**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 2011/26870

Case Number: 2012/34486

Appeal Case Number: A5061/2016

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **NO**

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|---|---|
| ..... | 14 August 2023 |
| SIGNATURE | DATE |

In the matter between:

**ASPHALT SERVICES (PTY) LTD** Applicant

and

**TARSPRAY CC** Respondent

**JUDGMENT**

**FORD, AJ**

Introduction

[1] In this application, the applicant seeks to have the order of the full court, dated 8 November 2017, more fully discussed below, interpreted in terms of Uniform Rule 42(1)(b). The respondent opposes the application, by way of a counter application, claiming in turn that the full court order contains a patent error,

namely that the order does not reflect the intention of the judgment.

[2] The material facts in this matter are largely common cause.

Brief factual background

[3] The applicant ("Asphalt") and the respondent ("Tarspray") instituted separate trial actions against each other in 2011 and 2012, respectively. The trial actions were ultimately consolidated, and came before the Makgoka J for determination.

[4] In his judgment, Makgoka J ("the trial judgment"), ordered Tarspray to pay Asphalt's costs of the trial on the normal party and party scale.

[5] Tarspray appealed against the trial judgment, and Asphalt noted a cross-appeal. The appeal and cross-appeal were noted against certain portions of the trial judgment.

[6] The appeal and cross-appeal were heard by a full court and judgment was delivered on 20 October 2017 ("the appeal judgment").

[7] Tarspray was partially successful in its appeal in that the amount found to be due to Asphalt by Makgoka J was reduced by the full court. The remainder of Tarspray's appeal was dismissed.

[8] Asphalt's cross-appeal was allowed in part and dismissed in part. The effect of the appeal judgment was that Tarspray and Asphalt were both partially successful in their respective appeal and cross-appeal. The order at the end of the appeal judgment reads as follows:

> 1. The appeal is dismissed with costs save in so far as the amounts awarded by the court a quo is varied herein.
> 2. The appellant is to pay the costs occasioned by the inclusion of volumes 2 and 9 to 19 of the appeal record on an attorney and client scale.
> 3. The cross-appeal is allowed in part and is dismissed in part.
> 4. The order of the court a quo is substituted with the following:

4.1 In case number 34486/2012 judgment is given in favour of the appellant against the respondent in the amount of R1 619 728.71.

4.2 In case number 26870/2011 judgment is given in favour of the respondent against the appellant in the amount of R2 032 365.22.

4.3 The amount in the para 4.2 above is set off against the amount awarded in para 4.1 above, resulting in a difference of R412 636.50.

4.4 The appellant is ordered to pay the amount in para 4.3 above to the respondent.

4.5 The appellant is ordered to pay interest on the amount referred to in para 4.3 above at the rate of 15.5%, calculated from 15 July 2011 to date of final payment.

4.6 The appellant is ordered to pay the respondent's costs in case number 26870/2011 inclusive of senior counsel fees as well as the costs of the postponement reserved on 12 October 2012 on the scale as between attorney and client."

[9] In prayer 4.6 of the order in the appeal judgment, Tarspray is ordered to pay Asphalt's costs of the trial, and the costs of the postponement on 12 October 2012, on the scale as between attorney and client.

[10] The dispute between the parties in relation to the interpretation of the appeal judgment arose when Tarspray's cost consultant, Mr. Jordan Beagle ("Beagle") addressed correspondence to Asphalt's cost consultant, Ms. Ilono Baguley ("Baguley") where Beagle disputed the taxation Asphalt's bill of costs on a punitive scale.

[11] The Taxing Master does not have the authority to determine the interpretation of the appeal judgment, and is as such incapable of taxing the bill of costs, until a determination by this court is made. This impasse, resulted in Asphalt launching of the present application.

[12] On 22 April 2022, Asphalt filed the main application in the present matter. Tarspray in turn filed an answering affidavit, in the form of a counter application on 1 August 2022.

Condonation

[13] The Tarspray's counter application and replying affidavit were admittedly filed late. This court is accordingly required to determine whether or not to grant or refuse condonation, in accordance with Rule 27(3) of the Rules.

[14] In *Grootboom v National Prosecuting Authority and Another*[1], the Constitutional Court stated that:

> "…It is axiomatic that condoning a party's non-compliance with the rules or directions is an indulgence. The court seized with the matter has a discretion whether to grant condonation."

[15] And at paragraph 55, the court held –

> "In this court the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted."

[16] The litigation between the parties, in the matter before me, has been protracted dating as far back as 2011. I have considered the parties' respective submissions in respect of condonation and have decided, in order to bring finality to this matter, to grant condonation in the interest of justice.

