

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

8/12/2011

CASE NUMBER 67241/2010


IN THE MATTER OF

LIBERTY GROUP LIMITED

versus

MALINDI LOADER

ADRIAN LOADER

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	APPLICANT
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED. ✓	
8/12/2011	
DATE	SIGNATURE

FIRST RESPONDENT

SECOND RESPONDENT

JUDGEMENT

BAM AJ

1. The applicant applies for an order compelling the respondents to pay costs to the applicant in a matter which the respondents issued summons against the applicant which action was subsequently withdrawn by the respondents The applicant further prays for a costs order against the respondents for this application. The applications are opposed.
2. It is common cause that that the respondents issued summons against the applicant for the payment of certain sums of money in accordance with the provisions of two retirement annuities held with the applicant, by a certain dr Pierre Rossouw (the "deceased"), who passed away on 22 August 2008. The respondent, represented by the trustees of the retirement fund, made a determination in terms of section 37C of the Pension Funds Act in respect of the distribution of the proceeds of the retirement annuities to the plaintiffs.

3. After having filed a notice of intention to defend the respondents applied for summary judgement which in turn was opposed by the applicant. It was apparently agreed by the parties that leave to defend should be granted to the applicant. The respondents however maintained that the applicant should pay the costs. The Court dealing with the application declined to adjudicate the costs issue and costs were reserved. The applicant then excepted to the claim on the basis that it failed to disclose a cause of action or was vague and embarrassing. Subsequently, on 10 May 2011 the respondents withdrew the action against the applicant.
4. It is the applicant's case that the notice of withdrawal by the respondents, which was served on the applicant on 11 May 2001, was not accompanied by a consent to pay the applicant's costs which the respondents were obliged to pay. Consequently the applicant is entitled, so it is submitted Advocate Wood, counsel for the applicant, that the respondents should pay the costs of the main case, and the costs of the Rule 41 (1)(c) application which was reserved, on an attorney and client scale, as well as the costs of this application, on an attorney and client scale.
5. The respondents decline to pay the costs and prays for an order that the applicant make payment of their costs, including in respect of certain portions of the litigation, costs on a scale as between attorney and client. The reasons advanced by the respondents for their failure to pay the applicant's costs are that the applicant, before summons was issued by the respondents, failed to comply with an application made by the respondents, in two letters addressed to the applicant by the respondents' attorneys, requesting that the applicant should furnish to the respondents information pertaining to the complaints filed by the children of the deceased. The applicant was allegedly in possession of the said information. It is the respondent's case that the applicant had *induced the litigation* based on the applicant's failure to furnish the respondents the detail of the alleged complaints.
6. The applicant avers that the respondents had no claim against the applicant. It is further averred that the respondents should have cited the Pension fund, who is the liable party for the payment of the proceeds of the two policies, and not the applicant. It is also contended by the applicant that the respondents were aware of the issue of the children of the deceased having lodged complaints. The said letter dated 14 September 2010, addressed to Weavind and Weavind, respondents' attorneys, by the applicant,

contains the information in question, however, without detail. The letter is attached to the respondent's Particulars of Claim as Annexure E.

7. The respondent's argument that the applicant's conduct was the fundamental cause of the litigation is, to my mind, without merit. The respondents were obliged to properly prepare their case before issuing summons. If the respondents were dissatisfied with the information supplied by the applicant, they surely had other remedies available before issuing summons against the applicant. To blame the applicant for something which laid squarely before the door of the respondents does not pass muster.
8. Accordingly I could not find any reason to depart from the principle that like *in casu*, a plaintiff who withdraws the case should also pay the costs.

Therefore I make the following order:

1. The application of the applicant succeeds;
2. The respondents' counter claim is dismissed;
3. The respondents are ordered to pay the costs of the action;
4. The respondents are ordered to pay the costs of the Rule 41(1)(c) application on the attorney and client scale;
5. The respondents are ordered to pay the costs of this application on the attorney and client scale.

A J BAM

ACTING JUDGE OF THE HIGH COURT