

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 23648/11

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

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DATE

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SIGNATURE

In the matter between:

MOBILE TELEPHONE NETWORKS (PTY) LTD

Applicant

And

APPLESEED ENTERTAINMENT

Respondent

In re:

APPLESEED ENTERTAINMENT

Plaintiff

And

MOBILE TELEPHONE NETWORKS (PTY) LTD

Defendant

SUMMARY

Civil proceedings – security for costs in pending action – respondent (plaintiff in pending action) ordered by court to provide security for costs for applicant’s (defendant in pending action) costs in terms of Uniform Rule 47(1) – respondent failing to provide security amount fixed by Registrar over extended period of time – applicant launching application in terms of Rule 47(4) for the dismissal of respondent’s action – application succeeding.

J U D G M E N T

MOSHIDI, J:

[1] This is an application brought in terms of Uniform Rule 47(4) for the dismissal of the action instituted by the respondent against the applicant.

[2] The applicant is the defendant, whilst the respondent is the plaintiff in a pending action instituted under case number 23648/2011 out of this Court. For the sake of convenience, I shall refer to the parties as “*the applicant*” and “*the respondent*” respectively.

[3] The matter was straightforward since the respondent did not file opposing papers. This, despite an opportunity afforded to the respondent by the court to do so at a previous hearing.

THE FACTS

[4] These are the facts. During June 2011, the respondent issued summons against the applicant. The action became defended and is still pending. In February 2012, the applicant, believing that the respondent will not be able to satisfy an adverse costs order against it in the event of the action failing, filed and served a notice requiring the respondent to furnish security in terms of Rule 47(1). On 10 August 2012, the court ordered the respondent to furnish security for costs in an amount to be determined by the Registrar. The court also ordered that the respondent's action be stayed pending the furnishing of security, and pending the payment of the taxed bill of costs. The respondent was also ordered to pay the costs of the application. In fact, the Taxing Master on 19 September 2013 taxed the determined security for costs in the sum of R415 000,00 (*"the security amount"*), to be paid by the respondent. This was to be done within twenty-one (21) days. This was not done up to the present. A period of more than seven (7) months had passed without such payment being made. Neither was there any undertaking provided by the respondent that it will pay the security amount. In addition, there were several costs orders in interlocutory applications granted against the respondent in the pending action which remained unpaid. The respondent, although filing a notice to oppose the present application on 8 May 2014, failed to file an answering affidavit thereafter. At the hearing of the matter on 30 October 2014, the respondent was represented by counsel who merely applied to withdraw from the matter on behalf of respondent's instructing attorneys. The withdrawal was opposed but granted subsequently.

[5] Rule 47(4) of the Uniform Rules provides that:

“The court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as to it may seem meet.”

From the above rule, it is readily plain that the relief sought by the applicant in the present matter, although drastic in nature, is a discretionary matter. In *Excelsior Meubels Bpk v Trans Unie Ontwikkelings* 1957 (1) SA 74 (T), at 77D-E, the Court said:

“In this case it must have been the intention of the Court, when the provision of security was ordered, that the respondent was not to proceed with the action unless and until it provided security for the applicant’s costs. The respondent was given time to find the amount of money, but as the security was not provided, it is illogical that the respondent should proceed with his action and inequitable that by disregarding the Court’s order he should be able to keep alive that action which the Court held he could only prosecute if he provided security for the applicant’s costs.”

In *Wallace NO v Commercial Insurance Co of SA Ltd* 1999 (3) SA 804 (C), it was held that a court will be slow to dismiss proceedings such as those under discussion unless there was alternative remedies available. See also *Kini Bay Village Association v Nelson Mandela Metropolitan Municipality and Others* 2009 (2) SA 166 (SCA), where it was held, *inter alia*, that the decision of the High Court in dismissing an action where there was failure to provide security as ordered, could not be faulted.

[6] In the present matter, it was more than plain that the respondent, as plaintiff in the pending action, had adopted a more than lackadaisical attitude in prosecuting its claim against the applicant. The respondent was afforded more than adequate opportunity to provide the ordered security amount. It chose not to do so over an extended period. It also elected not to oppose the instant application. Its counsel was constrained to withdraw at the hearing of the matter. The applicant will be prejudiced should the pending action be kept alive under these circumstances. The applicant had no alternative remedy to adequately protect itself in the event of an ultimate adverse costs order against the respondent in the pending action.

[7] For all the above reasons, the conclusion that the applicant had succeeded in making out a case for the relief claimed in the notice of motion, became irresistible.

COSTS

[8] I deal briefly with the issue of costs, which is a discretionary matter. There was no reason advanced at all why the costs should not follow the result. As stated above, counsel for the respondent took no part in the merits of the application. In the notice of motion, the applicant claimed costs on the attorney and client scale only in the event of any opposition. There was no such opposition. The costs ought to be on the ordinary scale.

ORDER

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

1. The pending action instituted by the respondent against the applicant under case number 23648/2011, is hereby dismissed with costs, including any costs previously ordered or reserved.

D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR APPLICANT	A M MTEMBU
INSTRUCTED BY	MASHIANE, MOODLEY AND MONAMA INC
COUNSEL FOR RESPONDENT	WITHDREW
INSTRUCTED BY	MAMATHUNTSHA INC
DATE OF HEARING	30 OCTOBER 2014
DATE OF JUDGMENT	29 JANUARY 2015