REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 2010/38437

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

13/6/13
DATE

SIGNATURE

In the matter between:

DREAM SETS (PTY) LIMITED	**Applicant/Respondent Plaintiff**
and	
STRIKE PRODUCTIONS (PTY) LIMITED	**Respondent/Applicant Defendant**

JUDGMENT

RATSHIBVUMO AJ:

1. This is an application by the plaintiff in the main action for costs order in respect of a number of interlocutory applications brought by or against it

by the defendant since the issue of summons. I shall refer to the Applicant as the plaintiff and the Respondent as the defendant. The defendant opposes this application.

2. **Background:** The plaintiff issued summons on 10 May 2012. Following the pleadings and discovery, the plaintiff issued a Rule 35 (12) and (14) calling for inspection of certain documents referred to in the defendant's plea. The defendant failed to respond to that notice. The order was sought and granted against the defendant on 7 August 2012 by Horn J, ordering the defendant to comply with the said notice. The defendant failed to comply with the said order prompting the plaintiff to launch an application to strike parts of the plea by the defendant. The defendant opposed the striking out application and the matter was set down for hearing on 5 February 2013. The matter was however postponed following a request to do so by the defendant on 4 February 2013, so as to allow it an opportunity to amend its plea and to introduce a counterclaim against the plaintiff.

3. On 25 February 2013 the defendant launched an application to supplement its Answering Affidavit to the application to strike out brought by the plaintiff. At the same time, the defendant served a Rule 28 notice on the plaintiff in terms of which it intended to amend its plea and to introduce a counterclaim, an application the plaintiff objected. After the objection, the defendant did not proceed with its application to amend its plea and to introduce a counterclaim. On 12 April 2013, the defendant eventually served and filed a supplementary discovery affidavit which complied with the order by Horn J referred to above. This compliance made the strike out application by the plaintiff and the application for leave to supplement the Answering Affidavit to be moot save for the costs.

4. **Costs:** The purpose of an award of costs is to indemnify a successful party who has incurred expenses in instituting or defending an action.[1] In *Jenkins v SA Boiler Makers, Iron & Steel Workers & Ship Builders Society*,[2] the Court held that where a disputed application is settled on a basis which disposes of the merits except insofar as the costs are concerned, the Court should not have to hear evidence to decide the disputed facts in order to decide who is liable for costs, but the Court must, with the material at its disposal, make a proper allocation as to costs. In that case Price J went on to state,

> "It seems to me to be against all principle for the Court's time to be taken up for several days in the hearing of a case in respect of which the merits have been disposed of by the acceptance of an offer, in order to decide questions of costs only... I cannot imagine a more futile form of procedure than one which would require Courts of law to sit for hours, days, or perhaps even for weeks, trying dead issues to discover who would have won in order to determine questions of costs, where cases have been settled by the main claims being conceded... When a case has been disposed of by an offer which concedes the main claim and the costs of the whole case have still to be decided, I think the Court must do its best with the material at its disposal to make a fair allocation of costs, employing such legal principles as are applicable to the situation"[3]

5. Just as Van Niekerk J pointed out in *Gamlan Investments (Pty) Ltd v Trilion Cape (Pty) Ltd*,[4] a party must pay such costs as have been unnecessarily incurred through his failure to take proper steps or through his taking wholly unnecessary steps.

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[1] *Jonker v Schultz* 2002 (2) SA 360 (O) at 363H-I; *Maloney's Eye Properties BK v Bloemfontein Board Nominees Bpk* 1995 (3) SA 249 (O) at 257. See also *Cobb v Levy* 1978 (4) SA 459 (T) at 464-5

[2] 1946 WLD 15

[3] *Jenkins v SA Boiler Makers, Iron & Steel Workers & Ship Builders Society supra,* at 17-18.

[4] *Gamlan Investments (Pty) Ltd v Trilion Cape (Pty) Ltd* 1996 (3) SA 692 (C) at p 701 C.

6. Even in interlocutory application, it is easy to tell who the successful party is just as it is in main action. If a party launches an interlocutory application which though opposed, is granted by a court, such a party is successful in that application. Equally, if an application is abandoned because the other party complied which what had caused the launching of said application; the party that abandons the application would be successful since the abandonment is due to compliance. For if the defending party is of the view that the application was unnecessary and the court would also find it so, there would be need for him to comply so that the court would show its displeasure in the application by dismissing it. However if the court dismisses an application, the opposing party would be the successful one. Even in instances where the application is withdrawn because the party launching it has reconsidered the wisdom of bringing the application, the opposing party would be successful.

7. The court's determination on whether the application or an opposition thereto was reasonable cannot be divorced from the ultimate finding or order of a court. I would therefore find it difficult to reach a conclusion that an application was unreasonable if the court proceeded to grant it. It could be that the plaintiff's application for an order that the court compels the defendant to comply with Rule 35 (12) & (14) may have been unwarranted since the documents to be discovered belonged to the plaintiff. But the defendant could have opposed the application so it is not granted. The court therefore granted the order and such an order still stands since it has not been rescinded or set aside.

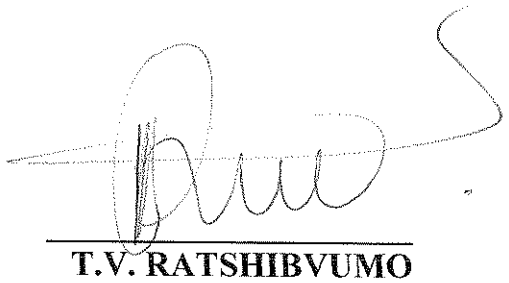
8. I am equally not convinced that the defendant's opposition of the striking out application launched by the plaintiff was reasonable seeing it was based on failure on its the part to comply with the court order, which it ultimately

complied with. The fact that the decision not to comply with the order was taken before the current attorneys of the defendant were on record does not take the matter any further since the defendant is the same person and the attorneys act on its instructions.

9. In light of the plaintiff having shown success in these applications, I therefore make the following costs order:

10. The defendant is ordered is ordered to pay

1. All costs occasioned by the application to strike out (brought by the plaintiff) on an opposed scale;
2. All costs occasioned by the application for postponement brought by the defendant on an unopposed scale;
3. All costs occasioned by the application for leave to supplement (brought by the defendant) on an opposed scale;
4. And the reserved costs (wasted costs) of 5 February 2013 on an opposed scale.



T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

Date Heard: **21 May 2013**

Judgment Delivered: **13 June 2013**

For the Applicant:	**Adv. JC Uys**
Instructed by:	**Marais Stephens Attorneys** **Randburg**
For the Respondent:	**Adv. M Nowitz**
Instructed by:	**Nowitz Attorneys** **Johannesburg**