REPUBLIC OF SOUTH AFRICA

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

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

15/11/2017
DATE SIGNATURE

QUALITY SAFETY 1990 (PTY) LIMITED	Appellant (Applicant in court a quo)
And	
SPIDERWEBB ALTITUDE SYSTEMS (PTY) LIMITED	1st Respondent
GOVENDER, COLIN	2nd Respondent
GOOGLE SOUTH AFRICA (PTY) LIMITED	3rd Respondent
GOOGLE INCORPORATED	4th Respondent
YOUTUBE LLC	5th Respondent

JUDGMENT

OPPERMAN J

[1] During May 2015 a video was published on the YouTube website purporting to evidence the failure of a safety test having been conducted on one of the safety harnesses manufactured by the appellant.

[2] On 15 July 2015 an urgent application was launched by the appellant seeking:

2.1. as against the first and second respondents (collectively hereinafter referred to as 'Spiderwebb') interdictory relief restraining the publication of any untruthful information regarding the appellant's harnesses or products, either to the public or to the appellant's clients;

2.2. as against the third to fifth respondents (collectively hereinafter referred to as 'Google') a mandatory interdict directing Google to remove the video from their website ('*main application*').

[3] On 18 August 2015 the appellant launched another urgent application ('*the interlocutory application*') seeking relief that Google be ordered to remove the video from their website platforms pending the final determination of the main application. Spiderwebb opposed the interlocutory application.

[4] Spiderwebb further delivered a counter-application to the interlocutory application seeking that the interlocutory application be struck from the roll with costs on an attorney and own client scale. Both the interlocutory application and counter application were set down for hearing on 25 August 2015.

[5] On 25 August 2015 and subsequent to a settlement agreement having been concluded between the appellant and Google insofar as the interlocutory application was concerned, a draft consent order was taken as between the appellant and

Google finalising the interlocutory application as between the appellant and Google in the following terms:

> "1. The application is withdrawn as against the third to fifth respondents [Google].
>
> 2. The fourth and fifth respondents undertake to block access from their platforms in South Africa in the reload of the publication reflected in annexure "FA1" to the notice of motion and identified on the YouTube platform as : https://www.youtube.com/watch?v=4BYS6GdS-6w, on being provided with a copy of an order directing its removal".

[6] The court (Makume J) on 25 August 2015 was accordingly required to adjudicate only upon the relief which remained in terms of the interlocutory and counter-application thereto, the pertinent issues being, namely:

6.1. whether costs ought to be granted against Spiderwebb as a result of their opposition to the interlocutory application to which they were not parties; and

6.2. whether the interlocutory application ought to be struck from the roll with costs on an attorney and own client scale.

[7] On 25 August 2015 the main application was not set down for hearing, the court was not requested to determine the merits of the main application and neither the appellant nor Spiderwebb (understandably) made submissions with regard to the merits of the main application.

[8] On 10 May 2016, Makume J erroneously and under circumstances explained in his judgment granting leave to appeal to this court, dismissed the main application

with a punitive costs order. The learned Judge had misplaced his notes and forgotten that he did not have to decide the main application.

[9] The learned Judge explained what had happened on 24 June 2016 after an opposed application for leave to appeal. One might have expected the practitioners for the parties, recognizing that to err is human and that to forgive is divine, to have come to an agreement that, given that the judgement was admittedly an error, it would be abandoned with no implications as to costs as all parties were innocent in the circumstances. However, the party in whose favour the erroneous judgement was granted, Spiderwebb, clung to it and opposed the application for leave to appeal. The learned Judge granted leave to appeal against the whole of his judgment and ordered that the costs of the application for leave to appeal, be costs in the appeal.

[10] The appellant, ensnared in a tangle that was not of its own making, thereupon filed a notice of appeal which recorded the relief it would be seeking in the following terms:

> 10.1. The order granted as between the applicant and third to fifth respondents on 25 August 2015 stands;
> 10.2. The counter-application under Case No. 2015/25281 brought by the first and second respondents before this Honourable Court on 26 August 2015 be dismissed;
> 10.3. The main application under the aforesaid Case No. 2015/25281 be adjourned to a date to be determined by the Registrar in consultation with the Deputy Judge President for argument on the merits of such application;
> 10.4. The incidence of costs incurred as between the applicant and the first and second respondents be reserved for determination at the hearing referred to in 3 above [10.3];
> 10.5. The first and second respondents are ordered to pay the costs appeal (including those of the application for leave to appeal), such costs to include the costs of two counsel where employed."

[11] It has been held that it would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants either in evidence or in oral or written submissions.

> "When a Judge comes across a point not argued before him by counsel but which he thinks is material to the resolution of the case it is his duty in such a circumstance to inform counsel on both sides and to invite them to submit arguments either for or against the Judge's point. It is undesirable for a Court to deliver a judgment with a substantial portion containing issues never canvassed or relied on by counsel". [1]

[12] The court *a quo* quite evidently erred in determining the merits of the main application when the parties did not address the merits thereof or seek relief in terms thereof.

