REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

(1)	REPORTABLE:NO
(2)	OF INTEREST TO OTHER JUDGES:YES
(3)	REVISED: YES
.....	24/05/2022
SIGNATURE	DATE

CASE NO: 1029/2019

In the matter between:

SAVE THE MAIZE BELT SOCIETY Applicant

and

THE MEC FOR AGRICULTURE, RURAL DEVELOPMENT, LAND AND ENVIRONMENTAL AFFAIRS: MPUMALANGA PROVINCIAL GOVERNMENT First Respondent

CHIEF DIRECTOR – INTERGRATED ENVIRONMENTAL AUTHORISATION DEPARTMENT OF ENVIRONMENTAL

AFFAIRS Second Respondent

THE DIRECTOR – APPEALS AND LEGAL REVIEW
DEPARTMENT OF ENVIRONMENTAL AFFAIRS Third Respondent

DIALSTAT TRADING 115 (PTY) LTD Fourth Respondent

J U D G M E N T

MASHILE J:

INTRODUCTION

[1] This is an interlocutory application brought in terms of Uniform Rule of Court 42(1)(b). On 11 May 2021, granting an order that favoured the Fourth Respondent ("Dialstat") in the main case, this Court per Legodi JP directed firstly, that the decision of the First Respondent ("the MEC") dated 19 November 2018 dismissing the appeal of the Applicant ("the Society") on procedural grounds be reviewed and set aside. Secondly, that the internal appeal by the Society be referred back to the MEC for consideration of the appeal on merits. Lastly, he also ordered that costs be borne by all the Respondents jointly and severally the one paying the others to be absolved. The other directions that he gave concern mainly how the MEC was expected to go about observing the order of the Court. As such, I do not deem it necessary to burden this judgment with their description.

[2] At the centre of the controversy in this application is whether or not the Court in making the cost order in the main application as outlined in Paragraph 1 *supra* made a patent error as envisaged in the Rule. It was common cause between the Society and Dialstat that the decision of the MEC ought to be set aside. That said, they disagreed on

substitution with the former preferring that the matter be referred back to the MEC for reconsideration while the latter insisted on the Court substituting the decision of the MEC for its own.

[3] This Court weighed up the arguments of the parties and resolved that it would be proper to refer the matter back to the MEC. Insofar as the costs of the matter were concerned, the first notice of motion of the Society sought costs against any Respondent who opposed the application. Later on, it amended it twice, one delivered on 5 December 2019 where it seeks costs against the Respondents excluding Dialstat and another, which it delivered on 12 February 2020 where it asks for costs against all four Respondents.

[4] The Respondents will be referred to in their actual names but where I mention Respondents it will mean the First to Third Respondents. The Fourth Respondent will simply be referred to as Dialstat. This application, on the face of it, has been brought by the Society, yet Dialstat is in reality the Applicant even though it is cited as the fourth Respondent. I do not wish to pursue the point any further but its peculiarity attracted my comment. The decision of the Society not to ask for costs against Dialstat was inspired by the latter not opposing the review application. Notwithstanding the Society's express decision not to ask for costs against Dialstat, this Court granted costs against all the Respondents with Dialstat included jointly and severally.

[5] It is this decision of the Court that Dialstat wants to set aside on the basis of Rule 42(1)(b). The Society is not opposing this application. The Respondents are opposing this application on the basis that firstly, the High Court was legally entitled to grant an order of costs against Dialstat and secondly, that Dialstat was afforded a general opportunity to make submissions on costs in consequence of a directive issued by this Court at the hearing.

FACTUAL BACKGROUND

[6] The facts that led to this Court granting the 11 May 2021 order in the main application are largely a matter of common cause. On 6 December 2010 and in terms of Section 22 of the Mineral and Petroleum Resources Development Act 28 of 2002, Dialstat applied for a mining right to mine coal on various properties in the district of Delmas, Mpumalanga. At the time Dialstat submitted its application, it was required to obtain various different regulatory approvals in order to commence mining, including an environmental authorisation in terms of s24 of National Environmental Management Act ,107 of 1998 ("NEMA").

[7] Dialstat applied for an environmental authorisation on 23 October 2013. The authorisation was granted by the second Respondent ("the Chief Director") on 11 November 2014. On 9 December 2014, the Society submitted an internal appeal to the MEC against the Chief Director's decision, in terms of s43 of NEMA (read with regulation 60 of the 2010 Environmental Impact Assessment Regulations) ("EIA"). Dialstat opposed the appeal and submitted an answer to the appeal on 12 January 2015. The Society replied on or about 22 April 2015. Dialstat filed a supplementary response on 12 May 2015.

