



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 162/06
Reportable

In the matter between :

THE COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICE

APPELLANT

and

TREND FINANCE (PTY) LIMITED
TREND GEAR ENTERPRISES (PTY) LIMITED

FIRST RESPONDENT
SECOND RESPONDENT

CORAM : HOWIE P, CLOETE, HEHER, VAN HEERDEN *et* COMBRINCK JJA

HEARD : 7 MAY 2007

DELIVERED : 19 SEPTEMBER 2007

Summary: Costs; provisional order; distinct ground of appeal.

Neutral citation: This judgment may be referred to as *Commissioner, SARS v Trend Finance (Pty) Ltd* [2007] SCA 105 (RSA).

CLOETE JA

[1] A provisional order was made in this matter in respect of the costs of the appeal: Trend was ordered to pay half of the Commissioner's costs. Trend's cross-appeal was dismissed with costs. We have now had the advantage of written argument from counsel on both sides.

[2] Paragraph 32 of the judgment contains an error. The cross-appeal concerned the first consignment and not the second and third consignments. Counsel for Trend concedes that as Trend was unsuccessful in respect of the cross-appeal, those costs were correctly awarded to the Commissioner. But counsel argued for a more favourable costs order in respect of the appeal. Counsel for the Commissioner urged that the provisional order should be made final.

[3] The Commissioner's appeal was against the order directing him to repay the amounts paid by Trend in respect of the second and third consignments, and against the order directing him to pay all of Trend's costs in the court *a quo*. The Commissioner failed on the first issue but was predominantly, although not entirely, successful on the second. Counsel representing Trend has correctly pointed out that the two issues were severable in that the Commissioner did not succeed in one of two arguments advanced in support of the same relief; he succeeded on one issue (trial costs) but lost on the other (refund of the amounts paid in respect of the second and third consignments). In such a case, whilst an appellant's success should be recognised in respect of the issue in respect of which it was successful, it must be borne in mind that the respondent succeeded on the other issue.

[4] Where the balance of success on severable issues favours one party, an appeal court can, instead of cross-orders, make a partial costs order in favour of the more successful party. In *Protea Assurance Co Ltd v Matinise*¹ this court said the following:²

'The defendant raised four distinct issues on appeal. These have been set out and have been dealt

¹ 1978 (1) SA 963 (A).

² At 978A-C.

with above. The defendant has succeeded on only one of the issues and, in my view, only part of the costs of appeal should be awarded to the defendant. See, in this respect, *Union Share Agency & Investment Ltd v Green* 1926 CPD 129 at p 141; *Gentiruco A.G. v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (AD) at pp 668 *et seq*; *Cine Films (Pty) Ltd and Others v Commissioner of Police and Others* 1972 (2) SA 254 (AD) at pp 268-269; *Minister van die Suid-Afrikaanse Polisie en 'n Ander v Kraatz en 'n Ander* 1973 (3) SA 490 (AD) at pp 513-514. An apportionment of the costs of appeal is, in the instant case, beset with difficulties, but I do think that it would be just to order that the defendant pay two-thirds of the plaintiff's costs of appeal.

The appeal succeeds to the limited extent aforestated and it is ordered that defendant (appellant) pay two-thirds of the plaintiff's (respondent's) costs of appeal.³

The appeal court may even order a predominantly unsuccessful appellant to pay all of the respondent's appeal costs: *Stiff v Q Data Distribution (Pty) Ltd*.⁴

[5] On the other hand, where two issues carry equal weight for costs purposes, an appeal court could make an order that each party pay half of the other party's costs on appeal; but the usual practice, to simplify matters, is to make no order as to costs so that each party bears its own costs of appeal.

[6] On reconsideration and taking into account the submissions made by counsel on both sides, I do not believe that the order provisionally made directing Trend to pay one half of the Commissioner's costs of appeal sufficiently recognises Trend's success in resisting that part of the appeal on which the Commissioner was not successful. The amount involved was substantial – R900 000, together with mora interest from 2001. The amount of time taken up in respect of this issue (both in respect of the heads of argument and oral argument) was considerably more than the time taken up in respect of the costs issue. It is true that the costs issue was only conceded in Trend's heads of argument, and then only on the conditional basis that the cross-appeal did not succeed, so that the Commissioner had to come to this court; but in this court the Commissioner had only to oppose the cross-appeal

³ See also *Community Development Board v Mohamed* 1987 (2) SA 899 (A) at 919F-920G; the provisional costs order in that matter was subsequently confirmed: *Hollywood Curl (Pty) Ltd v Twins Products (Pty) Ltd (1)* 1999 (1) SA 236 (A) at 253I-254G. The court made a similar order in the latter case as well.

⁴ 2003 (2) SA 336 (SCA) para 20.

successfully, which he has done, to succeed also in respect of the costs issue in the appeal. Trend has been ordered to pay the Commissioner's costs in the cross-appeal.

[7] Bearing all these facts in mind, and the fact that the Commissioner was not entirely successful in his appeal on the costs issue, I consider that it would be fair if the Commissioner were to be ordered to pay three-quarters of Trend's costs of the appeal. The Commissioner should also be ordered to pay the costs of Trend's application for the variation of the provisional order made on 23 May 2007.⁵

[8] The following order is made:

1. The provisional order in respect of the costs of the appeal contained in paragraph 3(1) of the order made on 23 May 2007 is replaced with the following order:

'The Commissioner is ordered to pay three-quarters of Trend's costs of the appeal.'

2. The Commissioner is ordered to pay Trend's costs of the application to vary the provisional costs order.

T D CLOETE
JUDGE OF APPEAL

Concur: Howie P
Heher JA
Van Heerden JA
Combrinck JA

⁵ *Gentiruco A.G. v Firestone SA (Pty) Ltd* 1972 (2) SA 773 (A) at 775F-*in fine*.