

REPUBLIC OF SOUTH AFRICA



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

- (1) REPORTABLE: NO / YES
(2) OF INTEREST TO OTHER JUDGES: NO / YES
(3) REVISED.

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SIGNATURE DATE

CASE NO: 13551/2018

In the matter between:

BEEFCOR (PTY) LTD

APPLICANT

and

JOSE JORGE DE FREITAS

FIRST RESPONDENT

FRANKLIN DOMICIANO DE AGUAR MENEZES

SECOND RESPONDENT

ABBYGAIL VAN WYK ATTORNEYS

THIRD

RESPONDENT

SHERIFF JOHANNESBURG CENTRAL

FOURTH

RESPONDENT

ABSA BANK LTD

FIFTH

RESPONDENT

In re the action between:

JOSE JORGE DE FREITAS

FIRST PLAINTIFF

FRANKLIN DOMICIANO DE AGUAR MENEZES	SECOND PLAINTIFF
and	
CHAMDOR MEAT PACKERS (PTY) LTD	FIRST DEFENDANT
BEEFCOR (PTY) LTD	SECOND DEFENDANT
PETRUS HENDRIK TROSKIE N.O.	THIRD
DEFENDANT	
JOHANNES LODEWIKUS LE ROUX N.O.	FOURTH
DEFENDANT	
JACOMINA ELIZABETH TROSKIE N.O.	FIFTH
DEFENDANT	
CORNELIUS JOHANNES HATEM N.O.	SIXTH DEFENDANT
HENDRIK LAMBERTUS JOHANNES MOULDER N.O.	SEVENTH
DEFENDANT	
ERENSCHA ALETTA ERASMUS N.O.	EIGHTH
DEFENDANT	
MALCOLM JOSEPH FARQUARSON	NINTH
DEFENDANT	
PETRUS HENDRIK TROSKIE	TENTH
DEFENDANT	
CASPARUS JAN HENDRIK WESSELS	ELEVENTH DEFENDANT
JOHAN ROBINS WATSON	TWELFTH DEFENDANT
HERMANUS ABRAHAM VAN STADEN	THIRTEENTH DEFENDANT
WESSELS JOHANNES MULLER	FOURTEENTH DEFENDANT
TROSKIE & DE WET CC	FIFTEENTH DEFENDANT
RINGDYER INVESTMENTS (PTY) LTD	SIXTEENTH DEFENDANT

DEFENDANT

*DE FREITAS, JOSE JORGE & MENEZES, FRANKLIN DOMICIANO DE AGUAR vs
CHAMDOR MEAT PACKERS (PTY) LTD & 16 OTHERS (Case No: 2018/13551)
[2023] ZAGPJHC 508 (18 March 2023)*

JUDGMENT

THOMPSON AJ

Introduction

[1] On 26 January 2021, my learned acting brother Rome handed down judgment in an opposed application whereby the Plaintiffs sought to amend their particulars of claim. Consequent upon a short and direct judgment, Rome AJ made the following order:

- "a. *The amendments as envisaged in the applicants' notice of amendment. . .are granted.*
- b. ***The respondents*** *are ordered to pay the opposed costs occasioned by ***the respondents'*** notice of objection. . ."*

[2] Relevant to the order made by Rome AJ are the following facts. The Plaintiffs instituted action against seventeen defendants. Of the seventeen defendants,

¹ ***My emphasis***

sixteen defended the action with only the eighth defendant not entering any fray in relation to the action.² The defendants were all, at the time of entering an appearance and delivery of a plea, all represented by the same set of attorneys. At the time the plaintiffs gave notice of their intention to amend their particulars of claim, the defendants in unison and still represented by the same set of attorneys, objected to the proposed amendment.

[3] The plaintiffs launched an application for leave to amend their particulars of claim against all of the cited defendants, but only sought costs of the application for leave to amend against the defendants, jointly and severally. The defendants, again in unison and represented by the same set of attorneys, opposed the application for leave to amend and the matter was finally heard, as stated above, as an opposed application.

[4] Material to the existing matter before me, the order by Rome AJ is absent the words "*joint and several*" as prayed for by the plaintiffs. Notwithstanding the aforesaid, the plaintiffs adopted the view that the costs order meant joint and several. As a result, the plaintiffs caused a writ of execution to be issued consequent upon having the costs of the opposed application taxed in the sum of R67 295,02. Pursuant to the writ, a notice of attachment was drawn by the sheriff in terms of which the sheriff attached the second defendant's right, title and interest in any and all bank accounts held in the name of the second defendant with ABSA Bank Limited was attached in order to obtain satisfaction of the full taxed sum of costs. In other words, the plaintiffs ended

² For the remainder of the judgment, a reference to the defendants will be a reference to the first to seventh and the ninth to seventeenth defendants.

up obtaining full satisfaction of their costs order against the second defendant only.

