REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER:26471/2016

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: ~~YES~~/NO

2.OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

3.REVISED

17/09/2019
DATE

SIGNATURE

In the matter between:

NICHOLAS CHARLES THOMAS CATLING	First Applicant
BLOSSOM SHEREEN CATLING	Second Applicant
and	
MARINA CONSTAS N.O.	First Respondent
THE BROADLANDS BODY CORPORATE	Second Respondent

JUDGMENT

DIPPENAAR J:

Introduction

[1] This application relates to legal costs. The applicants and second respondent (collectively referred to as "the parties" where appropriate) were involved in arbitration proceedings before the first respondent, pursuant to which the applicants launched review proceedings. The review proceedings were resolved and resulted in a settlement agreement being concluded. The first respondent has not participated in these proceedings and no relief is sought against her.

[2] The applicants sought an order directing the respondent to pay the costs of:

[2.1] The arbitration proceedings concluded before the first respondent on 8 June 2016;

[2.2] The subsequent review application which culminated in a settlement agreement which was made an order of court on 24 August 2017;

[2.3] The costs of the present application.

[3] In the alternative, the applicants sought an order directing the Chairperson of the Johannesburg Society of Advocates to appoint a suitable arbitrator to finally determine the costs issues.

[4] The second respondent, in a conditional counter application, sought an order for the costs of all the proceedings in its favour.

The facts

[5] The background facts are uncontentious. A dispute arose between the parties regarding the applicants' alleged indebtedness to the second respondent in respect of alleged arrear levies and related charges, including penalty interest, pertaining to various sectional title units owned by the applicant.

[6] This dispute was referred to the first respondent as arbitrator, who furnished an award on 15 June 2016 in favour of the second respondent.

[7] Pursuant thereto, the applicants launched review proceedings against the award made by the first respondent, which the second respondent opposed. Shortly before the hearing, the parties concluded a settlement agreement, which was made an order of court on 24 August 2017.

[8] In terms of the settlement agreement, the second respondent agreed that the award be reviewed and set aside and the parties agreed to meet and undertake a debatement of the applicants' alleged indebtedness to the second respondent, termed "the issue" in the settlement agreement.

[9] Pursuant to the settlement agreement, the parties met and debated the account on 27 September 2017. New information was provided by the applicants regarding certain payments made by them, hitherto not disclosed in either the arbitration or the review proceedings. The debatement of the account established that the applicants were not indebted to the second respondent. The only issue which the parties could not resolve was that of costs.

[10] The applicants contended that as they were substantially successful and it was established that they were not indebted to the second respondent, they were entitled to

all the costs of the preceding proceedings as the second respondent had erred all along in contending that the applicants were indebted to it.

[11] The second respondent on the other hand contended that the new payments and substantiating documents raised by the applicants at the debatement meeting constituted a new defence not previously raised. The applicants had not prior to the debatement meeting raised any dispute or query regarding the schedules on which the second respondent's claim was based. On this basis, the second respondent disavowed liability for the costs. It proposed that the applicants should be liable for the costs of the arbitration and that each party should bear its own costs in relation to the review proceedings.

[12] On 24 November 2017, the second respondent advised the applicants: *"If the parties cannot agree on the costs of the arbitration, same should be referred to Marina Constas for argument in terms of clause 4 of the settlement agreement*".

[13] On 1 February 2018 the second respondent addressed a letter to the first respondent informing her that the costs issue remained outstanding and requesting her to indicate her availability to hear argument on the dispute. The applicants addressed a follow up letter to the second respondent on 13 March 2018.

[14] On 20 June 2018 the applicants addressed a further letter to the first respondent in which they stated inter alia, "*unless we hear to you to the contrary before close of business on 28 June 2018, we shall accept your silence as a formal refusal to act in accordance with section 10(1) of the Arbitration Act 42 of 1965.*"

[15] The first respondent did not reply to any of the correspondence sent to her.

[16] The applicants proposed the appointment of an alternative arbitrator, being a suitable junior counsel at the Johannesburg bar, to determine the costs issues and

requested the second respondent to provide the names of three advocates to be nominated as alternative arbitrators.

[17] The second respondent initially adopted the stance that the initial arbitrator should determine the costs issue as the additional costs of an alternative arbitrator would be out of proportion and unnecessary. On 6 August 2018, it changed its stance, now contending that there was no longer an arbitral dispute between the parties and that any dispute should be dealt with in another forum. This triggered the present application.

