



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not reportable

Case no: 1068/2020

In the matter between:

CIPLA VET (PTY) LTD

APPELLANT

and

MERIAL

FIRST RESPONDENT

MERIAL LTD

SECOND RESPONDENT

MERIAL SOUTH AFRICA (PTY) LTD

THIRD RESPONDENT

Neutral citation: *Cipla Vet (Pty) Ltd v Merial and Others* (1068/2020) [2022] ZASCA 5 (11 January 2022)

Coram: Mocumie, Molemela and Mokgohloa JJA and Kgoele and Phatshoane AJJA

Heard: 15 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 11 January 2022.

Summary: Interpretation of orders – rule 42 or common law – clarification of order – whether qualifying costs including costs of two counsel occasioned by an amendment prior to hearing included in wasted costs order granted – appeal dismissed – order of the full court confirmed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Tolmay J, Louw J and Hughes J sitting as court of appeal):

The appeal is dismissed with costs.

JUDGMENT

Kgoele AJA (Mocumie, Molemela and Mokgohloa JJA and Phatshoane AJA concurring):

[1] This appeal concerns the interpretation of a cost order granted by Murphy J sitting as the Court of the Commissioner of Patents on 24 July 2014. The central issue is whether the wasted costs incurred as a result of an amendment sought and made by the appellant, Cipla Vet (Pty) Ltd, to its pleaded case of invalidity before the commencement of a trial in a patent infringement action, should include the costs of two counsel and the qualifying fees of the expert witnesses of the respondents, Merial, Merial LTD and Merial South Africa, in circumstances where such costs were not expressly set out in para (ii) of Murphy J's order.

[2] The following are common cause facts. The dispute between the parties emanated from an action that was instituted by the respondents as plaintiffs, against the appellant, as the defendant, for the infringement of South African Patent No 96/8057. The appellant pleaded that the patent was invalid and raised several grounds to support this. Amongst these grounds, the issue of lack of inventorship (obviousness) constituted the bulk of the appellant's case. To this

end, extensive preparation and consultation with the respondents' expert witnesses had been undertaken by their counsel in preparation for the trial. The appellant's plea was amended several times, but more relevant to this appeal, again on 9 January 2014, shortly before the trial; to abandon reliance on the ground of obviousness. Subsequently, Murphy J granted the following order:

- '(i) The action is dismissed with costs, such costs to include the costs of two counsel and qualifying fees of Prof Barbour.
- (ii) The defendant is ordered to pay the wasted costs occasioned by its amendment of its plea.'

[3] The respondents, with leave of the court of first instance, appealed to this Court against para (i) of Murphy J's order (the first appeal). Paragraph (ii) which is the subject of the current appeal was not part of the first appeal. Whilst the respondents' first appeal was still pending, a bill of costs (first bill) was prepared and submitted by the respondents. The appellant opposed the taxation and amongst others, claimed that the tender for wasted costs and the order by Murphy J did not make provision for the recovery of the costs of two counsel and the costs of expert witnesses. It took time before the Companies and Intellectual Property Commission (the CIPC) could appoint a taxing master because the appellant also objected to the forum of taxation. The bill of costs was ultimately set down for taxation for 1 to 4 November 2016.

[4] In the meantime, this Court on 1 April 2016, upheld the first appeal. It ordered amongst others that the appellant (plaintiff) pay the costs, which costs included the costs of two counsel and the qualifying fees of the respondents' (defendants) expert witnesses. Needless to say, this costs order is of no relevance to the current appeal. Suffice it to state that the respondents thereafter prepared a revised comprehensive bill of all costs and gave notice of their intention to tax it on 7 November 2016. The appellant persisted with its initial objection, which prompted the respondents to launch an application for the clarification, alternatively, variation of the order made by Murphy J. The application served

before Baqwa J, who dismissed it and found that the order by Murphy J was unambiguous. And furthermore that, when read in context, the wasted costs did not include the costs of two counsel and the qualifying fees of experts. However, he subsequently granted the respondents leave to appeal to the full court of that division (Tolmay J, Louw and Hughes JJ).

