THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 050/2016

In the matters between:

DOBSA SERVICES CC	**APPELLANT**
and	
DLAMINI ADVISORY SERVICES (PTY) LTD	**FIRST RESPONDENT**
ZOLILE ABEL DLAMINI	**SECOND RESPONDENT**

DLAMINI ADVISORY SERVICES (PTY) LTD	**FIRST APPELLANT**
ZOLILE ABEL DLAMINI	**SECOND APPELLANT**
and	
DOBSA SERVICES CC	**RESPONDENT**

Neutral citation:	*Dobsa v Dlamini Advisory Services*; *Dlamini Advisory Services v Dobsa* (050/2016) [2016] ZASCA 131 (28 September 2016)
Coram:	Bosielo, Petse, Mathopo and Mocumie JJA and Schoeman AJA
Heard:	6 September 2016
Delivered:	28 September 2016

Summary: Civil Procedure ─ Costs ─ Award of costs is at the discretion of the court of first instance ─ Power of appellate court to interfere with the exercise of such judicial discretion circumscribed.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Reyneke AJ sitting as court of first instance):
Both appeals are dismissed with costs.

JUDGMENT

Petse JA (Bosielo, Mathopo and Mocumie JJA and Schoeman AJA concurring):

[1] These two appeals are concerned with two costs orders granted in the Gauteng Local Division of the High Court, Johannesburg (Reyneke AJ) in two interrelated applications. The appellant in the first appeal is Dobsa Services CC (Dobsa), a close corporation which carries on business as, inter alia, an auditing and accounting corporation in Braamfontein, Johannesburg. The first respondent is Dlamini Advisory Services (Pty) Limited (the company) which is a private company conducting business as business advisory and consulting services provider in Parktown of which the second respondent, Mr Zolile Abel Dlamini (Dlamini), is the managing director. In the second appeal the company and Dlamini are the appellants and Dobsa is the respondent. For the sake of convenience, I will henceforth refer to the company and Dlamini collectively as the company unless the context dictates otherwise.

[2] In the first appeal the court a quo awarded costs against Dobsa which had unsuccessfully opposed an application for an interdict to stay enforcement of the judgment granted by default in its favour. The company against which the default judgment had been granted sought an order staying the enforcement of such judgment pending the outcome of an application to rescind the default judgment. The second appeal raises the question whether the company which had applied for rescission of the default judgment sought an indulgence from the court a quo and must therefore bear the costs of such application even though it was successful in its application as the court a quo found. These issues arise against the following backdrop.

[3] During November and December 2010 Dobsa, on the one hand, and the company and Dlamini as the administrator of Bakubung Ba-Ratheo Traditional Community (Bakubung Ba-Ratheo), on the other hand, concluded a written contract in terms of which Dobsa undertook to render certain forensic investigation services to Bakubung Ba-Ratheo on behalf of the company and Dlamini at an agreed remuneration rate of R1 350 per hour subject to the terms and conditions spelt out in the parties' written contract. Initially all had proceeded well between the parties. It appears that some work was done and Dobsa was paid for such work.

[4] During March to May 2011, a dispute arose between the parties in relation to payments that Dobsa claimed were overdue. So as to induce the company to settle the alleged overdue amounts, Dobsa withheld its forensic report and insisted that it would not release it to the company without payment upfront. On its part, the company asserted that it would not be possible to pay without it being provided with the forensic report first. The respective positions taken by the parties became entrenched and this resulted in a stalemate. This led to what appears to have been an irretrievable breakdown of the parties' contractual relationship.

[5] As indicated, Dobsa asserted that there were further moneys owing to it. On 6 June 2013 it instituted an action against the company in the Gauteng Local Division of the High Court, Johannesburg comprising four claims (styled Claims A, B, C and D). Claim A was for payment of R191 085.87 being the balance of the amount owing in respect of services rendered in January 2011. Claim B was for payment of R213 034.10 in respect of services rendered in February 2011. Claim C was for payment of R253 360 in respect of services rendered in March 2011. And Claim D was for payment of R467 856 which represented the amount that the appellant alleged it would have earned, but for the respondent's repudiation, had the contract been allowed to run its course, ie until May 2011.