Lack of jurisdiction and functus officio

[18] The second respondent contended that pursuant to the order granted on 24 August 2014 in terms of which the settlement agreement was made a court order, the court is functus officio and has no jurisdiction to determine the costs.[1]

[19] The second respondent's approach was conflicting in various respects. Whilst challenging the court's jurisdiction to determine the costs issues, it did not seek a stay of the proceedings. Instead, it launched a conditional counterapplication seeking the award of all costs in its favour. During argument, second respondent's counsel conceded that the second respondent in doing so, was hedging its bets. It further insisted that the costs be determined by an arbitrator, whilst simultaneously contending that no arbitral dispute exists.

[20] The papers do not address the source of the referral of the dispute to arbitration. It appears to have been thus referred by agreement. The existence of an agreement to arbitrate does not deprive a court of its ordinary jurisdiction over the disputes; but obliges the parties to refer such disputes in the first instance to arbitration and to make it

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[1] Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A) at 306f-G' rEke v Parsons 2016 (3) SA 37 (CC) para 31; Slabbert v MEC for Health and Social Development of Gauteng provincial Government (432/2016) [2016] ZASCA 157 (3 October 2016) para 7

a prerequisite to an approach to the court for a final judgment. The second respondent did not actively seek a stay of the proceedings in its counter application, rather it sought the granting of costs in its favour. The court's jurisdiction remained intact[2]. Furthermore, there is merit in the applicants' contention that in launching the counter application, the second respondent consented to the jurisdiction of this court.[3]

[21] To determine whether the court is *functus officio*, it is necessary to consider the relevant portions of the order of 24 August 2017 in terms of which the settlement agreement concluded between the parties was made an order of court.

[22] It is trite that once a settlement agreement has been made an order of court, it is an order like any other and will be interpreted like any other court order. As stated by the Constitutional Court in *Eke v Parsons* [4], the well-established test on the interpretation of court orders is this:

> *"The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention".*

[23] Clause 3 of the settlement agreement provided: "*The parties shall meet at a mutually agreed time and venue, within a period of 30 days from date of this settlement agreement being made an order of court, and as between the parties proceed to debate the Applicants' alleged indebtedness to the Second Respondent, with reference to the schedules to the First respondent's final award made on 15 June 2016 ("the issue")".*

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[2] Prekh v Shah Jehan Cinemas (Pty) Ltd and Others 1980 (1) SA 301 (D) 305E-H
[3] Mediterranean Shipping Co v Speedwell Shipping Co Limited and another 1986 4 SA 329 D at 333H; American Flag PLC v Great African T-Shirt Corporation CC ; American Flag PLC v Great African T-Shirt Corporation CC; In Re Ex Parte Great African T-Shirt Corporation CC 2000 (1) SA 356 W 377G, 380A-I
[4] 2016 (3) SA 37 (CC) para [30].

[24] Clause 4 of the settlement agreement provided; *"In the event of the parties being unable to finally resolve and settle the issue within a further 30 day period from date of the meeting contemplated in paragraph 3 above, or such extended time period agreed to between the parties, in writing, the issue will be referred to the first respondent for adjudication and final determination on such aspects thereof as may remain in dispute between the parties."*

[25] Clause 5 of the settlement agreement provided: *"The costs of the (review) application shall be costs in the arbitration, together with any additional costs in respect of the recommenced arbitration proceedings contemplated in paragraph 4 above'.*

[26] Considering the purpose and context of the order and a sensible interpretation of its wording[5], the order in its terms did not in my view determine the costs issues (other than directing that the costs of the review proceedings would be costs in the arbitration). It envisaged that the costs issues would be determined pursuant to the outcome of the arbitration proceedings. The order did not address what would happen if the first respondent refused to act as arbitrator or what would occur if costs remained the only outstanding issue.

[27] The order only envisaged the referral to the first respondent of any outstanding aspects pertaining to the applicant's alleged indebtedness to the second respondent for determination, including any additional costs of recommenced arbitration proceedings, if those issues could not be resolved though debatement at the proposed meeting. It did not determine or deal with the costs of the arbitration proceedings, nor regulate how they were to be determined, given that the arbitrator's award was set aside.

[28] Factually, there was no need to recommence the arbitration proceedings as the issues regarding the applicant's alleged indebtedness were resolved pursuant to debatement at the meeting.

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[5] The City of Tswane Metropolitan Municipality v Blair Atholl Homeowners Association (106/20180 [2018] ZASCA 176 (3 December 2018) paras [61]-[66]

[29] The parties both relied on *Firestone South Africa (Pty) Ltd v Genticuro AG* ("Firestone") [6]. The second respondent relied on the general principle that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it[7].