[8] In terms of the 2010 EIA Regulations, the MEC ought to have determined the appeal on or before 24 July 2015, which he failed to do. It is alleged by Dialstat that while the MEC's office assured it on no less than five occasions during 2016 and 2017 that a decision was being prepared, in fact, at that time the Department had lost all of the files relating to the application. The promises notwithstanding, the MEC could never have prepared a decision at this time. It therefore did not come as a surprise when the MEC did not determine the appeal. Dialstat was obliged to approach this Court on 8 March 2018 to obtain an order compelling him to do so.

[9] The Society opposed this application but in September 2018 this Court ordered the MEC to determine the appeal on or before 20 October 2018. The MEC did not comply with the order timeously. Having initially requested an extension to determine the appeal to the end of November 2018, the MEC's decision was eventually forwarded to Dialstat

on 5 December 2018, although it was dated 19 November 2018. The MEC resolved that there was no appeal before him because the Society's appeal did not contain any grounds of appeal.

[10] According to Dialstat, this decision was manifestly wrong. The Society and Dialstat both understood that the Society's grounds of appeal were contained in the appeal. Dialstat had submitted an answer in the appeal addressing those grounds of appeal. As such, there was no dispute between Dialstat and the Society on this issue. Following this, on or about 25 March 2019, the Society launched an application to review and set aside the MEC's decision and to have its appeal remitted to him for reconsideration.

[11] The Society also sought to set aside the decision of the Chief Director. Neither the MEC nor the Chief Director was able to provide a record for the application. In consequence, Dialstat had to reconstruct one. A recreated record was ultimately finalised on 27 November 2019 and the Society delivered a supplementary founding affidavit on or about 5 December 2019. Dialstat delivered an answering affidavit on 25 March 2020, as did the Chief Director.

[12] In her affidavit, the Chief Director alleged that the MEC was not a party to the application because, although he was correctly described in the founding affidavit, he was incorrectly referred to as the Minister in the header to the notice of motion and founding affidavit. The Chief Director raised the alleged non-joinder of the MEC as a point *in limine* in the application. Dialstat alleges that this point was raised despite the fact that the MEC's office had been served with the application and was aware that the MEC's decision was sought to be set aside.

[13] Besides, the MEC's office had assisted in preparing a record of his decision for purposes of the review application. The MEC was also correctly cited in the founding affidavit. The incorrect description of him in the headings to the Society's papers was clearly nothing more than a clerical error, and the Society (on Dialstat's suggestion) applied to amend these descriptions. The Respondents opposed the amendment and

persisted with the point *in limine*, which was then argued on 19 November 2020. The point was dismissed at the hearing, but the Respondents then immediately sought leave to file an answering affidavit on behalf of the MEC, which the Court granted.

[14] The MEC delivered an answering affidavit on 14 January 2021. The MEC conceded in his answering affidavit that his decision was wrong but nonetheless persisted that his decision ought not to be set aside. The matter was set down for hearing on 4 May 2021. A few weeks before the hearing, the MEC filed supplementary heads of argument and a practice note in which he expressly conceded that his decision should be set aside. Additionally, he then supported Dialstat's submission that his decision should be substituted by the Court and that the appeal should not be remitted to him for reconsideration.

[15] The parties therefore only dealt with the issue of substitution at the hearing. This Court handed down its judgment on 11 May 2021. It set aside the MEC's decision but remitted the appeal back to him for reconsideration rather than substituting his decision and ordered all of the Respondents to pay the costs of the application, jointly and severally. Aggrieved by the Court's decision on payment of costs, Dialstat launched this application on 1 June 2021. The Respondents delivered their answering affidavit on 14 July 2021.

ISSUES

[16] The main issue for consideration is whether or not the facts described above support the allegation that there exists a patent error in the cost order that the Court has made. Below follows the law that will guide this Court in determining the outcome of this judgment.

