

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 2020/24081

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
(3)	REVISED.
11 August 2021	

In the matter between:

SOMIKA SARL

Applicant

and

SAARTHY PROPRIETARY LIMITED

Respondent

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be 11 August 2021.

Summary: Leave to appeal against the order granting specific performance by the urgent court. The respondent's conduct resulting in the enforcement of the order becoming moot. The applicant seeking costs on a punitive scale of attorney and client scale.

JUDGEMENT

Molahlehi J

Introduction

[1] This matter served before this court initially as an application for leave to appeal against the judgment made on 11 September 2020. The judgment was granted in favour of the respondent, Somika (Pty) Ltd (Somika), directing the respondent Saarthy (Pty) Ltd (Saarthy) to issue the relevant amendment bill of landing at the port in Tanzania. Saarthy did not comply with the order but instead filed an application for leave to appeal against it.

[2] Saarthy did not proceed with the prosecution of the leave to appeal as it became moot. The mootness arose because there would be no practical outcome that would flow from that application as the urgent court order is no longer capable of being implemented. The urgent court order cannot be given effect because Saarthy is incapable of procuring the bill's amendment to reflect Somika as the consignee.

[3] The issue that now remains for determination is which party is responsible for the costs occasioned by the application for leave to appeal, including those occasioned by the application to declare the judgment referred to above, declared to have been abandoned by Somika.

Background facts.

[4] The initial dispute between the parties in this matter concerned the consignment of yellow Sulphur pellets (the consignment), which was placed in forty consignment

containers on board the vessel, which was docked in the port in Dar es Salaam on 14 September 2020. The dispute concerned the failure of Saathy to sign the amendment of the bill of landing and the packing list invoice.

[5] In the urgent application, this court granted an order favouring Somika and compelling Saathy to sign the bill of landing. The relevant part of the order directing specific performance of the contract reads as follows:

"1 (Saathy) is ordered, directed and compelled to forthwith procure the amendment of bill of lading number MEDUI 823919, annexed to the founding affidavit marked "FA3" to reflect the consignee as Somika ... and the notified party as ...; and

2 (Saathy) is ordered, directed and compelled to forthwith deliver the Bill of Lading ... by close of business on 12 September 2020..."

[6] The other application launched by Saathy was for an order declaring Somika to have abandoned the judgment made in its favour.

[7] Saathy did not comply with the order, and on 16 September 2020, Somika launched an urgent application to declare the directors of Saathy be in contempt of court. The following day on 17 September 2020, Saathy applied for leave to appeal against the order compelling it to sign the bill of landing.

[8] It is common cause that the urgent court order has become unenforceable and has thus become moot. In terms of section 16 (2) (a) (i) of the Superior Court Act, "the appeal may be dismissed on this ground alone."

Submissions by the parties.

[9] Saarthy contends that Somika should be held liable for the costs occasioned by the leave to appeal because it (Somika) abandoned the judgment resulting in the leave to appeal becoming academic. It further contended that Somika was responsible for the cost incurred in the application to declare the judgment abandoned. It was submitted in this regard that the judgment was abandoned because Somika cancelled the agreement regarding the delivery of the consignment and instituted a claim for damages in the amount of USD82080 00.

[10] In the heads of argument, Saathy argues that Somika could not have it both ways. It claimed specific performance in the urgent application compelling compliance with the agreement. On the other hand, the action proceedings now claim restitution damages based on the alleged breach of the same contract.

Abandonment of judgment or order

[11] As indicated earlier, the issue concerns costs arising from the mootness of the leave to appeal. The case of Saarthy is that the leave to appeal became moot because Somika abandoned the judgment.

[12] In general, a party abandoning a judgment shall be held liable for the costs up to the time of the abandonment of the judgment.¹

[13] The procedure to follow in abandoning a judgment is set out in rule 41(2) of the Rules of the High Court (the Rules), which reads as follows:

¹ Bonthys v Visser 1950 n (1) SA Sentraoer Kooperetief v Mphaka 1981 (2) SA 814.

"(2) Any party in whose favour any decision or judgment has been given, may abandon such decision or judgment either in whole or in part by delivering notice thereof and such judgment or decision abandoned in part shall have effect subject to such abandonment. The provisions of subrule (1) relating to costs shall mutatis mutandis apply in the case of a notice delivered in terms of this subrule."

[14] In the present matter, Saarchy does not rely on the above rule in contending that the urgent order granted by this court was abandoned. It alleges that Somika abandoned the rights acquired in instituting action proceedings in which it claimed damages for the alleged repudiation of the contract.

[15] The issue of abandonment of a judgment was equated to waiver in *Body Corporate 22 West Road v Erggold Property Number 8 CC*,² where the court held that: "The waiver is a mechanism whereby a party can limit costs or distance himself from a particular judgment, but it certainly, as I have already indicated above, cannot be equated to a rescission or setting aside of the judgment on appeal..."