[30] It is trite that the effect of a settlement order is to change the status of the rights and obligations between the parties and that generally, parties may not again litigate on the same matter once it has been determined on the merits. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the lis between the parties; the lis becomes res iudicata. The type of enforcement may be execution or contempt proceedings, or it may take any other form permitted by the nature of the order, that form may possibly be some litigation the nature of which will be one step removed from seeking committal for contempt[8].

[31] I am not persuaded that the costs issue formed part of the *lis* between the parties which was compromised in the settlement agreement. The definition of "the issue" in the order, does not include any reference to the arbitration costs.

[32] The applicants relied on two of the exceptions to the general principle enunciated in Firestone, being (i) that a principal judgment or order may be supplemented in respect of accessory or consequential matters, such as costs, which the court overlooked or inadvertently omitted to grant and (ii) that where counsel have argued the merits and not the costs of a case , but the court, in granting judgment, also makes an order concerning the costs, which order it may thereafter correct, alter or supplement where it is open to an aggrieved party to be subsequently heard on the appropriate order as to costs[9].

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[6] 1977 (4) SA 298 (A)
[7] 306F-G
[8] Eke v Parsons supra paras [30]-[31]
[9] 306H and 307A

[33] Considering the nature of the order and given that the order made no final determination on the cost issues, such reliance is in my view well founded and the principal order may be supplemented by an appropriate order as to costs.

[34] For these reasons, the second respondent's contention that the court is functus officio and lacks jurisdiction to entertain this application, must fail.

Format of application

[35] The second respondent further challenged the short notice format in which the present application was launched and contended that a substantive application, using the long form notice of motion should have been brought. It did not however contend for any prejudice. This challenge lacks merit insofar as the present application is interlocutory and relates to matters incidental to the order granted during the litigation between the parties [10].

Discussion on costs

[36] In my view it would not serve the interests of justice to grant the applicants the alternative relief sought as it would only serve to increase the litigation costs substantially and delay finalisation of the matter. I am fortified in this view by the stance adopted by the second respondent in addressing the merits of the application fully, both in their written and oral submissions. It is thus not necessary to address the second respondent's contention that the alternative relief sought by the applicants is premature.

[37] As a general principle, where a disputed application is settled on a basis which disposes of the merits except insofar as 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

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[10] South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) 549F; Muller v Paulsen 1977 (3) SA 206 (E) 208E

but a court has, with the material at its disposal, to make a proper allocation as to costs[11]. Costs must be decided on broad general lines rather than on lines which necessitate a full hearing on the merits. Even where the decision on costs is separate from the merits, it does not mean that the decision must of necessity be totally isolated from the merits. Each matter must be determined on its own facts in order to determine the extent to which such considerations apply[12].

[38] Insufficient facts have been placed before me to make any reliable determination of who would ultimately have been successful in the review proceedings. The additional payments which were disclosed late by the applicants played no role in the review proceedings and there were other issues which resulted in those proceedings being launched.

[39] In my view, consideration should be given to the conduct of the parties in relation to the litigation in order to determine an appropriate order as to costs. It is trite that 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 [13]. On the facts, it cannot be concluded that the review proceedings were wholly unnecessary.

[40] The applicants' argument is based on the general rule that as they were substantially successful[14] in the arbitration proceedings and the review application, they should be awarded the costs of those proceedings. It is contended that there are no special circumstances justifying a departure from this rule.[15] Their papers do not address the arbitration or review proceedings in any detail.

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[11] First National Bank of Southern Africa Ltd t/a Wesbank v First East Cape Financing (Pty) Ltd 1999 (4) Sa 1073 (SE) 1079G-I; Nxumalo and Another v Mavundla and Another 2000 (4) SA 349 (D) 355E-F
[12] Gamlan investments (Pty) Ltd and Another v Trillion Cape (Pty) Ltd and Another 1996 3 SA 692 (C) 703J-704A
[13] Gamlan 701C-F
[14] Kathrada v Arbitration Tribunal 1975 (2) SA 673 (A) 679
[15] Joubert t/a Wilcon v Beacham 1996 (1) SA 500 (C) 502E

[41] The second respondent on the other hand relies on the existence of special circumstances justifying a departure from the normal rule. It relies on various authorities which establish the principle that where a successful litigant has misled the unsuccessful party to litigate by the withholding of information[16] and the latter acted reasonably in instituting proceedings, a deprivation of costs is justified.[17]

[42] In my view a distinction must be drawn between the arbitration proceedings, the review proceedings and the present application. It is undisputed that in terms of the order, the costs of the review proceedings were costs in the cause in the arbitration. This order is in my view final in effect and not open to reconsideration.

