

REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No: 2008/32155

In the matter between:

EXCELLENT PETROLEUM (PTY) LTD (IN LIQUIDATION)
(Represented by its duly appointed liquidators,
Trevor Philip Glaum and Peter Carolus)

Plaintiff

and

SYNCHRONY LOGISTICS (PTY) LTD
t/a IMPERIAL BULK SERVICES

Defendant

JUDGMENT ON COSTS

MEYER, J

[1] In this action the joint liquidators of Excellent Petroleum (Pty) Ltd (in liquidation) ('Excellent Petroleum') had sought the setting aside in terms of s 29(1) of the Insolvency

Act¹ read with s 340 of the Companies Act² of payments adding up to an amount of R4, 860, 000.00, which Excellent Petroleum had made to the defendant company, Synchrony Logistics (Pty) Ltd t/a Imperial Bulk Services ('Imperial') during the period 30 October 2005 until 8 March 2006. Payment of an amount of R3, 500, 000.00 was made on 31 October 2005, of an amount of R250, 000.00 on 11 November 2005, of an amount of R100, 000.00 on 16 November 2005, of an amount of R800, 000.00 on 8 November 2005, of an amount of R50, 000.00 on 23 November 2005, of an amount of R20, 000.00 on 22 December 2005, of an amount of R100, 000.00 on 9 January 2006, of an amount of R20, 000.00 on 9 February 2006, and of an amount of R20, 000.00 on 8 March 2006. The plaintiff only succeeded in having the payments that were made during the period December 2005 until March 2006 set aside, which payments constituted an amount of R160, 000.00 of the plaintiff's claim of R4, 860, 000.00. The plaintiff was accordingly successful in claiming the setting aside as voidable preferences of five of the nine payments, which constitutes just below 50% of the payments while in monetary terms the plaintiff was awarded a mere 3.29% of the total amount claimed.

[2] I was not addressed in argument on the matter of costs in the event of the plaintiff only being successful in having the payments that were made during the period December 2005 until March 2006 set aside. I accordingly reserved the matter of costs and required the parties to address me thereon. They agreed to make written submissions only. I am grateful to the plaintiff's counsel, Adv J Muller SC, and to the

1 Act No 24 of 1936.

2 Act No 61 of 1973.

defendant's counsel, Adv PF Rossouw SC, for their heads of argument, which were of great value in determining the question of how the discretionary power in regard to an award of costs, which must of course be exercised judicially, should be exercised in the present case.

[3] The general rule applicable in ordinary trial actions is that, in the absence of special circumstances, a successful litigant should be awarded its costs.³ In *Joubert t/a Wilcon v Beacham and Another*,⁴ Traverso J held '[t]hat there is no fixed definition of what 'special circumstances' will justify a departure from the general rule, but it is well recognised that the fact that a plaintiff succeeds in a lesser amount than his claim does not in itself justify a departure from the general rule.' Where a plaintiff succeeds in a lesser amount than its claim a defendant could always have safeguarded itself against being held liable for all the plaintiff's costs by having made a timeous and an appropriate tender with costs.⁵ A departure from the general rule may be justified where several points of dispute have been raised and the successful party succeeds only in

³ See: *Kathrada v Arbitration Tribunal and Another* 1975 (2) SA 673 (A), at p 679A – C; *Fripp v Gibbon and Company* 1913 AD 354, at p 357.

⁴ 1996 (1) SA 500 (C), at p 502E.

⁵ See: *Van Vuuren v Jonker* 1910 TS 686.

respect of some of them.⁶ In *Union Share Agency & Investment Ltd. v Green*,⁷ Gardiner

J said this at p 141:

'Generally speaking, the party in whose favour judgment is given should get the costs of the case. But where a party, though he has succeeded in obtaining judgment, has failed on certain substantial issues, for the raising of which he was responsible, then, if the costs of those issues are severable from the general costs of the case, he should be ordered to pay the costs of those issues. The victor had no right to make defeat unnecessarily expensive for the vanquished, and if he has not been content to rely on a good point, but has added to the expense by raising weak issues, he should bear the additional expense to which his adversary has been put.'