[6] Dobsa's summons was served on the company on 19 June 2013. Despite having been served with the summons, the company, through inadvertence, failed to defend the action. It bears mentioning that upon service of the summons on the company, Dlamini transmitted it by email to his attorney with whom he had had an attorney and client relationship for some 15 years for the latter to defend the action. It was

uncontested that the email address to which the summons was sent by Dlamini was incorrect and therefore the summons did not reach his attorney, hence the failure to defend the action. Upon the expiry of the *dies induciae*, Dobsa applied for and obtained default judgment against the company on 1 August 2013. On 28 October 2013 Dobsa caused to be issued a writ of execution against the company.

[7] On 23 October 2013 the company ascertained that default judgment had been granted against it. On 29 October 2013, and unbeknown to them that a writ of execution had already been issued on 28 October 2013, the company's attorneys addressed a letter to Dobsa's attorneys proposing that they stay further action against the company pending the outcome of a rescission application that they were instructed to launch, stating that:

'Given that it [appeared] that the judgment was granted . . . some three months ago, there [could] be little prejudice to [Dobsa] in holding off.'

They went on to indicate that in the event that Dobsa was not prepared to provide an undertaking to hold further enforcement of the judgment in abeyance, the company would bring an urgent court application for its stay. Thereafter a series of letters were addressed to Dobsa's attorneys which elicited no response. In the event, no undertaking was given by Dobsa's attorneys. On 12 November 2013 the company launched an application to rescind the judgment granted against it by default.

[8] But, Dobsa was unrelenting. It proceeded to instruct the sheriff to remove the company's goods pursuant to the attachment. Consequently, on 28 November 2013, the company launched an urgent application for an interdict restraining Dobsa from removing the company's goods pursuant to the attachment effected on 26 November 2013 and ancillary relief. Dobsa opposed the application. It contested not only the issue of urgency but also questioned the company's bona fides in bringing such application, contending that the application was a stratagem merely to delay and frustrate Dobsa's attempts to obtain satisfaction of its judgment. It is apparent from the record that Dobsa essentially adopted the attitude that: (a) the company was indubitably indebted to it in the amount of the judgment; (b) the rescission application was contrived and that the company had no bona fide defence to its claim; and (c) it was entitled to enforce the judgment that was properly granted in its favour until and unless it was rescinded.

[9] On 3 December 2013, the interdict application came before Victor J whose judgment was delivered on 5 December 2013, granting the interdict sought. The learned judge reserved the costs of the application for determination in the rescission application. In the course of her judgment the learned judge made the following observations: (a) the company had done everything possible to avoid instituting the application; (b) it was clear that Dobsa was not amenable to accommodate the company whilst its rescission application was pending; (c) the company had not been wilful in failing to defend the action; (d) it appeared that the acrimony between the parties had spilt over to their attorneys; and (e) the company had a bona fide defence to the claim particularly in relation to the arbitration clause as contained in the parties' written contract.

[10] In due course the application for rescission came before Reyneke AJ who, on 9 June 2014, delivered a judgment rescinding the judgment. The learned judge ordered that the costs of the application for rescission be paid by the company (as applicants). And that the costs of the application for the stay of the enforcement of the judgment reserved by Victor J for determination in the application for rescission be borne by Dobsa.

[11] The court a quo expressed similar views as those of Victor J in relation to the conduct adopted by Dobsa. It also took note of the fact that the company had made out a case for rescission. Apropos the costs relating to the interdict application, the court a quo considered various judgments dealing with the interpretation of rule 49(11)[1] of the Uniform Rules of Court that are discordant. One view[2] was that to the extent that rule 49(11) provides that the operation and execution of a judgment is automatically suspended when, inter alia, an application for rescission is made it was ultra vires and of no force and effect. The contrary view was that the rule was not ultra vires.[3] The

[1] Since repealed by Department of Justice and Constitutional Development Regulations, GN R317, *GG* 38694, 17 April 2015, with effect from 22 May 2015. Presumably Uniform rule 49(11) was repealed because it was inconsistent with s 18 of the Superior Courts Act 10 of 2013 which in essence provides that the operation and execution of a decision which is the subject of an application for leave to appeal or an appeal is suspended pending the decision of the application or appeal. An application for rescission is not mentioned in this section.