[16] It is clear that abandonment or waiving a judgment concerns the surrender of rights by a litigant in whose favour judgment was made. The onus was thus on Saarchy to show that Somika had surrendered the rights it derived from the urgent court order.

[17] The issue that then arose is whether Saarchy has disclosed material facts that show that there has been waiver or abandonment of the judgment in its founding affidavit.

[18] The case of Saarchy, as appears from the earlier discussion, is that the judgment cannot be given effect because of the cancellation of the contract by Somika in

² JDR 2258 at paragraph 9.

instituting the action proceedings. In paragraph 23 of the founding affidavit, it is contended that:

"23.... Somika cannot approbate and reprobate. By virtue of the election it made to cancel the agreement, it abandoned the judgment of 11 September 2020. There is, therefore, no conceivable reason why the order of 11 September 2020 should be kept alive."

[19] I agree with Somika that the cancellation of the contract is irrelevant to whether the judgment was abandoned or the rights acquired were waived. The facts of this case do not support the proposition that the urgent order of this court was abandoned.

[20] In the first instance, it is important to note that the reaction of Somika when called upon by Saarchy to file a notice of abandonment in terms of rule 41 (2) of the Rules. In this respect, Saarchy attorneys of record addressed a letter dated 6 May 2021 to Somika's attorneys of record and, amongst others, stated the following:

"4. You will recall that the urgent application was founded on an agreement concluded between your client, Somika and Saarchy.

Your client sought the agreement (sic).

5. In the action, your client has cancelled the agreement concluded with Saarchy, and claims, inter alia, repayment of the amount it paid in respect of the first shipment.

6. Your client, by its conduct aforesaid, abandoned the order obtained in the urgent proceedings. This renders the application for leave to appeal moot.

7. Kindly let us have a formal notice of abandonment in confirmation of your client's position, failing which we are instructed to place this correspondence before his Lordship Mr Justice Molahlehi at the hearing of the application for leave to appeal and to argue this point..."

[21] Somika's attorney of record responded as follows:

"We disagree that the appeal is moot. If however your client wishes to abandon the appeal then it should serve a notice of withdrawal and tender our clients' costs. It should do so sooner rather than later to avoid further inconveniencing the court."

[22] It is common cause that Saarthy did not comply with the urgent court order. In my view, the urgent court order became unenforceable after December 2020 when the Tanzanian Port Authority confirmed that the cargo relevant to the bill of landing was discharged from the relevant ship by the agent of Saarthy to a third party. This means Saarthy cannot comply with the order and this state of affairs existed since December 2020, more than four months before the cancellation of the contract alleged to be evinced by the action proceedings instituted by Somika.

[23] It follows from the above that in terms of section 16 (2) of the Superior Court Act the leave to appeal stands to be dismissed. For this reason, the declaratory order sought by Saarthy also stands to fail because the proposition that the urgent court order was abandoned is unsustainable.

Costs

[24] Somika has prayed for the cost to be awarded to it on a punitive scale of attorney and client.

[25] The guiding principles governing the awarding of costs on an attorney and client scale are summarised in *Public Protector vs South African Reserve Bank*,³ as follows:

"Costs on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process. As correctly stated by the Labour Appeal Court—

"[t]he scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible [manner]. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium."

³ [2019] ZACC 29.

[26] In my view, the institution of leave to appeal by Saarchy was unnecessary and amounted to nothing but an abuse of the court processes. It embarked on a stratagem intended to undermine the order's implementation, directing it to sign the bill of landing to authorize Somika to remove the cargo from the Tanzanian port. It was aware or ought to reasonably have been aware that once the cargo was removed from the port, it would not be possible to give effect to the order and thus, an application for leave to appeal was ill conceived and unnecessary.

[27] For the above reasons, I am satisfied that Somika has made out a case for the awarding of costs on a punitive scale against Saarchy.

Order

[28] In the circumstances, the following order is made:

1. The application for leave to appeal is dismissed in terms of section 16 (2) of the Superior Courts Act with costs on the scale as between attorney and client scale.
2. The application to declare the urgent court order issued on 11 September 2020 to have been abandoned by Somika is dismissed with costs on the scale as between attorney and client scale.
3. Saarchy is to pay the costs occasioned by the postponement arising from the belated delivery of the supplementary grounds of appeal.

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E Molahlehi
Judge of the High Court,
Local Division, Johannesburg

Representation:

For the Applicant: Adv. F Bezuidenhout

Instructed by: AYOOB KAKA Attorneys

For the Respondent: Adv. Pullinger

Instructed by: Thomson Wilks Inc.

Date of order: 11 September 2021

Date of reasons: 23 December 2020

Application for leave to appeal: 18 June 2021

Delivered: 11 August 2021