Asphalt's case

[17] Asphalt brought this application in terms of Rule 42(1) (b) of the Uniform Rules, seeking the following relief:

17.1. That the full court decision dated 8 November 2017, and for the purposes of the taxation of the bill of costs, be confirmed to mean that the respondent is ordered to pay the applicant's costs as follows:

17.1.1. all the applicant's taxed costs or agreed costs in case number 26870/2011 inclusive of senior counsel's fees on the scale as between attorney and client; and

[1] 2014 (2) SA 68 (CC), at para [20]

17.1.2. all the applicant's taxed or agreed costs in case number 26870/2011 occasioned by the postponement on 1 October 2012, including the costs of senior counsel on the scale as between attorney and client.

17.2. Costs of this application on the scale as between attorney and client.

[18] It was argued on behalf of Asphalt that, in terms of the aforesaid Rule, this court is empowered to clarify its judgment or order if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided that it does not thereby alter the sense and substance of the judgment or order.

[19] In support of the aforestated proposition, it was argued that the basic principles applicable to construing documents apply to the construction of a judgment or order. Further that, the court will generally consider the following:

19.1. the court's intention to be ascertained primarily from the language of the judgment or order as construed according to the well-known rules;

19.2. the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention;

19.3. if, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it;

19.4. if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court granting the judgment or order may be investigated and regarded in order to clarify it; and

19.5. if the meaning of the order is, however, clear and unambiguous, it is decisive and cannot be restricted or extended by anything else stated in the judgment.

[20] According to Asphalt, and this appears plainly from the papers, the parties disagree on the interpretation of the cost order, specifically the scale of costs

being on a punitive scale. Therefore, there exists an obscurity, ambiguity, *alternatively* an uncertainty in relation to the interpretation of the cost order requiring the court to intervene and provide clarity.

[21] Asphalt contends that the cost order as aforesaid means the following:

21.1. The respondent (appellant in the appeal) is ordered to pay the applicant's costs (respondent in the appeal) in case number 26870/2011 inclusive of senior counsel's fees on the scale as between attorney and client; and

21.2. That the respondent (appellant in the appeal) is ordered to pay the applicant's costs (respondent in the appeal) inclusive of senior counsel's fees in respect of the postponement reserved on 12 October 2012 on the scale as between attorney and client.

[22] It contends further that, the above interpretation is in line with the relief sought by the applicant in its notice of cross-appeal. Further that in terms of ground 5 of the notice of cross-appeal, Asphalt sought to appeal the order in relation to costs, in the following terms:

> "The costs order made against the appellant could not reasonably have been made by a Court properly directing itself to air the relevant facts and principles. The appellant should have been ordered to pay the costs of the action on the attorney and client scale, not the ordinary scale, given its:
>
> (1) dishonesty in relation to the settlement that it has reached with Tarfix;
> (2) its subsequent dishonest attempt to hide such settlement;
> (3) the dishonest attempt to contend that no part of the 3.6 million received from Tarfix related to work done by the applicant on the Boshoek contract and the dishonest attempt to hide the true nature of the settlement;
> (4) the dishonest attempt to escape the consequences of its obligation as pleaded in paragraph 3.3.5 of its plea as amended;
> (5) the dishonest claim that a different contract existed between the parties; and
> (6) the failure of the respondent to call a witness to explain the aforesaid conduct in relation to its settlement with Tarfix."

[23] It is, according to Asphalt, evident from the aforesaid grounds of appeal, that it sought to appeal the cost order of the court a *quo* and to replace and/or

substitute the cost order of the court *a quo* with a punitive costs order on an attorney and client scale.

[24] On Asphalt's interprets the cost order full court as follows: it succeeded in appealing the cost order, and that the cost order of the court *a quo* was replaced with a punitive cost order on the attorney and client scale.

[25] Asphalt directed the court to the conduct of Tarspray and provided sufficient notice that it intended appealing the cost order, more specifically the scale of costs. It sought to substitute the cost order of the court a *quo* with a punitive cost order awarding the costs on the scale as between attorney and client.

[26] In addition, it provided written heads of argument in support of its cross-appeal. In those heads of argument, Asphalt, under a separate and distinct heading, indicated its submissions on costs and stated the following at paragraph 89 thereof:

> "If the appeal succeeds this court may impose its own cost order. Tarspray should be ordered to pay the costs of the action on the attorney and client scale not the ordinary scale."

