THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 216/10

In the matter between:

WINLITE ALUMINIUM WINDOWS & DOORS (PTY) LTD **Appellant**

and

PYRAMID FREIGHT (PTY) LTD t/a UTI **Respondent**

Neutral citation: *Winlite Aluminium Windows & Doors v Pyramid Freight* (216/10) [2010] ZASCA 152 (29 November 2010)

Coram: HARMS DP, NAVSA, HEHER, SNYDERS JJA AND BERTELSMANN AJA

Heard: 23 November 2010

Delivered: 29 November 2010

Updated:

Summary: Trial – costs – tender under Uniform rules 34(1) and (5) – effect – reconsideration under rule 34(12) – whether trial court exercised proper discretion in concluding that plaintiff not justified in proceeding with trial when tender more than capital awarded but less than sum of capital and accrued interest at date of tender.

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ORDER

On appeal from: Western Cape High Court (Cape Town) (Fourie, Waglay and Ndita JJ as court of appeal):

The appeal is dismissed with costs.

JUDGMENT

HEHER JA (HARMS DP, NAVSA, SNYDERS JJA AND BERTELSMANN AJA concurring):

[1] This judgment concerns the effectiveness of a secret tender made in terms of Uniform rules 34(1) and (5) to influence the award of costs in a trial action.

[2] In September 2005 the respondent (Pyramid) sued the appellant (Winlite) in the Cape of Good Hope Provincial Division (exercising its Admiralty Jurisdiction) for payment of R755 675.32, being the balance of fees and disbursements for services rendered as a cleaning and forwarding agent, and R10 000 in respect of storage and preservation expenses incurred as a cargo agent, together with interest on the said amounts.

[3] Winlite defended the action. It also claimed, in reconvention, payment of R131 243.01 as damages for the cost of posting guarantees to release goods allegedly wrongfully withheld by Pyramid and the monthly fees for the renewal of such guarantees, as well as loss of profits resulting from such withholding and the consequent delay in its ability to install and commission a manufacturing plant.

[4] The trial commenced on Wednesday 14 March 2007 before Cleaver J. It continued on 15 March, 19 March, 31 July and 2 August. On 11 October 2007 the learned Judge delivered judgment and made the following order:

‘1. Judgment is granted against the defendant for payment of:

1.1 R212 745.30

1.2 Interest on the said sum as follows:

1.2.1 At the rate of 17% per annum with effect from 9 September 2005 to 4 March 2007.

1.2.2 At the prevailing repo rate as defined in Government Notice No 166 dated 26 February 2007 plus one third thereof, plus eight percentage points with effect from 5 March 2007 to date of payment.

1.3 The sum of R9 120.

1.3.1 Interest on the said sum of R9 120 at the prescribed legal rate reckoned from 9 September 2005 to date of payment.

2. Defendant is to pay the plaintiff's costs of the proceedings including the costs of the postponement of the matter on 19 March 2007.

3. The defendant's counter-claim is dismissed with costs.

4. The plaintiff's application to compel defendant to furnish trial particulars which on 21 February 2007 stood over for later determination is dismissed with costs.'

[5] The learned judge was thereafter timeously notified in terms of rule 34(13) that Winlite had, on 14 March 2007, made a secret tender in terms of rules 34(1) and (5) in which it offered to pay 'in full and final settlement of all the Plaintiff's claims, including its claim for costs . . . the sum of R250 000,00' and 'the Plaintiff's taxed party and party costs to date (including costs of Senior Counsel), including the reasonable costs of considering and accepting this offer.' He was requested to reconsider the question of the costs of the action as required by rule 34(12).

[6] Cleaver J duly heard argument on the effect of the tender and delivered a considered judgment on the matter. He found that once the tender had been made, it was unnecessary to continue running the trial for a further four days 'when only the claim for interest had not been covered by the tender' and no evidence was necessary to prove the claim for the interest. He considered that Pyramid had been entitled to a *spatium deliberandi* until the recommencement of the trial on 19 March. Accordingly he ordered that Winlite would be liable for the costs of 14 and 15 March and that Pyramid should be responsible for Winlite's costs thereafter.

