the version of the respondents is reasonable and the defence is probable and it stands unanswered. Mr. Swanepoel on behalf of the respondents submits that the failure of the applicants to furnish a replying affidavit to the defence pleaded by the respondents is their answering affidavits is similar to the failure by the appellant in Da Matta v Otto, N.O. 1972 (3) SA 858 (AD) at p. 869A-E/F.

[8] It is trite that the question of awarding cost is a matter in the discretion

of the Court. In the matter of Erasmus v Grunow en 'n Ander[2] Flemming J, as he then was stated that:

> "When a decision concerning costs stands separately from the decision concerning the "merits" because a decision on the merits is no longer required or no longer permissible, it does not mean that a decision concerning the costs can be arrived at in total isolation of consideration of the merits. In an appeal against costs order, it is obvious that, in the absence of complicated factors, the decision must be arrived at with regard being had to the question whether the appellant should have been successful on the merits See Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (A) at 863, 866. Concerning proceedings that have not been brought to finality, due to the needlessness thereof to decide in favour of the second defendant, assuming firstly the general rule that a litigant simply because he has a reason why he wants to terminate the litigation, he cannot escape the liability of his opponent's costs (cf. Germishuys v Douglas Besproeiingsraad 1973 (3) SA 299 (NK); Sing v Sing 1911 TPD 1034); that the court has competency to prevent, where a claim is withdrawn for whatever reason, to flesh open the full merits in order to decide costs thereafter (et Jenkins v SA Boilermakers, Iron & Steel & Ship

2 1980 (2) SA 793 at 798C/D-H.

Builders Society 1946 WLD 15);"[3]

In the matter of Waste Products Utilisation v Wilkes (Beccari Interested party)[4] the court said that:

> 'Where a party withdraws a claim the other is entitled to costs unless there are good grounds for depriving him."

[9] In the matter of Gamlan Investments (Pty) Ltd v Trilion Cape (Pty) Ltd[5] the Court said:

> "In Jenkins v SA Boilermakers, Iron & Steel & Ship Builders Society 1946 WLD 15, the Court held that where a disputed application is settled on a basis which disposes of the merits except insofar as the costs are concerned, the Court should not have to hear evidence to decide the disputed facts in order to decide who is liable for costs, but the Court must, with the material at its disposal, make a proper allocation as to costs."

[10] In these proceedings the applicants were seeking a final order. In the Plascon-Evans Paints v Van Riebeeck Paints[6] Corbett said:

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3 My translation.

4 2003 (2) SA 590 (WLO) at 597 A-B

5 1996 (3) AS 692 (CPO) at 700G-H

6 1984 (3) SA 623 9AD) at 634 E-F

"The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by Van Wyk J (with whom DeViliiers JP AND Rosenow J concurred) in Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235E-G, to be:

'... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with admitted facts in the applicant's affidavits justify such an order... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.

This rule has been referred to several times by the Courts (see Burnkloof Cateres (Pty) Ltd v Horseshoe Cateres (Green Point) (Pty) Ltd 1976 (2) SA 930 (A) at 938A-B Tamarillo (Pty) Ltd v BN Aitkin (Pty) Ltd 1982 (1) SA 398A at 430-1; Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Backereien (Pty) Ltd en Andere 1982 (3) SA 893 (A) at 923G-924D). It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some

other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order applicant's affidavit..."

[11] The applicants failed to file a replying affidavit within 1 0 days after the respondents had filed their answering affidavit.[7] The averments of the respondents have not been formally disputed and they are therefore regarded as admitted by the applicants. It therefore means that I must accept the version of the respondents that the movables sought by the applicants were returned to the applicants as early as on 29 November 2007. The proceedings were however commenced with on 8 November 2007. The application was served on the respondents on 12 November 2007. However there is annexure "H" attached to the respondents answering affidavit. In annexure "H" is a letter dated 24 October 2007 addressed to the applicants attorneys by Victor where in he confirms a telephonic conversation between himself and the applicants in terms of which it was agreed between them that the respondents would continue to complete the dwelling and equipment and utensils necessary for the completion of the dwelling would be made available to Victor. This averment has not been denied. I am of the view that in the light of the this averment which has not been denied formally, I must therefore conclude that when the applicants

7 Rule 6(5)(e) of the Uniform Court Rules of the High Court.

signed their affidavit on 7 November 2007, they had already concluded the agreement with Victor. In the premises I conclude that the applicants were not entitled to launch this application, as they did. The respondents were entitled to set the matter down and they were entitled to the costs of this application. I am of the view that the respondents would have been the successful parties even if the matter had to decided on the merits. The applicants did not press that the matter should be decided on the merits. They did not bring an application for condonation to file their replying affidavit, whatever the reason might be. The respondents must be regarded as the successful parties and they are therefore entitled to the costs of this application to date.

[14] In the result the applicants are ordered, jointly and or severally, the one paying the other to be absolved, to pay the costs of this application to date of this order.

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N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

HEARD ON THE:	04/08/2008
DATE OF JUDGMENT:	08/08/2008
APPICANTS' ATT:	MR. J BASSON
APPLICANT'S ADV:	MR. T.P. KROGER
RESPONDENT'S ATT:	MR. J.D. CLAASSEN
RESPONDENT'S ADV:	MR. P.A. SWANEPOEL