[27] It further indicated, in its heads of argument at paragraph 97.6 that the following relief in respect of costs was sought:

> "the defendant is ordered to pay the plaintiff's costs in case number 26879/2011 inclusive of senior counsel's fees, as well as the costs of the postponement reserved in October 2012 on the scale as between attorney and client."

[28] According to Asphalt, if due regard is had to the notice of cross-appeal and its heads of argument, it is clear that it sought to appeal the cost order of the court *a quo* and sought to substitute such cost order with a punitive one. Further that, the full court in considering the grounds upon which Asphalt sought to appeal the cost order of the court *a quo* stated the following[2];

28.1. The court found that all the witnesses who testified before the court *a quo* asserted that the agreement was concluded between the appellant and the respondent;

[2] Full court judgment

28.2. In finding that the agreement was concluded between the appellant and the respondent, the court considered the dishonest claim that a different contract existed between the parties;

28.3. The court further considered the fact that the respondent failed to call a witness to explain its conduct in relation to its settlement with Tarfix;

28.4. The court indicated that five witnesses testified on behalf of the respondent, three of whom asserted that the agreement was entered into by the appellant and the respondent. The appellant called no witnesses resulting in the evidence being largely common cause;

28.5. The court considered the payment received in an amount of R3.6 million in August 2011 from Tarfix;

28.6. In considering the payment received in an amount of R3.6 million, the court considered the dishonesty in relation to the settlement and the subsequent dishonest attempt to hide such settlement.

[29] It is therefore evident from the full court decision, so it was argued, that the court considered all of the grounds Asphalt sought to appeal, in order to substitute the court *a quo'*s cost order with a punitive one. In consequence, the court made the following cost order: *"The respondent (appellant in the appeal) is ordered to pay the respondent's costs in case number 26870/2011 inclusive of senior counsel fees as well as the costs of the postponement reserved on 12 October 2012 on the scale as between attorney and client".*

[30] On Asphalt's interpretation of the court order, it is submitted that:

30.1. The language of the judgment and cost order indicate that the court intended that the costs awarded were on an attorney and client scale inclusive of the costs of senior counsel;

30.2. In reading the full court's judgment as a whole, the full court considered the grounds raised by Asphalt and agreed with its contentions. And in the circumstances, the court awarded punitive costs.

Tarspray's case

[31] Tarspray contends that there is nothing stated in the appeal judgment which justifies the disputed order for costs on the attorney and client scale. And that the disputed order is clearly a patent error in the appeal judgment.

[32] It is submitted that, while Asphalt did cross-appeal against the cost order of the court *a quo's* trial judgment, the full court did not deal with that portion of the cross-appeal in the appeal judgment. Further that it cannot be disputed that the award of costs on an attorney and client scale, is a punitive cost order.

[33] Tarspray submitted in addition, that the full court did not state any reasons why it would have made an order for punitive costs against Tarspray. In its view, a punitive cost order does not ordinarily follow the result, and reasons ought to have been given justifying the award of punitive costs. This is especially so where an appeal court intends to alter the order of the court *a quo*.

[34] Moreover, so it was argued, both Tarspray and Asphalt were partially successful in their respective appeals and cross-appeals. This would not justify a punitive costs order because both parties were successful and unsuccessful in their respective relief sought.

[35] For these reasons, Tarspray contends that the disputed order is not one open to interpretation but rather constitutes a patent error in the appeal judgment. Further that the relief sought by Asphalt is incompetent. The appeal judgment and order, and the full court's reasons for giving it, must be read as a whole in order to ascertain its intention. Tarspray contends further that, on a reading of the appeal judgment and order as a whole, the judgment and order are unclear and ambiguous. They are, in fact, at odds with each other. This must be clarified by the full court, and the patent error must be corrected.

[36] It was argued that when reading the disputed order in the context of the appeal judgment as a whole, and in light of the full court's reasons for the order, it is clear that the full court never intended to, and did not, award punitive costs against Tarspray on the scale as between attorney and client. This is even more apparent when regard is had to the cost order in the appeal itself – the full court awarded party and party costs against Tarspray in the appeal. Should the full court have been displeased in any respect with Tarspray, so it was contended,

it would have granted attorney and client costs both in the appeal and in the disputed order. It did not do so.

[37] Tarspray therefore seeks the correction of this patent error in its counter-application, as the disputed order does not reflect the real intention of the full court as it appears from the judgment itself.

Analysis

[38] The relief sought by both Asphalt and Tarspray, is obtainable in terms of Rule 42(1)(b). To this end, both parties relied on the same rule, for different purposes. Asphalt contends that the disputed order of the appeal court ought to be properly interpreted which in and of itself requires a variation of that order, whereas Tarspray contends that the disputed order contains a patent error, also requiring a variation.

