THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 477/2002

In the matter between:

MICHAEL DE VILLIERS, N.O. First Appellant

BRIAN BASIL NEL, N.O. Second Appellant

and

BOE BANK LIMITED Respondent

Coram: *Howie P, Streicher, Navsa JJA* and *Van Heerden AJA*

Date of delivery: **28 November 2003**

Summary: **Application to alter costs order after judgment – principles discussed and applied.**

J U D G M E N T

NAVSA JA:

[1] This application for the amendment of a costs order follows on a judgment of this court on 26 September 2003. The applicants, BOE Bank Limited ('the bank') instituted action in the South Eastern Cape Local Division against the respondents, joint liquidators of Intramed (Pty) Ltd (in liquidation). The claim, which was the subject of the appeal in this Court, was based on three loan agreements each of which contained clauses entitling the bank in the event of litigation to recover costs on an attorney and client scale.

[2] An area of dispute between the parties was the question of whether the loan agreements and the underlying securities had been authorised by Intramed (Pty) Ltd (Intramed). The court below held that the liquidators were liable to the bank on the three loan agreements and that the bank's claims were secured by underlying securities. An order in those terms was thus made. This Court whilst agreeing that the agreements and the underlying securities had been authorised, held (Heher JA dissenting) that the loan agreements had lapsed because of non-fulfilment of a suspensive condition in each of the loan agreements. We held that the bank was entitled to the restitution of monies advanced in pursuance of the now lapsed

agreements and made an order to that effect. The practical effect of the order was that the amount due to the bank was less than the amount that would have been due in terms of the loan agreements.

[3] In making the related costs order this Court recorded the following in paragraphs [82] and [84] of its judgment:

'[82] The cost order made by the Court below was based on the terms of the loan agreements which provided for attorney client costs against the party in breach. The lapsing of the agreements renders the provisions in question inoperative.

. . .

[84] The degree of success attained by the appellants is insufficient in the overall picture to carry costs of appeal. It was not argued that it should…'

[4] In respect of the underlying securities the following was stated at paragraph [83]:

'It has not been suggested that, in the event that the underlying securities were held to be authorised, the liquidators would not be bound by them.'

The documents constituting the securities were part of the record and featured during the trial and the appeal.

[5] Because the Court below had held the liquidators liable on the loan agreements it had ordered them to pay the bank's costs on the attorney client scale. For the reason set out in para [82] of our

judgment referred to above we set aside that costs order and substituted it as follows:

'The defendants are ordered to pay the plaintiff's costs of suit including the costs of two counsel.'

[6] The bank now applies to have the costs orders in this Court and in the Court below amended to include costs on an attorney client scale. The bank contends that, since the documents constituting the underlying securities provide that, in the event of it exercising its rights in terms thereof, it shall be entitled to recover any costs incurred on an attorney client scale, it is entitled to costs in those terms. The bank contends further that had the relevant clauses in the security documents been brought to the attention of this Court, costs would have been awarded on the scale now contended for. It is submitted that the issue of costs on this basis was not dealt with in argument and that it is proper for this Court to alter or supplement its order. In this regard reliance is placed on the decisions in *Estate Garlick v Commissioner For Inland Revenue* 1934 AD 499 at 503, *Firestone South Africa (Pty) Ltd v Gentiruco A.G.* 1977 (4) SA 298 (A) at 306G-308A, *Thompson v South African Broadcasting Corporation* 2001 (3) SA 746 (SCA) and *Mostert N.O. v Old Mutual Life*

Assurance Co (SA) Ltd 2002 (1) SA 82 (SCA). In the *Mostert* and *Thompson* cases the principles enunciated in the *Firestone* case were discussed and applied.

[7] The general well-established rule is that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it - it becomes *functus officio*.

[8] In the *Firestone* case at 306H-308A, after a reference to the *Estate Garlick* case, four exceptions to the rule are spelt out and dealt with.

I repeat them and consider their applicability:

(i) The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the court overlooked or inadvertently omitted to grant.

This exception does not apply as the question of costs was considered and dealt with. When the fourth exception is dealt with the extent to which the parties made submissions on the issue of costs in their heads of argument and in oral argument will become clear.

