

THE HIGH COURT OF SWAZILAND

MABY CORPORATE CLOTHING (PTY) LTD

Plaintiff

And

ALTERNATIVE INVESTMENTS (PTY) LTD

Defendant

Civil Case No. 2501/2005

Coram: S.B. MAPHALALA - J

For the Plaintiff : MISS ZWANE

For the Defendant: MR. J. WARING

RULING

(On costs) (2nd December 2005)

[1] On the uncontested motion of the 28 November 2005, the Applicant who is the Plaintiff in the main action was granted an order under Rule 28 (4). The effect of the order in terms of prayer 1 of the Notice was to grant Applicant leave to amend its Particulars of Claim. However, on prayer 2 thereof being costs, a dispute arose as to

who bears the costs of the application. This therefore is the subject matter of this short ruling.

[2] Miss Zwane appearing for the Applicant argued strenuously that Applicant is entitled to wasted costs as the earlier objection by the Respondent (Defendant in the main action) was not justified. She referred the court to the textbook by Herbstein and Von Winsen, *The Civil Practice of the Supreme Court of South Africa*, 4th Edition at page 527 to the proposition that it is implicit in the procedure prescribed in Rule 28 that an objection to a Notice to Amend must be reasonably and responsibly taken. If an objection is taken merely to inconvenience the litigant seeking the amendment, or in an attempt to compel him to incur the costs of an application to court, when the opponent has no real grounds for objecting and either does not appear in court at all to oppose the application or appears and raises some frivolous objection; then the court is likely to order the objecting party to pay all the costs incurred in bringing the application (see also the case of *Gcanga vs A.A. Mutual Insurance Association Ltd* 1979 (3) S.A. 320 (E) at 330 D - E).

[3] Mr. Waring for the Respondent advanced *au contraire* arguments.

[4] The general principle in such matters is stated by the authors Herbstein et al, (*supra*) at page 527 that each case depends upon its own merits and the discretion of the court to make an order that is fair in all the circumstances is unfettered (see also *Gcanga's case* (*supra*) at page 330 D - E). Having considered both arguments in *casu*. I have come to the considered opinion that it will be fair in the circumstances that costs be costs in the course, and it is so ordered.

S.B. MAPHALALA

JUDGE