[39] In *Firestone South Africa (Pty) Ltd v Genticuro AG*[3], the court held that:

39.1. The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgement debt, which the court overlooked or inadvertently omitted to grant;

39.2. The court may clarify its judgement or order. If, on proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter *" the sense and substance*" of the judgement or order;

39.3. The court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention;

39.4. Where counsel has argued the merits and not costs of a case (which nowadays often happens since the question of costs may depend upon the ultimate decision on the merits), but the court, in granting judgment, also makes an order concerning the costs, it may thereafter correct,

[3] 1977 (4) SA 298 (A) at 304D

alter or supplement that order.

[40] The first question raised in this matter, by implication, is whether a court sitting as a single judge can vary an order of a full court constituted by two or more judges. Where the issue for consideration, like in the matter before me, merely concerns, in part, an interpretation of an order, so as to give effect to its true intention, there seems to me, at least, no basis to have a full court reconvene in order to determine such an application. This can expediently be done by a single judge. Provided of course, as set out in *Firestone,* that the court sitting as a single judge, does not seek to alter the sense and substance of the judgment.

[41] Asphalt raises essentially four considerations, for its claim that the order of the full court ought to be interpreted in the manner it contended for, namely that:

41.1. its interpretation being in line with the relief sought in its notice of cross-appeal;

41.2. in its written heads of argument, in the cross-appeal, Asphalt, under a separate and distinct heading, indicated its submissions on costs;

41.3. the language of the judgment and cost order indicate that the court intended that the costs awarded were on an attorney and client scale inclusive of the costs of senior counsel; and

41.4. in reading the full court's judgment as a whole, the full court considered the grounds raised by Asphalt, agreed with its contentions and in the circumstances, awarded punitive costs.

[42] Prior to dealing with the listed considerations, I deem it appropriate to first address the issue of the punitive order and corollary thereto, the trite legal position in this regard. It is common cause that the relevant portion of the disputed order is punitive in nature.

[43] In an appeal against a cost order issued by a lower court on a punitive scale, the Labour Appeal Court (“LAC”) reasoned as follows:

> The scale of attorney and client is the highest scale possible that a litigant can be ordered to pay. It is an extraordinary one which should be reserved for cases where there is clearly and indubitably vexatious and reprehensible conduct on the part of a litigant. The nature and reach of such an order has been described as "exceptional, very punitive and as indicative of extreme *opprobrium*."[4] The learned authors of *Erasmus Superior Court Practice* list various circumstances in which the courts have, over the years, awarded costs on an attorney and own client scale. One of the instances is where a party's conduct has been found to be "unconscionable, appalling and disgraceful". See also *Sentrachem v Prinsloo*[5] where it was reiterated that an award of attorney and own client costs had to be seen as an attempt by the Court to go one step further than an ordinary order of costs between attorney and client so as to ensure that the successful party was indemnified with regard to all reasonable costs of litigation, and that it was an extraordinary order which could not be made without good reason.[6]

[44] It is trite that the primary purpose of any cost award is to minimise the extent to which a successful party will be financially impaired as a result of litigation that he or she should not have had to endure. Cost orders often fail to achieve this objective, and fall short of assisting the successful party in fully recovering his or her expenses. For this reason, it will at times be just and equitable to award costs against the losing party on a punitive scale, not only to punish vexatious litigation, but also to assist the successful party in recovering, in most instances, substantial expenses. Generally, our courts do not make punitive costs orders frequently. Exceptional circumstances must exist before they are warranted.[7]

[45] In *Mkhatshwa and Others v Mkhatshwa and Others*[8] the Constitutional Court held that the purposes of punitive costs, being an extraordinarily rare award, are to minimise the extent to which the successful litigant is out of pocket and to indicate the court's extreme opprobrium and disapproval of a party's conduct. Although punitive costs are rarely awarded, the court affirmed that existing

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[4] *Erasmus Superior Court Practice* at E12-26
[5] *Sentrachem Ltd v Prinsloo* 1997 (2) SA1 (SCA)
[6] At 22B-D.
[7] LAWSA, Volume 10, Third Edition, 284 note 15.
[8] CCT220/20

jurisprudence indicates that they are appropriate when it is clear that a party has conducted itself in an indubitably vexatious and reprehensible manner.

[46] Rule 42(1)(b) provides that the court may rescind or vary any order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission. A patent error or omission has been described as 'an error or omission as a result of which the judgment granted does not reflect the intention of the judicial officer pronouncing it, meaning, the ambiguous language or the patent error or the omission must be attributable to the court itself. The court is accordingly not entitled to reconsider the whole of its order or judgment, and its competence is limited to the interpretation of the order.