[2] See in this regard: *United Reflective Converters (Pty) Ltd v Levine* 1988 (4) SA 460 (W) at 463J-464C; see also *Nel v Le Roux NO & others* 2006 (3) SA 56 (SE) at 59I-J.

[3] *Khoza & others v Body Corporate of Ella Court* 2014 (2) SA 112 (GSJ); *Peniel Development (Pty) Ltd & another v Pietersen & others* 2014 (2) SA 503 (GJ).

court a quo adopted the latter view. In the event, it took note of the following: (a) that the writ was issued after the rescission application had been launched (which is factually incorrect); (b) the company could not be faulted for resorting to litigation given Dobsa's unpreparedness to suspend its execution proceedings against the company despite the pending rescission application in the face of the decisions in *Khoza* and *Peniel*. As to the costs in relation to the rescission application, the court a quo relied on authorities such as *Meintjies NO v Administrasieraad van Sentraal-Transvaal* 1980 (1) SA 283 (T); *Iveta Farms (Pty) Ltd v Murray* 1976 (1) SA 939 (T) and *Zarug v Parvathie NO* 1962 (3) SA 872 (D). The first two of these decisions are to the effect that in an application for rescission of default judgment the applicant seeks an indulgence and must therefore bear the costs reasonably incurred in opposing the application. And the latter of the three decisions is to the effect that a party opposing a rescission application ought not to be required to do so at their peril even if rescission is ultimately granted.

[12] Motivated by the considerations outlined above (para 9 and 11), the court a quo made the costs orders which are now the subject of present appeals. Both parties were aggrieved by the costs orders granted against them by Reyneke AJ. Consequently, they sought and were granted leave to appeal against the respective costs orders to this court. What is therefore before this court on appeal are the following orders: (a) the order awarding costs against Dobsa in the application for an interdict staying execution; and (b) the order awarding costs against the company in relation to the rescission application.

[13] But counsel contended that the ambit of the appeal is much wider and that Uniform rule 49(11) was the central issue on appeal. Thus, counsel argued, it was necessary for this court to settle the controversy generated by the discordant judgments mentioned earlier (para 11) by interpreting Uniform rule 49(11) so as to offer guidance for the future. I am not persuaded that there is any justification in embarking on such a course on the facts of this case. As already indicated, Uniform rule 49(11) has since been repealed. And in light of the enactment of s 18 of the Superior Courts Act 10 of 2013, I am not persuaded, contrary to what counsel contended for, that the controversy generated by Uniform rule 49(11) is likely to arise again.

[14] Accordingly, these being appeals in relation to awards of costs, it is necessary to briefly set out the principles relating to the nature and proper exercise of the discretion vested in a judicial officer when making an order as to costs and the circumstances in which an appellate court can interfere with the exercise of that discretion. The discretion of the nature under consideration in these appeals has been described as 'a discretion in the strict or narrow sense'.[4] Accordingly, the appellate court's power to interfere on appeal is limited to instances where it is found that the court of first instance did not exercise the discretion judicially, or acted upon a wrong principle, or exercised its discretion capriciously, or did not bring its unbiased judgment to bear on the question or did not act for substantial reasons.[5] And as the Constitutional Court put it, albeit in a different context:

'. . . the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.'[6]

That the appellate court would probably have come to a different conclusion had it sat as a court of first instance is of no moment. The appellate court would still not be entitled to interfere solely on that ground.[7]

[15] In the present appeals there was no suggestion that the learned judge in the court a quo was not mindful of the parameters of the discretion vested in her. Counsel for Dobsa sniped at the judgment[8] of the court a quo in which the learned judge said that Dobsa had heedlessly went ahead to issue a writ after the company had launched its rescission application. Whilst this statement was clearly incorrect, it was not the sole consideration that weighed in the court a quo's mind.

[16] Before us, it was contended on behalf of the company that the court a quo committed a misdirection or did not bring its unbiased judgment to bear on the question

---

[4] *Ganes & another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) para 21; *Beinash v Wixely* 1997 (3) SA 721 (SCA) at 739G-I.