[5] The full court upheld the respondents' appeal, set aside the order made by Baqwa J and substituted it with the one in terms of which Murphy J's order was clarified to declare that the 'defendants' wasted costs shall include the cost of two counsel and the qualifying fees of their expert witnesses'.

[6] In coming to its conclusion, the full court reasoned (paraphrased for brevity): the relief sought by the respondents can either be granted in terms of rule 42 of the Uniform Rules of Court or the common law but Baqwa J limited his judgment to rule 42 only; Baqwa J erred in finding that Murphy J had no intention to deal with the costs and wasted costs on the same basis; Baqwa J failed to have regard to the context and wording of para 96 wherein Murphy J recognised the complexity of the case which could not have been intended to be limited to the appellant's case; the nature of the claim and its complexity was a given whether it applied to the wasted costs or the costs ultimately granted on appeal on the merits to this Court; Baqwa J erred by finding that the application could not succeed due to a long delay which elapsed before they sought relief.

[7] The current appeal is directed at the order made by the full court, special leave to appeal having been granted by this Court on 5 November 2020.

[8] As indicated already, the crisp issue before us is whether the full court was correct in clarifying or varying the order made by Murphy J to read that the wasted costs order shall include the costs of two counsel and the qualifying fees of the respondents' expert witnesses.

[9] In terms of rule 42(1)(b) the court may rescind or vary an order or judgment in which there is an ambiguity, or a patent error or omission. The same relief can also be granted in terms of the common law if, on a proper interpretation, the meaning assigned to the words in the order remain ‘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.¹

[10] It is clear that the case of the respondents is based on an ambiguity and can be claimed under both rule 42 and the common law. Their notice of motion also reveals the fact that they were alive to this, and in particular, special reference was made to the word ‘clarifying’ as the relief sought.

[11] Paragraph 96 of Murphy J’s judgment is key to the interpretation of the order he granted. It reads:

‘In the result, while the defendant has not proven invalidity, the action stands to be dismissed on the ground that the plaintiffs failed to discharge the onus to prove that the defendant’s product, Fiprotec, included integers b) and d) of claim 1 of the patent and thus infringed. Costs should follow the defendant’s success, including, by reason of the nature of the claim and its complexity, the costs of two counsel. It was agreed between the parties that the expert witnesses would be entitled to their qualifying fees. The defendant agreed that it was liable for the costs occasioned by the amendment of the plea.’

[12] Before us, the appellant persisted with the argument that Murphy J’s order was clear and unambiguous. In their opposition, the respondents maintained that, properly and contextually interpreted, having regard to para 96 of the judgment by Murphy J confirming the complexity of the matter including the agreement between the parties that the expert witnesses would be entitled to their qualifying fees, the order by the full court should be confirmed.

¹ *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 306F-308A.

[13] The basic principles applicable to the interpretation of court orders are trite and need no further emphasis.² It appears from para 25 of the judgment of the full court that it regarded Murphy J's order to be ambiguous or otherwise uncertain. This served as a basis for the clarification of the order by the full court to give effect to Murphy J's true intention. For the reasons that follow hereunder, the findings of the full court cannot be faulted.

[14] On a simple reading of Murphy J's order it is clear that he recognised that the nature and complexity of the matter justified the employment of two counsel. And that there was an agreement between the parties regarding the qualifying fees of expert witnesses. However, what remains manifestly obscure and uncertain is that despite this recognition (the nature and complexity of the matter and the agreement between the parties) he nevertheless omitted to expressly include these costs as part of para (ii) of the order he made. This omission can not be of assistance to the appellant for the following reasons. First, in this case there was an agreement between the parties regarding the qualifying fees of their expert witnesses. Second, para (ii) of the order of Murphy J cannot be read without reference to para 96. This is so because para 96 is the only paragraph in the entire judgment which makes reference to the determination of costs and therefore serves as the basis of the costs orders Murphy J made in the two paragraphs.