[43] The second respondent had instituted arbitration proceedings against the applicants because its records indicated that the applicants were in arrears and in default of their obligations to pay levies and related charges during the period March 2005 to June 2013. Pursuant to the first hearing before the first respondent on 26 September 2013,an interim award was made on 9 December 2013 and she directed the second respondent to prepare a schedule of all debits and credits illustrating how the arrears were calculated and taking into account the specific challenges made by the applicants in respect of the arrears. The December award was supplemented on 26 February 2014. Pursuant thereto, the second respondent prepared schedules according to the initial awards. A further hearing took place on 8 June 2016, pursuant to which the first respondent made an award against the applicants directing them to pay certain arrears.

[44] On 29 July 2016, the applicants launched review proceedings to set aside the June 2016 award. The second respondent opposed the review proceedings. The matter was due to be enrolled for hearing and heads of argument had been delivered when the

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[16] Nxumalo and Another v Mavundla and Another 2000 (4) Sa 349 (D) 354 B-D
[17] Chetty v Louis Joss Motors 1948 (3) SA 329 (T)' Berkowitz v Berkowitz 1956 (3) SA 522 (SR) 527A; Palley v Knight NO 1961 (4) SA 633 (SR) 636B-D; Rainbow Chicken Farm (Pty) Ltd v Mediterranean Woollen Mills (Pty) Ltd 1963 (1) SA 201 (N) 206A-C; waste Products Utilisation (Pty) Ltd v Wilkes and Another (Biccari Interested party) 2003 (2) SA 590 (W) 597A-B, 599A

parties shortly before the hearing concluded the settlement agreement, which was made an order of court on 24 August 2017. In terms of the settlement agreement, the second respondent consented to the June 2016 award being set aside. The applicants aver that there was merit in the application, evidenced by the second respondent consenting to the award being set aside. The second respondent contended that it concluded the settlement agreement to as a compromise and in order to avoid the costs of high court litigation. By this time however, the majority of the costs in respect of the review proceedings had been incurred and this explanation is unconvincing

[45] On 1 September 2017, the applicants for the first time alleged that they had made certain further payments, not reflected in the schedules prepared by the second respondent. During the debatement of the account during September 2017, it was established that the applicants were not indebted to the second respondent, taking into account the additional payments relied on by the applicants.

[46] In my view, both of the parties contributed to the extensive litigation which ensued. The second respondent initiated the proceedings as dominus litis and bore the onus of proving the indebtedness for which it contended. It relied on records which were ultimately proved to be wrong.

[47] On the other hand, the applicants bore the onus to prove payment and only disclosed the relevant payments after most of the litigation costs had been incurred. The facts do not however establish that the applicants were mala fide in only disclosing the payments so late in the day and the second respondent's attempts to avoid responsibility for its erroneous records do not pass muster. The documentation provided by the applicants contained sufficient information for the second respondent to allocate the payments. Why the applicants did not disclose them timeously, was not explained on the papers. This failure undeniably contributed to an increase in the costs of the litigation.

[48] I do not agree with the second respondent's contention that the applicants caused it to litigate unnecessarily. From the history of the litigation, it is clear that the issue of additional payments was not the only issue between the parties and the interim award of the first respondent had directed it to amend the schedules originally relied on.

[49] There are however exceptional circumstances to justify a departure from the general principle that costs follow the result. Had the applicants disclosed the additional payments earlier, the additional costs occasioned by the debatement during September 2017 could have been avoided. In my view, it would be just between the parties to pay the costs related thereto.

[50] The second respondent's subsequent conduct once the first respondent refused to act, was in my view unreasonable and obstructive, resulted in substantial delay in finalising the matter and necessitated the launching of the present application. It adopted conflicting approaches to regarding who was to determine the costs issue expanding the ambit of the litigation unnecessarily. After initially agreeing to refer the disputes regarding the costs to the arbitrator. Despite the arbitrator refusing to act, the second respondent persisted that the first respondent determine the issue of costs. After eventually conceding her refusal to act some months later, the second respondent contended that no arbitral dispute existed and disregarded the applicant's request to agree to the appointment of an alternative arbitrator. As such, it is fair that it should be liable for the costs of this application.

[51] For these reasons, I grant the following order.

[1] The second respondent is directed to pay the costs of the arbitration.

[2] The applicants are directed to pay the costs relating to the debatement of the account during September 2017.

[3] The second respondent is directed to pay the costs of this application.

F DIPPENAAR
JUDGE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

APPEARANCES

DATE OF HEARING	:	05 September 2019
DATE OF JUDGMENT	:	17 September 2019
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