[5] See for eg: *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781I-782B and the authorities therein cited; *Kruger v Le Roux* 1987 (1) SA 866 (A) at 871F-G; *Cronje v Pelser* 1967 (2) SA 589 (A) at 592H-593C.

[6] *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) para 11.

[7] *Penny v Walker* 1936 AD 241 at 260; *Molteno Bros v South African Railways* 1936 AD 408 at 417; *Cronje v Pelser* at 592H-593A.

[8] Para 26.

of costs in adopting the view that the company was essentially seeking an indulgence. To my mind, neither of the contentions advanced by Dobsa and the company can be sustained. That an applicant in a rescission application is in essence seeking an indulgence has often been affirmed in a number of decisions.[9]

[17] More importantly, in relation to Dobsa's appeal, is the fact that both in the application for an interdict and the application for rescission, the company explained how it came about that default judgment was granted. Significantly, it asserted that it had at the outset intended to defend the action and to that end had instructed attorneys to enter an appearance to defend. But, inadvertently, the summons was sent to an incorrect email address. This mishap was only discovered when the company was informed of the default judgment by Dobsa on 23 October 2013. These assertions were not and could not be seriously contested by Dobsa.

[18] Whilst Dobsa was perfectly within its rights to enforce its judgment, this does not, however, mean that in so doing it was not at risk of an adverse costs order in the event that its opposition to the interdict was unsuccessful as it happened. In light of the circumstances of this case as outlined above (paras 9 and 11) its stance was not only ill-conceived but also unreasonable. It ought to have reflected dispassionately on the merits of the rescission application. But, lo and behold, it allowed its better judgment to be clouded by the obdurate attitude it adopted that the company had no triable defence to its claim. In these circumstances, it cannot be said, by any stretch of the imagination, that the court a quo did not exercise the discretion vested in it properly.

[19] Before concluding there is another issue that requires mention. As indicated, these appeals are essentially about the costs orders made by the court a quo. That being so, I cannot discern why it was thought necessary to grant leave to this court as the appeals could have been dealt with by the full court. Hence the company belatedly attempted to have the appeals withdrawn from this court and determined in the full court. This court has on occasions lamented the frequency with which leave is granted

[9] *Phillips t/a Southern Cross Optical v SA Vision Care (Pty) Ltd* 2000 (2) SA 1007 (C) at 1015G-H; *Greeff v Firstrand Bank Ltd* 2012 (3) SA 157 (NCK) para 49; *Minnaar v Van Rooyen NO* [2015] ZASCA 114; 2016 (1) SA 117 (SCA) para 20.

to this court in respect of matters not deserving of its attention.[10] The unfortunate consequence of this tendency is that complex cases deserving of the attention of this court wait longer for enrolment than would otherwise have been the case as they have to compete with cases that are not.

[20] For all the aforegoing reasons, therefore, there is no basis to interfere with the costs awards made by the court a quo. Thus, both appeals cannot succeed.

[21] In the result the following order is made:
Both appeals are dismissed with costs.

_____

X M PETSE

JUDGE OF APPEAL

[10] *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC & others* 2003 (5) SA 354 (SCA); [2003] 3 All SA 123 para 23; *MTN Service Provider (Pty) Ltd v Afro Call (Pty) Ltd* [2007] ZASCA 97; 2007 (6) SA 620 (SCA) para 24.

APPEARANCES:

For the appellant in the Dobsa appeal:	R Ram (with him I Monnahela) Instructed by: DMS Attorneys, Sandton Molefi Thoabala Attorneys, Bloemfontein
For the respondents:	G G M Quixley Instructed by: Barry Aaron & Associates, Johannesburg Honey Inc, Bloemfontein
For the appellants in the Dlamini Advisory Services appeal:	G G M Quixley Instructed by: Barry Aaron & Associates, Johannesburg Honey Inc, Bloemfontein
For the respondent:	R Ram (with him I Monnahela) Instructed by: DMS Attorneys, Sandton Molefi Thoabala Attorneys, Bloemfontein