

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 34/10
[2011] ZACC 5

In the matter between:

VIKING PONY AFRICA PUMPS (PTY) LTD
t/a TRICOM AFRICA

Applicant

and

HIDRO-TECH SYSTEMS (PTY) LTD

First Respondent

CITY OF CAPE TOWN

Second Respondent

Decided on : 10 March 2011

JUDGMENT

MOGOENG J:

Introduction

[1] In the main judgment,¹ which was handed down on 23 November 2010, a provisional order for costs was made in the following terms:

¹ *Viking Pony Africa Pumps (Pty) Ltd v Hidro-Tech Systems (Pty) Ltd and Another* [2010] ZACC 21; 2011 (2) BCLR 207 (CC); 2011 (1) SA 327 (CC).

- “4. The City of Cape Town is ordered to pay the costs of Hidro-Tech Systems (Pty) Ltd and Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa in this Court, including the costs of two counsel.
- 5. The order in sub-paragraph 4 is provisional.
- 6. The parties and the City of Cape Town are invited to make representations within 10 days of the date of delivery of this judgment on whether the provisional order should be made final.”²

Representations have since been made. They are essentially as set out below.

Representations

[2] Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa (applicant) submits that its costs should be borne by its business rival, Hidro-Tech Systems (Pty) Ltd (first respondent), if the City of Cape Town (City) is otherwise not ordered to do so. It contends that it would not have been necessary for the applicant to approach this Court had the first respondent chosen to abide the decision of the Supreme Court of Appeal, which ordered that the City should investigate allegations of fronting against the applicant. The applicant submits that since it supported an order for an investigation, which was ordered by this Court, in both the Supreme Court of Appeal and in this Court, it should not be burdened with costs.

[3] According to the applicant, the first respondent insisted on the imposition of punitive measures on the applicant since it contended that no further investigation need be conducted. The first respondent has failed in its attempt to secure that outcome in this

² Id at para 59.

Court. The applicant further submits that although this Court did not set aside the order for costs made by the Supreme Court of Appeal, it in effect set aside the order of the Supreme Court of Appeal, thus upholding the appeal. For these reasons the applicant contends that the first respondent, being the unsuccessful party, should be ordered to pay its costs.

[4] The first respondent supports the confirmation of the provisional order for costs. It contends that, in the event of this Court discharging the provisional order, it would not be opposed to an order that each party pays its own costs.

[5] The City advanced several reasons why the provisional order, which could impose an obligation on it to pay the parties' costs, should not be made final. They follow below:

- (i) The City chose not to challenge the decision of the Western Cape High Court, Cape Town (High Court) which enjoined it to act against the applicant in terms of regulation 15(2). Instead it decided to implement the decision forthwith.
- (ii) To this end, the City reported the matter to the police and it has been informed that the prosecuting authority is currently drafting charges in this connection.
- (iii) The City has also drafted a policy to address future allegations of fronting.

- (iv) The City decided not to get involved in the appeal in the Supreme Court of Appeal and this Court because it accepted the finding of the High Court and did not seek to have it set aside.
- (v) An order for costs has already been made against the City by the High Court. Since the City has already complied with that order, it should not be held liable for costs of the litigation that it chose not to be a part of.
- (vi) The participation of the City in this Court would have been a fruitless exercise since it had already accepted and implemented the findings of the High Court and the Supreme Court of Appeal. It had no submissions to make to this Court since it did not wish to have those findings set aside.

I turn to address the question whether the City has sufficiently explained its non-participation in the proceedings before the Supreme Court of Appeal and this Court to justify the non-confirmation of the provisional order.

Should the provisional order be made final?

[6] When we made the provisional order, we did not have the benefit of the City's submissions concerning its reasons for not participating in the case. In my view it was not unreasonable for the City not to participate in the proceedings before the Supreme Court of Appeal and this Court since it had decided to investigate the matter. It cannot be said to be illegitimate for the City to decide not to burden the public purse by participating in a dispute in which it had no real interest. In my view the new information

is sufficient for us to change the provisional order to the extent that the City should not be ordered to pay the applicant's costs. In the circumstances, bearing in mind the result of the case and the City's explanation, I do not think that the City should be ordered to pay the applicant's costs.

[7] The position of the first respondent is however different. It would not have been necessary for the first respondent to bring the application before the High Court if the City had complied with its obligation to investigate. It is precisely because of the City's lack of compliance with its obligations that the first respondent had to approach the High Court. Once the High Court had been approached, the circumstances indicate that the proceedings in the Supreme Court of Appeal and in this Court would probably have followed. Accordingly, the first respondent incurred all its costs as a result of the City's failure to investigate. It is in the interests of justice that the City be ordered to pay the first respondent's costs. The fact that they did not participate in the proceedings in the Supreme Court of Appeal and in this Court does not detract from this.

[8] In these circumstances the provisional order for costs should not be confirmed. A just costs order is to replace that order with an order that the City pay the costs of the first respondent.

Order

[9] In the result, the following order is made:

(a) The provisional order of this Court dated 23 November 2010 is set aside and replaced with the following order:

- “(i) The City of Cape Town is ordered to pay the costs of Hydro-Tech Systems (Pty) Ltd in this Court.
- (ii) There is otherwise no order as to costs.”

Ngcobo CJ, Moseneke DCJ, Brand AJ, Cameron J, Froneman J, Khampepe J, Nkabinde J, Skweyiya J, and Yacoob J concur in the judgment of Mogoeng J.

For the Applicant:

Advocate AM Smalberger instructed by
Rabie & Rabie Attorneys.

For the First Respondent:

Advocate DC Joubert instructed by
Jacques Viljoen Attorneys.

For the Second Respondent:

Advocate GM Budlender SC and
Advocate M Bridgman instructed by
Cliffe Dekker Hofmeyr Inc.