LEGAL FRAMEWORK

[17] Obviously the starting point has to be the provisions of Rule 42(1)(b) being the one in terms of which this application has been brought. The Rule provides that a Court may:

"mero motu or upon the application of any party, rescind or vary … an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission"

[18] A patent error occurs where an order does not reflect the true or real intention of the Court that made it. See in this regard *Consolidated Leasing Corporation Ltd v McMullin* [1]. The Court's intention is primarily determined by reference to its judgment. To this extent, it is crucial to read the judgment with in mind, the applicable general rules of interpretation. Perhaps it might be prudent to refer to the case of *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2]where the following was stated:

"…. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself"*, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."*

[19] An order may therefore contain a patent error if there is no evidence that it reflects a considered decision by a Court given expression in its judgment. The case of *Seatle v*

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[1] 1975 (3) SA 606 (T) at 608E – F

[2] 2012(4) SA 593 (SCA) at para 18

Protea Assurance Co Ltd [3]finds application here. The correction of a patent error must not alter the sense or substance of the Court's judgment. See, *Firestone South Africa (Pty) Ltd v Gentiruco AG* [4], which has been approved and applied in subsequent cases including the Constitutional Court.

[20] Rule 42(1) provides further that the powers identified in sub-rules (a) – (c) are *"in addition to any other powers it might have" to rescind or vary an order".* One of those other powers is the power to reconsider an award of costs made by a Court without counsel having been afforded an opportunity to address the Court on the appropriateness of such an order. The Appellate Division, as it then was, in the Firestone case *supra,* has explained that the basis for this rule is that:

"the Court is always regarded as having made its original order 'with the implied understanding' that it is open to the mulcted party (or perhaps any party 'aggrieved' by the order ...) to be subsequently heard on the appropriate order as to costs."

ANALYSIS

WHETHER OR NOT THE COST ORDER AGAINST DIALSTAT WAS A PATENT ERROR

[21] The Respondents' assertions in this respect is that a Court always has a discretion to or not to grant costs against any party. Besides, argue the Respondents, Dialstat cannot cry foul because it has squandered the general opportunity the Court had afforded to all the parties at the hearing of the main case to prepare further heads of argument making submissions on costs. The Respondents conclude that there is no merit in the argument that Dialstat must be excused from paying the costs jointly and severally the one paying the others to be absolved.

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[3] 1984 (2) SA 537 (C) at 541C

[4] 1977 (4) SA 298 (A) at 307D

[22] The assertion of the Respondents on costs must be weighed against the submissions made by the Society both in its papers and oral argument in Court. In its second amended notice of motion delivered on 12 February 2020, the Society specifically seeks costs against all four Respondents but in its supplementary heads delivered on 25 February 2021 it submits that if the application was reviewed and set aside, it would be a substantial success and the Respondents, with the exception of Dialstat, should be mulcted with costs.

[23] The revised supplementary heads of the Society served on 1 March 2021 and two draft orders submitted before the hearing do not alter its stance on costs. Even during oral argument before Court on the date of hearing, Counsel for the Society made it clear that the Society expected the Respondents, and not Dialstat, to pay the costs for all the interlocutory applications that preceded the hearing of the review itself. Counsel went on to validate the approach of the Society on costs by adding that the review application became inexorable as a result of the unbecoming conduct of the MEC. Added to this is the fact that Dialstat did not oppose the Society consequently it had no reason to ask for costs against a party that agreed with it.

[24] Given the trite principle that a Court would invariably furnish reasons for the order that it makes, the question becomes why in this instance did it depart from that rule without an account of its decision? The probable answer is that the Court only looked at the last amended notice of motion and noted that costs were sought against all the Respondents. Had it seen the draft orders, the supplemented heads and the revised version thereof and given a proper consideration to Counsel's oral argument on costs, it would have sought the views of the parties concerned before making an order different from that requested by the Society.

[25] Fortifying the approach adopted above is that even in its judgment, the Court makes no comment at all on why it did so. I find myself agreeing with Counsel for Dialstat that it would be staggering that the judgment would be replete with reasons on the substantive controversy between the parties yet be short on reasons for the cost order.

This omission deeply suggests that the order was an inadvertent patent error as contemplated in Rule 42(1)(b).

[26] Turning then to the question whether or not the alteration of the Court order to reflect its true intention will interfere with the substance of the Court order. Once I have concluded that the granting of the costs against Dialstat was a patent error, it means that the Court's intention could not have been to grant costs against all the Respondents without exception. Had the Court been mindful of all the facts surrounding the question of the costs, it would have granted costs as requested by the Society. In the result, I find it exceedingly difficult to fathom how a variation of the order to reflect what could have been the actual intention of the Court will modify the general theme of the order.

