REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 08/26088

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED. ✓

18/04/2012
DATE

SIGNATURE

In the matter between:

JUCHNIEWICZ, CHANTEL	First Applicant
SANTANA, DIVAN	Second Applicant
and	
RIJAVEC, CARMEN	First Respondent
RIJAVEC, CARMEN N.O.	Second Respondent
In re:	
CARMEN RIJAVEC	First Plaintiff
CARMEN RIJAVEC N.O.	Second Plaintiff
and	
CHANTEL JUCHNIEWICZ	First Defendant
DIVAN SANTANA	Second Defendant
MASTER OF THE HIGH COURT, PRETORIA	Third Defendant
CLIENTELE LIFE ASSURANCE COMPANY LIMITED	Fourth Defendant

JUDGMENT

COPPIN, J:

[1] In February 2011 I dismissed the plaintiffs' claim with costs, but I made no order regarding the qualifying fees of the expert witnesses. In this application the successful defendants are the applicants and the plaintiffs are the respondents. I shall refer to the parties, respectively, as "the plaintiffs" and "the defendants". The defendants seek an order that the qualifying fees of their expert witnesses be allowed. The plaintiffs are opposing the application and ask that it be dismissed with costs.

[2] In the judgment of February 2011 I made no order regarding the qualifying fees of the experts who were called because, while costs were argued before me, the issue of qualifying fees was not raised and addressed by either side. In this application the defendants request of me to allow the qualifying fees of their two expert witnesses, Dr Edeling, a neurosurgeon and Dr Mazabow,a psychologist, who were called to counter the evidence of the plaintiffs' expert, a psychiatrist, Dr Eppel.

[3] The issues that were crystallised in argument before me do not really include the question whether the costs of employing Drs Edeling and Mazabow were reasonable and necessary, but are about whether the court is competent, at this stage, to consider the application, given the fact that I had

already made an order for costs and given the time lapse since I had handed down my judgment in the trial.

[4] The defendants' contend with reference, mainly, to three decisions, namely, *Firestone South Africa (Pty) Ltd v Genticuro A-G*[1], *Thompson v South African Broadcasting Corporation*[2] and *Lynmar Investments (Pty) Ltd v South African Railways and Harbours*[3], that this Court can and should at this juncture consider the question of allowing the qualifying fees. The submission is that if the defendants had sought these fees at the hearing they would have been granted because they were reasonable and necessary. It is further submitted on behalf of the defendants that the qualifying fees are ancillary to the costs; that there is authority, also with reference to the aforementioned cases and others, that the court is not *functus officio* in respect of the ancillary issues. It was further submitted that this application did not call for a re-opening of issues which were already decided or dealt with and does not challenge the correctness of any factual findings already made.

[5] With regard to the time within which this application was brought, it was submitted on behalf of the defendants that it was brought within a reasonable time and any delays were not due to the defendants' fault. The following was submitted in this regard, that after the judgment was handed down on 24 February 2011 a letter was addressed to the respondent's attorneys requesting them to agree to the payment of the qualifying fees of Drs Mazabow and Edeling (I shall revert to this letter); on 18 March 2011 the

1 1977 (4) SA 298 (AD).
2 2001 (3) SA 746 (SCA).
3 1975 (4) SA 445 (D&CLD).

plaintiffs answered to that letter and refused to agree to such payment; approaches were made by the defendants' counsel to my Registrar for a meeting to clarify the issue, but due to my availability the defendants had to wait until the third term and the matter was eventually raised before me on 19 August 2011; that I then expressed a view that a formal application had to be brought by the defendants; that the same was launched on 20 September 2011; an answering affidavit and replying affidavits were filed on 19 October 2011 and 4 November, respectively and that the only date for the hearing of the application, which was suitable to all parties, was agreed as being the 28th March 2012, which is the date on which I heard this matter.