[5] The second defendant, aggrieved by the fact that the costs of the opposed application was recovered from only it elected to launch the present application, which turned into an opposed application of some 135 pages. The second defendant adopted the stance that, despite the defendants having acted in unison in opposing the application for leave to amend, each defendant should be liable only for a joint *pro rata* portion of the taxed costs and, accordingly, sought to have the writ set aside and repayment of the sum of R54 081,91.³

[6] The plaintiff's countered with a stance that the order, despite the absence of the words "*jointly and severally*", is to be interpreted as rendering the defendants jointly and severally liable. However, in the event that the court finds that the costs order by Rome AJ could not be recovered on a joint and several liability basis, the plaintiffs apply to have the costs order varied in terms of Rule 42(1)(b) on the basis that there is a patent error and/or ambiguity and/or omission.

[7] The starting point in interpreting any order is the words itself.⁴ As *Mr Louw* for the second defendant correctly points out in his heads of argument, by reference to ***Roelou Barry (Edms) Bpk v Bosch en 'n Ander***,⁵ the general

³ This sum is calculated by subtracting a tendered sum by the second defendant together with the twelfth and thirteenth defendants from the sum attached in terms of the notice of attachment.

⁴ ***Natal Joint Municipal Pension Fund v Endumeni Municipality*** 2012 (4) SA 593 (SCA) (16 March 2012)

⁵ 1967 (1) SA 54 (C)

rule of our common law is that joint-debtors can be held liable for no more than their equal share of the particular debt, unless there is clear evidence that it is the intention that they be held liable *in solidium*.⁶ It is therefore practice for a court to add the words “*jointly and severally*” to an order where *in solidium* liability is envisaged.⁷

[8] *Mr Cowley*, for the plaintiffs, relied on two authorities for the proposition that the order must be interpreted to include joint and several liability. The first authority relied upon, in my view, does not more than establish a general rule that where parties make common cause in opposing a matter, equity demands that they should be jointly and severally liable for such costs.⁸ The second authority, in my view, clarifies the general rule established by the first authority. The second authority makes it clear that where parties make common cause to oppose certain relief sought, the other party seeking the relief is entitled to an order in respect of joint and several liability.⁹

[9] More eloquently stated, as a general rule a party seeking relief against more than one opposing party is entitled to have his/her costs paid on a joint and several liability basis by the opposing parties, where such opposing parties made common cause in the opposition of the relief sought. However, such entitlement must be clearly stated in the order by stipulating that the order envisages *in solidium* liability by adding the words “*joint and several*” to such order.

⁶ *Roelou*, *supra* at 59A – B

⁷ *Roelou*, *supra* at 59C

⁸ *Minister of Labour & Others v Port Elizabeth Municipality* 1952 (2) SA 522 (A) at 537H

⁹ *Yassen & Others v Yassen & Others* 1965 (1) SA 436 (N) at 444F – H

[10] In light of the aforesaid, *Mr Cowley's* submission cannot muster scrutiny that words must be interpreted into the order where they do not clearly appear in the order. The second defendant is therefore correct, the order does not stipulate a joint and several liability on the part of the defendants.

[11] Had it not been for the Rule 42-counterapplication, this would have been the end of the matter. The plaintiffs, wisely so, kept the additional string in their bow to seek a variation of Rome AJ's costs order in the event that it was needed. In this regard the plaintiff's aver that the order by Rome AJ contains either an ambiguity, patent error or omission.

[12] During argument I pointed out to *Mr Louw* that the general rule is that where opposing defendants make common cause with one another, the plaintiff is entitled to an order pertaining to joint and several liability. I then directed *Mr Louw's* attention thereto that Rome AJ continually referred in this judgment to "*the respondents*" and that, in my view, is indicative of him accepting that the defendants had made common cause with one another. As such, the proposition was postulated to him, the order by Rome AJ which refers to the common cause respondents, envisaged a joint and several liability scenario. *Mr Louw's* submission in response, at first blush, is a cogent one. Rome AJ would have been aware of this general rule and the fact that he made the order he made, despite his grouping of the respondents under a

common cause umbrella is indicative thereof that he did not intend joint and several liability on the part of the defendants.

[13] As I said, at first blush this argument seemed a cogent argument. Upon proper consideration, however, the submission is fatally flawed. The first flaw in the submission is to be found in the **Roelou**-judgment earlier relied upon by *Mr Louw*. The **Roelou**-judgment makes it clear that the general rule of equal proportional liability can only be deviated from where there is clear evidence that *in solidium* liability is intended. The costs prayer in the application for leave to amend is clear in this regard, *in solidium* liability is intended. The second flaw in the argument is the general cost principle that costs should follow the result.¹⁰ This general costs' principle should be considered in terms of the other general principle that where opposing defendants make common cause, the plaintiff is entitled to an *in solidium* liability order. Otherwise stated, *in casu*, the plaintiff was entitled on the general costs principles stated above to an order for costs as the successful party with such costs to be paid by the defendants on a joint and several liability basis.