[27] Would the Court have made an adverse cost order against Dialstat had it been conscious of the submissions of the Society on costs? The answer has to be in the negative because the general rule is that if a Court intends to depart from the wishes of a party on costs, it would invite representations from the affected party on the subject. The Court in this instance did not call upon Dialstat to state why it would be inappropriate to mulct it with costs. The only reasonable inference to draw is that had it been aware it would not have done so.

[28] Additionally, it should be borne in mind that the decision by the MEC to decline to hear the appeal on the basis that it lacked grounds of appeal was essentially in favour of Dialstat. However, noticing that the MEC's decision was conspicuously incorrect, it supported the review application by the Society albeit that its approach on whether to substitute or remit to the MEC was at variance. The MEC alone was responsible for the matter being taken to Court. Strangely, shortly before the hearing of the review, he conceded that contrary to his earlier opinion, the appeal did contained grounds of appeal. Given those facts, why should Dialstat pay cost jointly and severally with the other Respondents?

[29] To the extent that the Respondents contend that the order of the Court is consistent with the rule that costs follow results, they need to be reminded that the Society and Dialstat were in agreement that the MEC's decision was wrong and that it had to be reviewed and set aside. Insofar as they were concerned, the matter could have been resolved without the Court. So, the dispute whether or not to remit was not the cause of the matter proceeding to Court. The reason for that was the MEC's persistence that the appeal lacked grounds for the appeal. This is the disagreement that forced the parties to approach Court.

[30] The question concerning whether to substitute or remit to the MEC therefore arose subsequently. Had the MEC not insisted on the matter proceeding to Court, the question of substitution or referral back to the MEC would not have been considered at all by the Court. There are just so many reasons why the MEC should be mulcted with costs.

[31] some of them are the gratuitous and unconscionable delay in hearing the matter and when he eventually heard it, he made a discernibly incorrect decision. As though that was not enough, he raised non-joinder of the MEC on the ground that he was incorrectly described. As the Court remarked when dismissing the point, it was completely fallacious because although there was a cosmetic error in typing, it was one that was glaring and could have been corrected without the need for raising the non-joinder.

[32] The Respondents are disingenuous by claiming that the Court had afforded Dialstat to make representations on costs generally. This allegation does not square up with what their Counsel states in his heads, which reads: "the parties have been directed to file these heads of argument in which the issue of costs addressed pertaining to the interlocutory applications for, compelling the State Respondents to file the Uniform Rule 53 record, and the application for condonation of filing supplementary Uniform Rule 53 record, respectively" (So, it is apparent from the submission of the Respondents' Counsel that the representations related to costs other than those of the review application itself. This behavior of deliberate distortion of facts deserves censure in the form of costs.

[33] Lastly and as submitted by Counsel for Dialstat, assuming that the Court indeed gave Dialstat opportunity to make representations on costs, why would it have done so especially in circumstances where firstly, the Society was not seeking costs against it. Secondly and perhaps most importantly, the Respondents themselves were not asking that Dialstat be directed to pay costs jointly and severally with them. Thus, it is extraordinary that the Respondents would now persists that Dialstat should be liable for costs like all of them.

CONCLUSION

[34] The principle that the Court enjoys discretion whether or not to order costs against a particular party remains. That is not the point though. Where it exercises that discretion, it is anticipated that it would furnish reasons for its decision or if it does not, it would invite the parties to state why it should not exercise such discretion in a certain manner. The fact that the Court in this instance did not do so is an intimation that had it done so, it would have adhered to the general rule. The fact that it does not, must as such, be a patent error vulnerable to a rescission in terms of Rule 42(1)(b). The application must succeed.

ORDER

[35] Against the background above, I am constrained to make the following order:

1. The order of this court dated 11 May 2021 on costs is set aside and rescinded and is substituted for the following:

   "The First to Third Respondents in the main review application are directed to pay the costs of the Society jointly and severally, the one paying the others to be absolved.";

2. Insofar as the costs hereof are concerned, the First to Third Respondents are liable for the costs of Dialstat, which costs include those of two Counsel, where so employed.

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 24 May 2022 at 10:00.

APPEARANCES:

Counsel for the Applicant:	**Adv MA Wesley SC**
Instructed by:	**Norton Rose Fulbright South Africa Inc**
Counsel for the State Respondents:	**Adv S Mpakane**
Instructed by:	**The office of State Attorney, Pretoria**
Date of Judgment:	**24 May 2022**