[6] It was submitted on behalf of the plaintiffs, in essence, that the decisions in *Firestone* and *Thompson* did not assist the defendants; that the facts in *Lynmar Investments* were clearly distinguishable from the facts in this application in that there an application for qualifying fees was made immediately after judgment was handed down and in circumstances where the applicant had already indicated before the judgment was handed down that it would be asking for the qualifying fees for its expert witnesses. The plaintiffs' counsel also referred to the decision in *Ditshigo v Motor Vehicle Assurance Fund*[4], as authority for the submission that this Court should not at this stage consider the issue of qualifying fees which were not raised at the trial hearing. In that case counsel had erroneously omitted to ask for the costs of two counsel at a preliminary hearing of an application. The court had granted costs of the preliminary hearing to the party which was represented

[4] 1983 (1) SA 838 (T).

by counsel and had postponed the main application indefinitely. At the subsequent hearing of the main application counsel asked for the costs of two counsel in respect of the main hearing and the preliminary hearing. The application was opposed. The court held that it was not entitled by Rule 42, or the common law, to vary its costs order made in the preliminary hearing in circumstances where counsel had omitted to ask for those costs then.

[7] Counsel for the defendants submitted that *Ditshigo* was distinguishable, because this Court is not being asked to vary any costs order, but to consider the issue of qualifying fees which are ancillary to the costs order. It was also submitted that the same principle that applied in *Lynmar Investments* applied here, because the applicants had brought this application within a reasonable time.

[8] Before I discuss the authorities referred to I should point out that it is apparent from my judgment of February 2011 that I did not omit to make an order for the qualifying fees of the expert witnesses, neither did I dismiss a request for the same, nor did I decide that such fees were not necessary. I made no decision whatsoever regarding the qualifying fees because that matter was not raised by any of the parties before me at the trial. I mention this because in their correspondence the defendants proceed from the premise that I omitted to make an order in that regard and the plaintiffs proceed from the premise that I disallowed those fees. The positions adopted by the parties in their correspondence to each other are not correct. However,

since then the parties have come to acknowledge and agree that the issue of qualifying fees was not raised by any of them at the conclusion of the trail.

[9] The legal position regarding the correction, supplementation, alteration or amendment of the court's judgment, as well as when and where it cannot entertain such an application, is conveniently summarised in *Firestone*. I quote here for convenience the headnote which is a reasonably accurate précis of the relevant parts of the judgment:

> *"Once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes functus officio : its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased. There are, however, a few exceptions to that rule. Thus, provided the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it in one or more of the following cases: (1) The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, that the court overlooked or inadvertently omitted to grant. (2) The 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. (3) The court may correct a clerical, arithmetical, or other error in its judgment or order so as to give effect to its true intention. This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance. (4) Where counsel has argued the merits and not the costs of a case (which nowadays often happens since the question of costs may depend upon the ultimate decision on the merits), but the court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order.*
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> *The above list is not exhaustive: the question whether the court has an inherent general discretionary power to correct any other error in its own judgment or order in appropriate circumstances, especially as to costs, raised but not decided. On the assumption that the court has a discretionary power this should be sparingly exercised, for public policy demands that the principle of finality in litigation should generally be preserved rather than eroded - interest reipublicae ut sit finis litium."*

[10] In *Thompson* the applicant had appealed to the Supreme Court of Appeal ("*SCA*") against an order of the High Court in terms of which he was ordered to pay damages and costs. His appeal was successful and that order was set aside and replaced by an order of absolution from the instance but no order regarding costs in the High Court was made, implying that the applicant had to pay his own trial costs. The applicant then applied to the SCA for reconsideration of the costs order arguing that since costs were not argued during the appeal the costs order was provisional and open to revision. (The reason why the SCA had mulcted the applicant in costs was because it had agreed with the High Court's findings that the applicant was an unreliable and dishonest witness who committed fraud and relied on specious defences. The applicant had attacked the High Court's findings in an application for leave to appeal but did not do so in the actual appeal and instead focused on legal issues). The applicant's argument in the SCA in his application for the reconsideration of the costs aspect was that the factual findings of the court *a quo* were incorrect and should be reconsidered. The SCA held that because the applicant did not attack the factual findings of the High Court it was justified in assuming that the applicant had accepted those findings and that the applicant laboured under a misconception that the court had the power to amend or supplement its findings as opposed to its orders. The court further held, *inter alia*, that a party had a right to have a costs order reconsidered if costs were not argued at the oral hearing but its argument had to be based on

the finding of the court and not upon an argument that the court was wrong in its findings.

[11] It is immediately apparent that *Thompson* is distinguishable from the present case, on its facts. In the present application the defendants are not arguing that this Court was wrong in its findings regarding costs. The argument here proceeds from the premise that nothing was said about qualifying fees at the trail and should be dealt with now.