[47] In the present matter, the full court did not advance any reasons for granting a cost order on a punitive scale, and its failure to do so was, as argued by Mr. Naidoo, a patent error. This is so, because the reasons for the judgment and the order, in respect of punitive costs, appear rather tenuous. A punitive cost order is an extraordinary one, generally made by the court in exceptional circumstances. The granting of a punitive cost order against a party, having regard to our court's general approach, should not be issued without at the very least advancing reasons for that decision. Where a punitive cost order is granted, the losing party would be justified in expecting a reasoning therefor being set out in the judgment.

[48] Apart from not stating any reasons why it issued an order for punitive costs against Tarspray, the full court also did not deal with the cost issue raised by Asphalt, in the appeal judgment.

[49] Ms. Mitchell argued that the notice of cross-appeal, specifically paragraph 5, alluded to above, did in fact raise the issue of a punitive cost order, in which it was stated:

> "The costs order made against the appellant could not have reasonably have been made by a court properly directing itself to all the relevant facts and principles. The appellant should have been ordered to pay the costs of the action on the attorney and client scale, not on the ordinary scale, given its:…"

[50] Further that it is clear from the cross-appeal that Asphalt sought to appeal the cost order of the court a *quo* and to replace and/or substitute it with a punitive one on an attorney and client scale. In addition, Asphalt provided written heads of argument in support of its cross-appeal indicative of the fact that Asphalt would argue, the issue of costs, at the hearing of the appeal.

[51] Mr. Naidoo, correctly contended, that the fact that a party raises the relief it will be seeking either in a notice or heads of arguments, does not without more, necessarily render such, mutually inclusive with the eventual order. A careful reading of the appeal judgment does not seem to promote this interpretation either. If it did, it would logically have followed, that the same reasoning would have been apparent.

[52] I agree with Mr. Naidoo that, a proper reading of the disputed order in the context of the appeal judgment as a whole, and in light of the full court's reasons for the order, makes it abundantly clear that the full court never intended to, and did not, award punitive costs against Tarspray on the scale as between attorney and client. This is even more apparent when regard is had to the costs order in the appeal itself – to this end, the full court awarded party and party costs against Tarspray. If the full court was so displeased with Tarspray, it would have granted attorney and client costs, both in respect of the appeal and in the disputed order. It did not do so.

[53] It was argued by Ms. Mitchell that the language of the judgment and cost order indicate that the court intended that the costs awarded were on an attorney and client scale inclusive of the costs of senior counsel; and in reading the full court's judgment as a whole, the full court considered the grounds raised by Asphalt, agreed with its contentions, and in the circumstances awarded punitive costs.

[54] I disagree with this contention for the following reasons:

54.1. A punitive cost order is an extraordinary order, not lightly issued by our courts and certainly not, without providing reasons for such an order;

54.2. Having considered the facts in the appeal, the appeal court concluded that both Tarspray and Asphalt were partially successful in their respective appeals and cross-appeals. This would not therefore justify a punitive costs order against Tarspray as contended by Ms. Mitchell. Even after having taken the conduct of Tarspray into consideration, the full court still only ordered ordinary costs in the appeal.

[55] The court order of the full court contains a patent error that can be easily varied, as proposed in the draft order of Tarspray, in order to give effect to the court's true intention.

[56] In the result, I make the following order:

Order

1. The applicant's application is dismissed with costs, as set out in prayer 5 below;

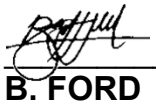
2. The respondent's late filing of its counter application and replying affidavit is condoned;

3. The respondent's counter-application succeeds and is hereby granted in the terms set out below.

4. The judgment of the full court, dated 8 November 2017, under the above case number, is hereby varied and substituted, in its relevant parts, to read as follows

> *"4.6 The appellant is ordered to pay the respondent's costs in case number 26870/2011 inclusive of senior counsel fees as well as the costs of the postponement reserved on 12 October 2012 on party and party scale"*

5. The applicant is ordered to pay the costs of the counter-application on party and party scale.



**B. FORD**
Acting Judge of the High Court
Gauteng Division of the High Court,
Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 14 August 2023 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 14 August 2023

Date of hearing: 24 April 2023
Date of judgment: 14 August 2023

**Appearances:**

| | |
|---|---|
| For the applicant: | Adv. K. Micthell |
| Instructed by: | A.J. Venter & Associates |
| | |
| For the respondent: | Adv. K. Naidoo |
| Instructed by: | Fairbridges Wertheim Becker |