(ii) A court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure,

ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter the ‘sense and substance’ of the judgment or order.

This exception is clearly inapplicable. The relevant orders and the motivations for these are unambiguous.

(iii) A court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention.

Again this exception does not apply. The order does not contain an error of the kind envisaged. This Court’s true intention is clear from the terms of the order and as set out in its motivation.

(iv) Where counsel has argued the merits and not the costs of a case but the Court, in granting judgment also makes an order concerning costs, it may thereafter correct, alter or supplement its order. The reason for this exception is that, in such a case, the court is always regarded as having made its order with the implied understanding that it is open to an aggrieved party subsequently to be heard on the appropriate order.

In order to decide the applicability of this exception the facts set out in the paragraphs that follow deserve closer scrutiny.

[9] In its heads of argument in the appeal the bank stated the following (at para 73):

'[If] the Court was to find for the plaintiff on the basis that the loan agreements lapsed and the parties were obliged to restore to each other what they received the only difference in the relief sought would be in respect of the amounts to be paid and the time from which interest would run. . .'

This paragraph would seem to imply that costs should also be awarded on an attorney client scale as this was the basis on which costs were sought in the event of the loan agreements being upheld. However, two paragraphs later, in the ultimate paragraph of the bank's heads of argument entitled 'Conclusions', the following appears:

'75. In the circumstances we submit that the appeal should be dismissed with costs on the scale as between attorney and client, including the costs consequent upon the employment of two counsel. *The loan agreements provide that costs are payable on this scale.*'

(emphasis added).

[10] In this paragraph the bank does not rely on the provisions of the underlying securities. It relies solely on the loan agreements in support of its contention that it is entitled to costs on the scale as between attorney and client. The liquidators adopted the position that

the loan agreements and the underlying securities were unauthorised. They thus submitted, in the final paragraph of their heads of argument, that the appeal should be upheld with costs, including the costs of two counsel, and that the appropriate order in the Court below would be that the plaintiff's claim be dismissed with costs including the costs of two counsel.

[11] During oral argument in the appeal the Court enquired from senior counsel for the liquidators whether he conceded that in the event it was held that the loan agreements had lapsed, the bank would be entitled to restitution of amounts paid over by the bank. Counsel for the liquidators responded by conceding that the bank would be entitled to an order in those terms plus costs. When later referred to this concession counsel for the bank confirmed that this would be the appropriate order. He did not submit that the bank would be entitled to costs on a higher than the usual scale.

[12] In the *Thompson* case the fallacy that unless something is dealt with during oral argument, the matter can be reopened and the court can amend its judgment in respect thereof was dealt with. At 749H-I

the following appears:

‘The Court is entitled to base its judgment and to make findings in relation to any matter flowing fairly from the record, the judgment, the heads of argument or the oral argument itself. If the parties have to be forewarned of each and every finding, the Court will not be able to function.’

[13] As shown, the question of costs, whether in relation to the loan agreements being upheld or in relation to a finding that they had lapsed, was addressed. That it may not have been addressed as elegantly or as impressively as counsel might, with hindsight, consider desirable is of no consequence for present purposes.

[14] In the *Firestone* case the following appears at 307H-308A:

‘But, of course, if after having heard the parties on the question of costs, either at the original hearing or at a subsequent hearing …the Court makes a final order for the costs, there can be no such “implied understanding” and such an order is immutable (subject to the preceding exceptions) as any other final judgment or order. . .’

[15] There can be no doubt that the question of costs on the basis that the loan agreements had lapsed was addressed.

[16] Against this background there can be no question of an implied understanding that, subsequent to the hearing, an aggrieved party could approach this Court to be heard on an appropriate order as to

costs. In these circumstances we are *functus officio* and our order is immutable.

[17] Counsel for the liquidators submitted that the application should be dismissed with costs including the costs of two counsel. This is not a matter that warrants the costs of two counsel.

[18] In light of the conclusions reached I make the following order: The application is dismissed with costs.

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MS NAVSA
JUDGE OF APPEAL

CONCUR:

HOWIE	P
STREICHER	JA
VAN HEERDEN	AJA