[12] In *Ditshigo* the costs of two counsel were not asked for at the preliminary hearing and the court had awarded costs in the applicant's favour. There the subsequent application that the costs of two counsel be awarded for the preliminary hearing was, in effect, an application for a variation of the costs order made by the court in the preliminary hearing. In the present case the defendants are not seeking a variation of the costs order which I made. They are not relying on Rule 42 or the common law. Instead they want this Court to deal with the issue of qualifying fees which was not dealt with at the hearing, not because of an omission on the court's part, but because it was neither dealt with, nor raised by either party due to inadvertence on their part.

[13] It is trite that qualifying fees must be asked for because an ordinary costs order does not include qualifying fees[5]. As those fees were not asked for it was not open to the court to make any order in that regard.[6]

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[5] See, *inter alia, Stauffer Chemical Co and Another v Safsan Marketing and Distribution Co (Pty) Ltd and Others* 1987 (2) 331 (AD) at 355C.

[6] Compare to the facts in *Lynmar Investments (Pty) Ltd v South African Railways and Harbours* 1975 (4) SA 445 (D&CLD).

[14] There is no question that if the qualifying fees of Drs Edeling and Mazabow were asked for by the defendants at the conclusion of the trail they would have been awarded. In argument before me in this application the plaintiffs' counsel made no submissions regarding the reasonableness, or necessity of the fees. In my view they were reasonable and necessary. If a concession were to be made in that regard that concession would be reasonable and proper. The only real question which remains in this application is whether this Court has the competence at this point in time to award the defendants those fees. This involves both a question of substantive law, namely, whether this Court has jurisdiction and a question of procedural law, namely, whether the application has been brought in time.[7]

[15] In *Lynmar Investments* the court held that it had been a longstanding practice for the courts to entertain applications made immediately upon delivery of a judgment, or very soon thereafter, for certain forms of relief which might flow from the main order. Some of this relief included declaring that a person be declared a necessary witness, or that interest at the standard rate be allowed, or that qualifying fees for an expert witness be allowed, or that the fees of two counsel be authorised.[8] The court accordingly granted the qualifying fees that were requested only after judgment in the main case had been handed down. In the course of his judgment, Miller J stated:

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[7] Compare in this regard the discussion in *Firestone South Africa (Pty) Ltd v Genticuro A-G* 1977 (4) SA 298 (AD) at 308E-F.

[8] See at 446C-E.

> "*I am unable to accept the argument that the court has no power at this stage to order that qualifying fees be allowed. This is not a case in which the court is being asked to vary the judgment already delivered; it is simply being asked for relief consequential upon its existing order for costs to the extent of authorising the inclusion of certain fees and expenses of witnesses for which it had not made express provision in its order.*"[9]

[16] It is noteworthy that in *Lynmar Investments the* judgment, in which no provision for qualifying fees was made, was handed down about a month before the application for qualifying fees came before Miller J.[10]

[17] In *P Lorillard Co v Rembrandt Tobacco Co Ltd*[11] Boshoff J (in whose judgment Marais J and Cillié J concurred) stated that costs that were reserved in review proceedings and which were inadvertently not raised to obtain the necessary order from the reviewing court, could be granted in an application where the court was asked to award costs to the party that was successful in the review proceedings. The learned judge further stated that the court could also authorise the employment by that party of two counsel in the review proceedings.[12] It was held that the court had the competence to entertain such an application in the light of cases such as *West Rand Estates Ltd v New Zealand Insurance Co Ltd*[13] and *Van Vuuren v Van Vuuren*[14] where the matter had, by reason of inadvertence, not been raised in the review

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9 See at 447A-B.

10 The judgment was handed down on 25 May 1975 and the matter came before Miller J on 25 June 1975. However, before the judgment was handed down the applicant had indicated to the respondent that it would be seeking the qualifying fees for its expert witnesses.

11 1967 (4) SA 353 (T).

12 See at 361B-E.

13 1926 AD 173 at 178.

14 1942 WLD 7 at 9.

proceedings. The court, however, dismissed the application before it on the merits.

[18] Even though the court in *Ditshigo*[15] may not have been aware of the *Lorillard* decision, those cases are distinguishable from each other on their facts. In *Lorillard* no order at all had been made in respect of reserved costs but in *Ditshigo* the court had already made an order in respect of the costs on the preliminary application in effect awarding the costs of one counsel. The application in *Ditshigo* for the court to award the costs of two counsel in respect of the preliminary matter was thus, in effect, an application for the court to vary its costs order.