[7] Cleaver J refused Pyramid leave to appeal against the main judgment but granted it leave to appeal to the Full Court against the costs order only.

[8] In the Full Court three separate judgments were delivered. Ndita J and Waglay J (for similar reasons) agreed that the appeal should be upheld with costs and the order of

Cleaver J be substituted with an order that the defendant's application in terms of rule 34(12) be dismissed with costs. The effect was thus that the original order made by the trial judge stood. As Ndita J saw the matter 'the award made by the court a quo in favour of the plaintiff exceeded the tender by a significant margin. The plaintiff, therefore, "faced the risk successfully . . . the court a quo was not justified in departing from the general rule." Fourie J dissented. Although he agreed that the appeal should succeed he thought the order of Cleaver J should have directed each party to pay its own costs from 19 March 2007 because Pyramid 'had prolonged the trial in an unsuccessful attempt to obtain a higher freight award', while Winlite had tendered less than the eventual award to Pyramid.

[9] In the exercise of a discretion on how costs should be apportioned when a tender has been made the starting point will ordinarily be whether the tender beat the amount awarded. This means that apart from determining the *spatium deliberandi* the discretion at this stage of the proceedings is fairly limited. In this regard it is common cause that Winlite's offer was about R28 000 less than the amount payable in terms of the judgment. But the capital sum awarded was, co-incidentally, R28 000 less than the sum tendered, the balance of the award consisting of interest. It was this last factor which persuaded Cleaver J to order Pyramid to pay Winlite's costs from the expiry of the *spatium deliberandi*. In his view, as I have mentioned, Pyramid unnecessarily prolonged the trial on a subsidiary issue. To my mind the learned misdirected himself in so concluding.

[10] The amounts claimed consisted of three elements, freight charges, contractually agreed interest and mora interest. The trial judge ordered in relation to both interest claims that such interest should be reckoned from 9 September 2005. By the time that the tender was made on 14 March 2007 accrued interest exceeded R50 000, thus amounting to more 20% of the capital. More importantly, by that date, the total of capital and accrued interest exceeded the amount tendered by at least R20 000 (more than 8%). I think therefore he was wrong to describe the freight charges as the 'central issue' at the time that the tender was made. While that may have been so from an evidential view point, the real issue was the amount of money that was then due by Winlite to Pyramid, however composed, and there was no reason for the learned judge to accord more weight to one element than the other. When Winlite tendered it did so with full knowledge of the nature and extent of

Pyramid's claim (including the basis of the interest calculations). In formulating its offer 'in full and final settlement of all the plaintiff's claims' it must be taken to have included whatever liability might be determined for interest accrued to the date of tender. The position might have been different if the tender had been so worded that it covered the successful claims only.

[11] This misdirection constituted a failure to exercise his discretion as to costs judicially. The Full Bench therefore was entitled to interfere. In my view Ndita J and Waglay J were correct in finding that Pyramid, was entitled to reject the tender and that, having done so, it 'faced the risk successfully' and, in accordance with the general principle, such success carried with it the costs of the action. For the reasons I have already enunciated the conclusion of Fourie J that 'the real reason why the appellant continued with the litigation was not to obtain payment of its interest, but to (unsuccessfully) pursue its claim for the increased freight amount' manifests the same misconception of the issue as tainted the reasoning of the trial judge. Their approach might have been justified in the initial determination of how the costs should fall but was not appropriate to the narrower question of the effect of the tender. As a matter of practice when deciding costs courts ought to consider whether unnecessary evidence was led by the successful party and should disallow the costs in relation to severable issues in respect of which that party did not succeed: *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 at 668H-669C. But, as said, that discretion should have been exercised when the original costs order was considered.

[12] The appeal is dismissed with costs.

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J A Heher
Judge of Appeal

APPEARANCES

APPELLANT: M J Fitzgerald SC with him L Buikman

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RESPONDENT: M Wragge SC

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