[4] The plaintiff, in order to succeed in respect of the setting aside of each payment, had to prove that immediately after the making of each such disposition the liabilities of Excellent Petroleum exceeded the value of its assets. The plaintiff called Mr Johan Andre Gerber as an expert witness to give evidence of an expert nature on the financial position and solvency of Excellent Petroleum as at 30 September 2003, 30 September 2004, 30 September 2005, and 31 October 2005. A substantial amount of time during the trial was spent on the evidence of Mr Gerber. The plaintiff, through the evidence and opinions of Mr Gerber, attempted to establish that Excellent Petroleum was uninterruptedly insolvent since the year 2003 until the commencement of its winding up on 3 April 2006, and that its insolvency had been increasing throughout this period until it was ultimately wound up. Mr Gerber did not investigate and was unable to express any opinion on the solvency of Excellent Petroleum after 31 October 2005. The plaintiff, however, had failed to discharge the *onus* in proving on a preponderance of

⁶ *Mouton v Die Mynwerkersunie* 1977 (1) SA 119 (A), at p 149A – E.

⁷ 1926 CPD 129.

probabilities that Excellent Petroleum's liabilities exceeded the value of its assets immediately after the making of the payment of R3, 500, 000.00 on 31 October 2005, or immediately after the making of each payment that had been made during the month November 2005.

[5] It was recently pointed out by the Supreme Court of Appeal in *Transnet Ltd t/a Metrorail v Witter*⁸ that an expert's 'qualifying fees' are now referred to as 'preparation fees'.⁹ The Supreme Court of Appeal held that whether the preparation fees for an expert should be claimable on taxation

'depends on whether they were reasonably necessary; and that question is to be answered not with the benefit of hindsight, but when the fee or expenses were incurred: *Stauffer Chemical Co & Another v Safsan Marketing & Distribution Co (Pty) Ltd & Others*¹⁰. If, therefore, it appears to the Court (in the case of preparation fees of an expert) ... that it was reasonable for the legal representatives of the successful party to incur such expenses when they did so, the expenses should be allowed. The consequence is that the qualifying fees and witness allowances may be allowed on taxation, even though the witness concerned did not, in the event, testify.'¹¹ Emphasis added.

8 2008 (6) SA 549 (SCA).

9 Para [15].

10 1987 (2) SA 331 (A), at p 354I – 355H.

11 Para [18].

[6] The caution expressed in *The Government v The Oceana Consolidated Co.*¹² is apposite. Smith J said this:

'In my opinion such orders should not be lightly made, and the Court should only grant them where it is quite satisfied that the payment of qualifying fees was reasonably necessary; in cases of doubt the order should be refused. As a rule qualifying fees would be paid to professional men for giving expert evidence, and the costs of litigation might be seriously increased if the payment of qualifying fees became a matter of course.'

[7] The plaintiff was not the successful party in respect of the claims for which the expenses of the expert witness, Mr Gerber, were incurred. The evidence and expert opinions of Mr Gerber related to the claims for the setting aside of payments that had been made during the period until 31 October 2005 and at best for the plaintiff also those that had been made until the end of November 2005. The issues pertaining to the setting aside of those payments were 'substantial issues' for the raising of which the plaintiff was responsible. The costs of those issues are severable from the general costs of the case and the defendant should not, in my judgment, be held liable for them.

[8] In the result the following order is made:

The defendant is ordered to pay the plaintiff's costs of suit, except the preparation fees of the witness Gerber and the trial costs for the duration of the evidence of the witness Gerber, which fees and costs shall be disallowed on taxation.

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¹² 1908 TS 43, at p 48.

P.A. MEYER
JUDGE OF THE HIGH COURT

8 September 2011