[13] Spiderwebb opposed the application for leave to appeal and even the appeal, although it's opposition to the appeal ultimately was only in respect of the costs orders sought by the appellant. Spiderwebb accepts that Makume J's judgment should be set aside.

[14] Spiderwebb had opposed the appeal initially by virtue of the relief formulated in para 2 [10.2 hereof] of the appellant's notice of appeal in terms of which the appellant requested this court to dismiss the counter-application to the interlocutory application ie to rule on that which Makume J had reserved judgment, but upon which he had not ruled. Opposition to this relief was obviously justified. Appellant, though a victim of curial error, had made an error of its own in its notice of appeal by asking an appeal court to decide a matter on which the court *a quo* had not yet decided.

---

1 *Kauesa v Minister of Home Affairs & Others* 1996 (4) 965 (NMS) at page 973; Groenewald NO and Another v Swanepoel 2002 (6) SA 724 (E); see too *Brian Kahn Inc. v S*amsudin 2012 (3) SA 310 (GSJ)

[15] This error was persisted in, in appellant's heads of argument filed in respect of the appeal, wherein the appellant contended that Spiderwebb's opposition to the interlocutory application (when no relief was sought against Spiderwebb save for costs in the event of opposition), the launching of the counter-application by Spiderwebb thereto, the opposing of the application for leave to appeal and this appeal, was unnecessary and frivolous.

[16] Whilst I agree that there should have been no opposition by Spiderwebb to the application for leave to appeal against the judgement that was, as the learned Judge *a quo* readily conceded, erroneously granted, I cannot agree that the opposition to the appeal, insofar as the appellant sought to extract from this appeal Court a judgment on a feature of the matter not yet decided by the Court *a quo*, was unwarranted. The appellant contended that the granting of costs against Spiderwebb was justified in the circumstances, and it was, but not to the extent of an appeal Court deciding that which is still to be pronounced on by the Court *a quo*.

[17] Appellant's argument for all the costs ignores the fact that Makume J has still to deliver judgement in respect of that on which he had reserved judgment ie (a) whether costs ought to be granted against Spiderwebb as a result of their opposition to the interlocutory application to which they were not parties and (b) whether the interlocutory application ought to be struck from the roll with costs on the attorney and own client scale. This, I shall refer to as '*the subject matter of the reserved judgment*'.

[18] At the hearing of this appeal, it was argued on behalf of Spiderwebb that it was only upon a reading of the appellant's practice note, that it became apparent that the

appellant was not persisting with the relief it was seeking from this court in respect of the subject matter of the reserved judgment.

[19] Spiderwebb's insight that appellant was no longer casting it's net too far (trying to get a judgment on the subject matter of the reserved judgment) in this Court, was revealed for the first time in Spiderwebb's heads of argument - filed on 27 October 2017. Paragraph 8 of Spiderwebb's heads of argument reads:

> 'In the result the appeal should succeed and there should be no order as to costs.'

[20] That order, that there be no order as to costs, would have been appropriate before Spiderwebb opposed that which it knew was born of judicial error alone, and before appellant tried to get a judgment in the appeal on the subject of a reserved judgment in the Court *a quo*. On 3 November 2017, Spiderwebb's attorney of record sent an e-mail to the appellant recording that:

> 'Our client [Spiderwebb] withdraws its opposition to the appeal in terms of paragraph 8 of the heads of argument.'

[21] Spiderwebb's opposition to this appeal on the basis that the relief sought in para 2 of the notice of appeal was not competent, was justified as this court cannot make orders in respect of the subject matter of the reserved judgment as the issues therein do not serve before this court. This court would be guilty of the exact same transgressions the appellant complains Makume J is guilty of (and which he graciously admits) if it were to make an order in respect of the subject matter of the reserved judgment .

[22] This appeal lies in respect of the main application only. The appellant's response to this was that this was clearly never the understanding of Spiderwebb as its withdrawal of its opposition to the appeal was unconditional without any reference

to para 2 of the notice of appeal. This criticism, in my view, is unwarranted. The notice of withdrawal specifically refers to para 8 of the heads of argument. There are only 8 paras in the heads of argument and the thrust of Spiderwebb's argument is contained in paras 5 and 7 which reads:

> "5. Because Makume J is yet to deliver judgment and grant an order in the interlocutory and counter applications which came before him on 25 and 26 August 2015, this Court cannot, it is submitted, substitute its own order for such non-existent order. Rather, the matter should be remitted to the court a quo for its decision on the said applications."

and para 7:

> "7. The appellant's charge that the 1st and 2nd respondents' opposition to the interlocutory application and the launching of the counter application was unnecessary and frivolous, and thus justifying costs against them in the appeal, cannot be adjudged at this stage in the absence of a decision in those very matters."

[23] There was some debate before this court as to whether or not the appellant had followed the correct procedure ie whether it should not perhaps have applied for a variation or a rescission of the judgment in terms of rule 42 of the Uniform Rules of Court and that the alternative method suggested by it, would have been less costly. It hardly lies in the mouth of Spiderwebb to contend that another procedure would have been less costly when it opposed the appeal on all fronts until the 11th hour. It did not make any offer to carry 50% of the alternative, less costly, method and it made no offer to support that alternative in order to get the judgment set aside or rescinded.