[20] Regarding the two cases referred to by Boshoff J in *Lorillard*, namely *West Rand Estates Ltd v New Zealand Insurance Co Ltd* and *Van Vuuren v Van Vuuren.* In the former case, the court, in giving judgment for an amount due under an insurance policy, overlooked the fact that *mora* interest had been claimed and made no order in that regard. In an application made to the court that such interest be granted, the court held that the application was brought within a reasonable time and that it had jurisdiction to amend its order and award the applicant the interest. That case was referred to in *Firestone* and is clearly a case where there was an omission on the part of the court; a situation which would be covered by Rule 42 and the common law. In the latter case Millin J stated[16] that if the court is to be asked to add to its order some additional, ancillary, or supplementary relief, such as *mora* interest, or

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[15] *Ditshigo v Motor Vehicle Assurance Fund* 1983(1) SA 838 (T)
[16] At page 9.

costs, this must be claimed in new proceedings with proper notice to the opposite party. Millin J expressed a willingness to entertain an application for costs which had inadvertently not been sought in the main proceedings.

[21] In *Firestone* the SCA did not necessarily reject or overrule the position adopted by the court in *Lorillard,* even though the correctness of that court's reliance on the decision of *West Rand Estates Ltd v New Zealand Insurance Co Ltd* is questionable. In fact the court, in *Firestone* held that the list of exceptions to the *functus officio* rule was not exhaustive. Given the circumstances in that case the court was prepared to assume in the applicant's favour there that the court does retain a general discretion to correct, or supplement, its judgment or order in appropriate cases other than those listed in the judgment, but warned that "*the assumed discretionary power is obviously one that should be very sparingly exercised, for public policy demands that the principle of finality in litigation should generally be preserved rather than eroded – interest reipublicae ut sit finis litium*".[17] It is noteworthy that in *Firestone* the applicant claimed the relief after seven years. The delay was of its own making. The court held that it was not willing to exercise the discretion in the applicant's favour because the applicant was "*supine and dormant about protecting its alleged rights and redressing alleged wrongs*".

[22] In my view there is no reason why the application cannot be entertained at this stage on the grounds discussed in *Lynmar Investments*

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[17] At 309A.

and in Lorillard, alternatively on the basis of the general discretion which the SCA in *Firestone* assumed the court had. On the basis that I have a discretion to include the qualifying fees of Drs Mazabow and Edeling, I am of the view that this is an appropriate case for the exercise of that discretion and the application ought to be granted. Very soon after the judgment was handed down the defendants engaged the plaintiffs about the issue of the qualifying fees –(albeit on a wrong basis). The defendants took steps to deal with the issue. They cannot be said to have been "*supine or dormant*" about it. The fact that it is only dealt with now is not entirly due to their fault. The availability of counsel and the court contributed to the delay.

[23] It was conceded by the defendants' counsel that the order should only be made in respect of qualifying fees for Drs Edeling and Mazabow and not in all the terms sought by the defendants in their application[18].

[24] Ordinarily the defendants would have to bear the costs of this application.[19] Even though the plaintiffs did not seriously dispute that the engagement of Drs Mazabow and Edeling was necessary and reasonable, the opposition was based, in essence, on procedural and substantive grounds. The law on these matters is not very certain and clear as is apparent from *Firestone*. The defendants' application was not free from ambiguity either. In those circumstances the plaintiffs' opposition to the application was

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[18] be supplemented by the addition of the following:" *such costs to include the qualifying, preparation and reservation costs pertaining to the medico-legal reports and of joint minutes of the Applicants' expert witnesses, being Drs Edeling and Mazabow as well as the necessary costs incurred for counsel to consult with the said experts in preparation for trial."*

[19] As they seek an indulgence. In paragraph 1 of their application the defendants seek an order that the original costs order.

reasonable. The defendants should bear the costs of the application on an opposed scale.

[25] In the result:

1. It is ordered that the qualifying fees and expenses of Dr Mazabow and Dr Edeling be allowed.

2. The defendants (applicants) are ordered to pay the costs of this application on the opposed scale.

P COPPIN
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

FOR THE DEFENDANTS	MR A DEN HARTOG
INSTRUCTED BY	RENIER VAN RENSBURG INC
FOR THE PLAINTIFFS	MR D VETTEN
INSTRUCTED BY	MARTINI PATLANSKY ATTORNEYS