[15] Furthermore, the appellant does not suggest that the obviousness defence it aborted just before trial, which necessitated the amendments it sought, was anything other than 'complex'. Ordinarily, this would justify costs occasioned by the employment of two counsel. The appellant was constrained to argue that the respondents did not incur those costs. If consideration is given to what Murphy J noted in para 96 and the acceptance by the appellant that indeed expert witnesses were considered necessary by both parties and were used in the preparation stage,

² *Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* [2020] ZASCA 16; 2020 (4) SA 428 (SCA) para 8 with reference to *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

up to the stage where the amendment was sought and made, then ineluctably the costs incurred occasioned by the preparation before the trial but for the late abandonment of the defence cannot be simply wished away. Axiomatically, such costs remains wasted costs even in circumstances where the witnesses were not ultimately called because the defence was abandoned on the eve of the trial.

[16] Taking into consideration all of the aforementioned, the argument of the appellant, that in the absence of a request by the parties to Murphy J to award the costs of two counsel and the qualifying fees of experts, Murphy J was not entitled to consider awarding these costs, was in my view correctly rejected by the full court. The argument that qualifying fees are special costs and therefore require a court order cannot assist the appellant either, as it is trite law that the payment of qualifying fees can be granted on the basis of an order of court or consent by all the parties (agreement).³ In my view, Murphy J was well within his powers to recognise the agreement between the parties without further ado, more so that he had already accepted that the matter was of a complex nature.

[17] As far as the ‘order in two parts’ argument of the appellant is concerned, which is to the effect that Murphy J had no intention to deal with the costs of suits and the wasted costs on the same basis, I am of the view that the full court was also correct to reject this argument. Indeed, there are two orders made by Murphy J regarding costs. That is in sub-paras (i) and (ii) of the order. In my view, the orders were separated for a good reason – to separate the costs of the main action from those occasioned by the amendments (wasted costs). But for this, as already indicated above, para 96 ought to be conjunctively read with para (ii) of the order of Murphy J. The argument that the agreement relating to the qualifying fees of expert witnesses related to the main action only and not to the wasted costs suffers

³*Stauffer Chemical Co and Another v Safsan Marketing and Distribution Co (Pty) Ltd and Others* 1987 (2) SA 331 (A) at 355B-C; *Cassel and Benedick NNO and Another v Rheeder and Cohen NNO and Another* 1991 (2) SA 846 (A) at 853; *Transnet Ltd t/a Metrorail and Another v Witter* [2008] ZASCA 95; 2008 (6) SA 549 (SCA) para 15G-H.

the same fate. The same applies to the contention that Murphy J was never told that counsel fees and the qualifying expert's fee agreed upon were to be included in the wasted costs.

[18] For the sake of completeness there is a need to address the one remaining ground which swayed Baqwa J's mind apart from the interpretation of Murphy J's order: the respondents' delay in bringing the application for clarification and or variation. This is clearly a red herring with no bearing at all on the central issue, on the simple basis that the respondents' delay in bringing the application was not inordinately long as there was an ambiguity as the full court correctly found. I am of the view that the full court was correct to find that the delay in launching the application was not unreasonable.

[19] For the reasons given, the appeal ought to be dismissed.

[20] Lastly, the issue of costs of this appeal. Although the respondents were substantially successful in their appeal in this Court, they did not cross-appeal the order of the full court on the costs, namely costs of one counsel and not two as they appeared before the full court and this Court. The matter is not complicated as it is based on the same argument before the full court. In the high court, counsel for the respondents accepted the view and ultimate decision of the full court that the matter was not complicated. Therefore, the order of the full court stands.

[21] In the result, the following order is made:
The appeal is dismissed with costs.

A M KGOELE
ACTING JUDGE OF APPEAL

APPEARANCES

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