IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

8/4/16

CASE NO: 18628/2015

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

08-APRIL-2016 .....

DATE SIGNATURE

In the matter between:

THE SOUTH AFRICAN NATIONAL ROADS AGENCY (SOC) LIMITED	Applicant
and	
SUPERWAY CONSTRUCTION (PTY) LTD	Respondent
In re: **SUPERWAY CONSTRUCTION (PTY) LTD**	Plaintiff
and **THE SOUTH AFRICAN NATIONAL ROADS AGENCY (SOC) LIMITED**	Defendant

DATE OF HEARING : 31 MARCH 2016
DATE OF JUDGMENT : 08 APRIL 2016

JUDGMENT

MANAMELA AJ

[1] On 25 September 2015 in the unopposed motion court, I granted an exception on various grounds in favour of the South African National Roads Agency, the applicant in terms of the current application.[1] The order granted did not make any reference to costs.

[2] The applicant submits in terms of the current application that there was an error in this regard. It is submitted that, based on the oral exchanges between counsel for the applicant and myself in court as transcribed,[2] on the fateful day. I had harboured an intention to grant costs in the applicant's favour. I was only disabled by the handing up of a draft order without costs by counsel, which was erroneously made an order of court. Therefore, the applicant submits that error be corrected by an award of costs for its successful exception to the respondent's particulars of claim.

[3] In its quest to correct the so-called "error", the applicant through its representatives wrote to the Deputy Judge President on 08 December 2015.[3] However, the matter was only brought to my attention at the beginning of February 2016, when I was coincidentally back at this Court as an acting judge. Initially I had considered it involved an obvious error capable of correction through the provisions of rule 42 of the Uniform Rules of this Court.[4] I simply directed the applicant's representatives to set down the matter in the subsequent week, when I was to be in the unopposed motion court again. This was ultimately done and the matter came

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[1] See annexure "ZM1" to the founding affidavit in indexed pp 8-9.
[2] See annexure "ZM2" to the founding affidavit in indexed pp 10-27.
[3] See annexure "ZM3" to the founding affidavit in indexed pp 28-51.
[4] Rule 42(1) of the Uniform Rules of Court reads: "The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby:
(b) An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, or a patent error or omission;
(c) An order or judgment granted as the result of a mistake common to the parties."

before me on 11 March 2016. The respondent opposed the application and complained that it was set down without being afforded a reasonable time to file papers. Eventually, the parties agreed to an order and the matter was postponed to 31 March 2016. I had indicated my availability on the day to hear the matter.

[4] The parties further exchanged voluminous papers. What was previously a simple issue of costs became a matter of almost 300 pages and authorities bundle of over 400 pages. Although I am grateful for the heads of argument filed on behalf of the parties, in my view the parties went overboard in their exchanges. Also, various aspersions were casted and the junior counsel who moved the original exception wasn't spared the wrath. He was warned about his professionalism or lack thereof, and even words like "fraud" have been brandished. All these brings some element of curiosity as to whether the subsequent costs incurred by the parties in their quest to fix "the error" aren't ironically exceeding those of the costs order sought to be enforced or avoided. But apparently this application represents very important matters to the parties and it appeared so when the application was argued on 31 March 2016. I was in the urgent court and therefore thought it prudent to reserve this judgment for a few days.

[5] I indicated to counsel appearing before me on 31 March 2016 that I am not going to allow any detention by the several submissions in the papers. I also indicated that I do not want my memory of the events of 25 September 2015 to be decisive of this matter. This, I indicated, included speculation of what appears or is missing from the transcript of that day. I am in no way a party or witness for or against the contending parties.

[6] I further indicated that, I intend determining the matter from a narrow angle, which I consider justified under the circumstances, as follows. Should the applicant have given notice to the respondent that a costs order will be sought upon granting of the exceptions, such costs order will be granted or confirmed. Absent prior notice, no costs order is possible.

[7] It is common cause that there was no prayer for costs in the notice of exception and the exception.[5] The prayer for costs came into the picture through heads of argument filed by the applicant, just before the original hearing of the unopposed motion.[6] The document was served by electronic mail which also alluded to the issue of costs in that the senior counsel was to be replaced by junior counsel in the event of the respondent not opposing the exception.[7] In my view the heads of argument and the accompanying electronic mail of 24 August 2015 gives an impression that the applicant was at that stage not aware that it had not included costs in the original notices or pleadings. It was mentioning costs as if it has always been an issue of contention. There is no indication that it was aware that there was a need for the change of stance through a formal amendment or formal notice to its opponent. It doesn't really matter whether or not my observations are misplaced. The matter was then unopposed and the respondent submit that it was busy effecting amendments to accommodate the causes of complaint in the exception.

[8] I have considered the authorities I was referred to by counsel in their heads of argument. I reiterate that I am grateful for their efforts in this regard. However, the

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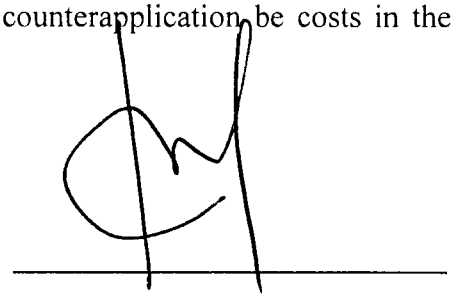
[5] See par 35.2 of the applicant's heads of argument; par 2 of the respondent's heads of argument.
[6] See par 16.2 of the applicant's heads of argument with filing notice dated 22 July 2015 (annexure "MR1") on indexed pp 266.
[7] See annexure "MR1" on indexed pp 268.

circumstances of this matter are clearly distinguishable from the authorities I was alerted to, and those I am aware of. I consider it in the interests of justice to arrive at a finding that will be fair and dispense justice between the parties. I will not grant any costs for the original application and this application, including the accompanying application. The costs for all this will be part of the outcome in the action proceedings. To the extent that I am considered to have made a costs order on the 25 September 2015, such costs order should be considered withdrawn as having been erroneously granted, and replaced with the order made herein.

[9] Therefore, I make an order as follows:

(1) that, the application and the counterapplication are refused.

(2) that, the costs for the application and the counterapplication be costs in the cause.



K. La M. Manamela

Acting Judge of the High Court

08 April 2016