

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

CASE NO: 4256/01

In the matter between:

REUBEN ROSENBLOOM FAMILY INVESTMENTS (PTY) LTD

(Registration Number 72/000737/07)

1st Applicant

GERMAZE INVESTMENTS (PTY) LTD

(Registration Number 60/003850/07)

2nd Applicant

and

MARSUBAR (PTY) LTD

(Registration number 68/02103/07)

Respondent

FORWARD ENTERPRISES (PTY) LTD

Intervening Shareholder

SOLOMON WEINER

1st Intervening Shareholder

SAMUEL TWORETSKY

2nd Intervening Shareholder

JUDGMENT: 15 AUGUST 2001

VAN REENEN, J:

First- and second applicants launched an application for the winding-up of the respondent on 23 May 2001 on the basis that it was just and equitable.

First- and second respondents and Forward Enterprises (Pty) Ltd (Forward) each hold one third of the shares in the respondent.

Forward and two of the directors of the respondent namely Mr Solomon Weiner (Weiner) and Mr Samuel Tworetsky (Tworetsky) on 23 May 2001, by notice of motion, applied for leave to intervene in the proceedings instituted by first- and second applicants so as

to seek the dismissal of the winding-up application and an order that the applicants be ordered to pay the intervening parties' costs on an attorney and client scale jointly and severally.

By agreement between the parties the court on 23 May 2001 postponed the winding-up application as well as the intervention application to 14 August 2001 for hearing in the 4th division and directed the applicants to deliver further affidavits on or before 14 June 2001. The intervening parties were authorised, if deemed necessary, to file further affidavits dealing with the applicants' opposition to the application for leave to intervene, before 5 July 2001.

No further affidavits were filed but the applicants on 26 June 2001 filed a notice in terms whereof they withdrew the application against the respondent and tendered to pay its party and party costs. The applicants on 5 July 2001 filed a further notice in terms whereof they, in addition to withdrawing the application against the respondent, tendered to pay the party and party costs of Forward, Weiner and Tworetsky (hereinafter referred to as the intervening parties).

The issue for decision is whether the intervening parties are entitled to their costs on an attorney and client or on a party and party scale.

Rule 41(1) provides as follows:

“(1)(a) A person instituting any proceedings may at any time before the matter has

been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the taxing master shall tax such costs on the request of the other party.

(b) A consent to pay costs referred to in paragraph (a), shall have the effect of an order of court for such costs.”

As it is the practice in this division for matters to be postponed to 4th division only after a date for hearing has been arranged with the registrar, it must be accepted that the winding-up and the intervention applications were set-down to be heard on 14 August 2001. Accordingly the winding-up application could be withdrawn only with the consent of the respondent or the leave of the court, neither of which was obtained. Accordingly the purported withdrawal was ineffectual (See: **Protea Assurance Co Ltd v Gamlase and Others** 1971(1) SA 460 (E) at 465 G). As it is not ordinarily the function of a court to compel a plaintiff/applicant to continue with proceedings against such a party's will (See: **Levy v Levy** 1991(3) SA 614 (A) at 620 B) and in order to obviate the squandering of court time, leave to withdraw the winding-up application is granted to the applicants to the extent that such

leave is necessary.

In terms of rule 41(1)(b) the tender of costs on a party and party basis in the notice of withdrawal of the winding-up application has the effect of an order of court for such costs. The result of the withdrawal of the winding-up application is that the need for the consideration of the intervention application has fallen away. As the tender of party and party costs to the intervening parties, in the context of the purported notice of withdrawal was limited to the winding-up application, it is for this court to decide whether the intervening parties are entitled to costs orders in respect of the intervention application and if so, the scale thereof. Those issues must be decided on the basis that the applicants have withdrawn the winding-up application and no longer place any reliance on the factual averments in the founding and supporting affidavits filed in that application and furthermore have not refuted the factual averments in the affidavits filed by the intervening parties in support of the intervention application. Accordingly the issues in question must be decided on the intervening parties' version. It is only in exceptional circumstances that a party that has been put to

the expense of opposing withdrawn proceedings will not be entitled to all the costs caused thereby (See: **Germishuys v Douglas Besproeiingsraad** 1973(3) SA 299 (NK) at 300 D). The intervening parties' counsel on the strength of **Epstein & Payne v Fraay and Others** 1948(1) SA 1272 (W) contended for costs on a punitive scale as the applicants by having failed to ascertain the correctness of their factual averments made incorrect and misleading statements. Although there may be merit in that contention, I prefer to base the exercise of my discretion in awarding attorney and client costs to the intervening parties in respect of the intervention application, on the unfairness thereof that they should be out of pocket in respect of their attorney and client costs for having sought to intervene in proceedings of such questionable merit that the applicants withdrew it as soon as opposition manifested itself.

As no blameworthiness is attributable to the applicants for having opposed the intervening parties' application for costs to be awarded on an attorney and client scale, the costs of 14 August 2001, in my view, should be awarded on a party and party scale.

Accordingly the following order is made -:

“The first and second applicant are ordered to pay the costs of the Intervening Shareholder (Forward), the First Intervening Director (Weiner) and the Second Intervening Director (Tworetsky) as follows –

- a) in respect of the winding-up application on a party and party scale;
- b) in respect of the intervention application on an attorney and client scale; and
- c) in respect of the appearance on 14 August 2001 on a party and party scale

jointly and severally.”

D. VAN REENEN