[24] The judgment granting leave to appeal, records an invitation by Makume J to Spiderwebb to abandon the judgment to which it was not entitled. The reason for Spiderwebb not doing so does not appear from the judgment but Mr Williamson, who

did not represent Spiderwebb during the application for leave to appeal, referred this court to authority in which, the consequences in respect of the abandonment of judgments was, apparently, for the first time definitively decided.

[25] This alleged uncertainty in the legal position relating to the abandonment of judgments, so the argument ran, precluded Spiderwebb from abandoning the judgment at the time of the invitation extended by Makume J.

[26] Mr Subel SC for appellant did not accept that such judgment changed the legal position, nor that the law was unclear in respect of such issue prior to the judgment. This court need not decide this issue as what is crystal clear, is that Spiderwebb did not, after the pronouncement of the judgment in the authority relied on, abandon the judgment of Makume J.

[27] Spiderwebb did, however, withdraw its opposition to the appeal as soon as it understood that the appellant was not persisting with the relief relating to the subject matter of the reserved judgement on which Makume J has still to rule.

[28] Spiderwebb argued that Makume J has accepted full responsibility for the error which occurred and that it follows that neither party is to blame for the present situation, ignoring it's unreasonable opposition, just as appellant ignores it's efforts to overreach it's appeal and get a judgment on the subject of the reserved judgement.

[29] Clearly, neither party is to blame for the present situation, being that a judgment exists in respect of the main application, which neither party had placed before the court to adjudicate upon and which judgment, by agreement, falls to be set aside.

[30] In my view, the opposition to the application for leave to appeal was unreasonable. Makume J has bound the costs of the application for leave to appeal

to the result of this appeal (which is the customary order). In this case it is not the appropriate order as it works an injustice to the appellant. Such costs order is interlocutory and can be revisited by this court. By virtue of Spiderwebb's concession that the appellant was entitled to be granted leave to appeal, I intend ordering the appellant to bear its own unopposed costs in respect of the application for leave to appeal, but that Spiderwebb should pay the appellant's costs it incurred in respect of the opposition to such application.

[31] The litigants face a most unfortunate situation in this matter. In my view, they could have undone the order in a far more co-operative and cost effective manner. They did not. Both parties failed to act reasonably at times. Mr Subel SC contended that the only questions which fell for determination was whether it could be said that the appellant was substantially successful and whether an appearance was necessary at the hearing of the appeal. If the answers to such questions were in the affirmative, so the argument ran, that was the end of the enquiry. I think not. Spiderwebb indicated on the 27th of October 2017, in para 8 of its heads of argument that it would not oppose the setting aside of the judgment. That being so, the parties could have sent one junior counsel to ask for a consent order to be made an order of court.

[32] I hold the view that the most appropriate costs order in this appeal would be to order that each party pay its own costs, save for the costs incurred in respect of the preparation of the appeal record, which costs are to be carried 50% by the appellant and 50% by Spiderwebb. The costs relating to the application for leave to appeal should reflect my views expressed hereinbefore.

[33] I accordingly propose the following order:

33.1 The appeal is upheld.

33.2 The orders granted by Makume J on 10 May 2016 are set aside.

33.3 The order granted as between the appellant and the third to fifth respondents on 25 August 2015 stands.

33.4 The matter is referred back to Makume J to deliver judgment in respect of the issues which served before him on 25 and 26 August 2015.

33.5 The main application under case number 2015/25281 is adjourned to a date to be determined by the Registrar in consultation with the Deputy Judge President for argument on the merits of such application.

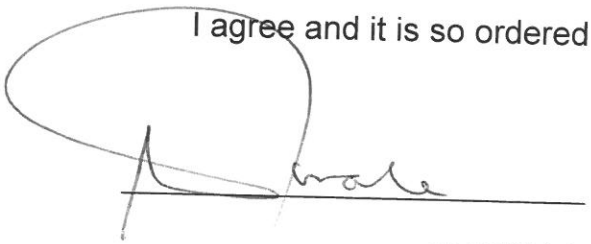
33.6 Each party is to pay its own costs in respect of this appeal.

33.7 The costs incurred in respect of the preparation of the appeal record are to be paid by the appellant 50%, and the first and second respondents 50 %.

33.8 The costs incurred by the appellant in respect of the application for leave to appeal which exceed the costs of an unopposed application for leave to appeal, are to be paid by the first and second respondents jointly and severally, the one paying the other to be absolved.

I OPPERMAN
Judge of the High Court
Gauteng Division, Johannesburg

I agree and it is so ordered



M TWALA
Judge of the High Court
Gauteng Division, Johannesburg

I agree

D NAIR
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 10 November 2017
Judgment: 17 November 2017
Appearances: MC Naught & Company
For Appellant: Adv A. Subel SC
Instructed by: MC Naught & Company
For First and Second Respondents: Adv A. Williamson
Instructed by: Schoonees, Belling & Georgiev
For Third to Fifth Respondent: No Appearance