[14] The reasons for a court's order must appear clearly from the judgment. Thus, where a court is to deviate from the general rule(s) relating to a costs order, such reasons must clearly appear from the judgment. In the application for leave to amend, Rome AJ's judgment does not even touch upon the issue of costs. He was, however, clearly unimpressed with the nature of the objection by the defendants. In my view, in failing to specifically deal with the

¹⁰ See generally *Ferreira v Levin NO & Others* 1996 (2) SA 621 (CC) at para [3]

issue of costs, he clearly envisaged the usual rule(s) relating to costs to apply. In other words, he clearly intended to apply the usual rule that costs must follow the result. There is nothing to indicate that he intended to deviate from the other general rule relating to liability where opposing defendants make common cause with one another. In my view, the repeated reference to the grouping of “*respondents*” is the clearest indication that he intended to hold each defendant liable with each other defendant for the whole of the costs order.

[15] *Mr Louw* submits, in response, that the plaintiffs failed to make out a case in this regard as they do not deal with the intention of court when the costs order was made by Rome AJ. Although the affidavit by the plaintiffs in this regard is somewhat wanting, in my view it is not fatally wanting. The plaintiffs do allege that they interpreted the order to give effect thereto as being joint and several liability in respect of the defendants. Interpretation is nothing more than a process of determining the intention of that which is being conveyed. In my view, although not directly said, the plaintiffs bring to bear that the order does not clearly convey the intention of Rome AJ when he made the order pertaining to costs that he made.

[16] The patent error or omission in the order, in my view, is attributable to the court and does not amount to, as submitted, a mere dissatisfaction of the order relating to costs on the part of the plaintiffs. Rome AJ was unimpressed with the opposition to the objection and dismissed same almost out of hand; he was requested to grant a costs order in line with the general rules

applicable to costs orders in the nature of that which was before him; and he set out no reasons, why he is deviating from the general rules, which reasons he should have set out if he intended to deviate from the general rules. The patent error or omission in this regard therefore lies with the court.

[17] In my view, the above is in line with the eloquent setting out of the law on Rule 42(1)(b) and the interpretation of court orders as recently discoursed by Meyer AJA (as he then was) in the matter of **HLB International (South Africa) v MWRK Accountants and Consultants**.¹¹ In particular, even a cursory reading of Rome AJ's judgment demonstrates that he grouped the defendants together as having made common cause with one another.¹² Any other interpretation would be absurd and be contrary to established legal principles relating to costs orders as set out earlier herein, particularly as Rome AJ did not deal with any reason why those general and usual rules should be departed from.

[18] In order to avoid further disputes as to costs orders I add in closing in respect of this application that neither party advanced any reasons why any of the usual costs orders should not be made and/or general rules should not be applied. In my view no such grounds exists. There was also, in the counterapplication a prayer for a costs *de bonis propriis* order against the defendants' attorney. No case is made out in terms of any of the recognized grounds for costs *de bonis propriis* against the defendants' attorney and, in light of my view expressed in paragraph [10] of this judgment, it cannot be said that the defendants' attorney acted in a frivolous or opportunistic manner.

¹¹ (113/2021) [2022] ZASCA 52; 2022 (5) SA 373 (SCA) (12 April 2022)

¹² See, for example, *HLB*, *supra* at para [26] – [28]

[19] In the premises I make the following order:

1. The second defendant's application (dated 26 May 2022) is dismissed with the second defendant to pay the costs of the plaintiffs (as the first and second respondents in the second defendant's aforesaid application).
2. Paragraph b. of the order by Rome AJ handed down on 26 January 2021 is corrected and varied to read as follows:

"The respondents (being the respondents who opposed the application for leave to amend) are to pay the opposed costs occasioned by the respondent's notice of objection dated 19 August 2020, jointly and severally.

3. The second defendant is to pay the costs of the plaintiff's conditional counterapplication dated 18 July 2022.

C.E THOMPSON

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE APPLICANT: ADV N.G LOUW

APPLICANT'S ATTORNEYS: MANLEY INC

COUNSEL FOR THE RESPONDENTS: ADV H.H. COWLEY

RESPONDENTS ATTORNEYS: VAN DER WALT ATTORNEYS

DATE OF HEARING: 15 MAY 2023

DATE OF JUDGMENT: 18 MAY 2023