REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No

_____ _____

DATE SIGNATURE

Case No.: 33395/2018

In the matter between:

THE WASTE GROUP PROJECTS (PTY) LIMITED **Applicant/Defendant**

and

RESHUMILE ENVIRONMENTAL

CO-OPERATIVE LIMITED **Respondent/Plaintiff**

JUDGMENT

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be on 6 August 2020

GILBERT AJ:

1. The defendant in the main action launched an interlocutory application on or about during 20 September 2019 seeking to set aside the delivery by the plaintiff on 16 September of amended pages to its particulars of claim.

2. Both parties delivered full sets of affidavits and heads of argument in the interlocutory application, and the matter was eventually enrolled on 19 June 2020, by the plaintiff as respondent, for hearing on the opposed roll for 3 August 2020.

3. At the commencement of the argument, defendant's counsel indicated that he had instructions to remove the application from the roll as the application lacked merit. When asked whether in those circumstances it was rather appropriate that the application be withdrawn, the defendant's counsel agreed and subsequently during the hearing confirmed that his mandate included withdrawing the application.

4. The plaintiff's attorney, who appeared for the plaintiff as the respondent, unsurprisingly had no difficulty with the application being withdrawn but sought costs consequent upon the withdrawal, and that such costs be paid on an attorney and client scale as a result of the manner in which the defendant conducted itself in relation to its interlocutory application. The plaintiff had given notice in its heads of argument that punitive costs would be sought. Defendant's counsel, who had no instructions in relation to costs, justifiably in the absence of instructions could not accede to tendering costs. Instead he argued that the defendant should

not be ordered to pay costs consequent upon the withdrawal of its application, but that if such costs were to be awarded, such costs should not be on an attorney and client scale.

5. The application having been withdrawn by the defendant, the remaining issue for me to determine is costs, including the scale of those costs.

6. As the defendant withdrew its application, ordinarily it should pay the costs of that application. Upon the defendant's counsel being asked why the ordinary costs order should not then follow, the submission was that as the defendant as applicant had not set down its application but rather the plaintiff as respondent had done so, the defendant should not be penalised for having had to deal with an application that it had not set down. The defendant's counsel further submitted that as it acted reasonably in seeking not to persist with its application, it should not be ordered to pay the costs of the application.

7. These submissions merely have to be stated in order to be rejected. The defendant should have withdrawn its application a long time ago, particularly as it conceded at the commencement of argument that the application was without merit. Instead the defendant waited until the commencement of the hearing of its application before withdrawing the application. By that stage both the court and the plaintiff as respondent had prepared for the hearing of the application on an opposed basis, particularly as the practice notes and heads of argument that had been filed all indicated that the matter was to proceed on an opposed basis.

8. It is extraordinary that the defendant as applicant can seek to fault the plaintiff as respondent for setting down the defendant's application when the defendant, notwithstanding that it was *dominus litis* in relation to its application, failed to do so. The defendant as *dominus litis* in respect of the application should have taken steps as to finalise its application, whether by way of timeously withdrawing the application, or by enrolling it. As the defendant did not do so, the plaintiff was fully entitled to take the initiative and enrol the defendant's application. Indeed, the plaintiff had to do so in order to dispose of the defendant's application.

9. The overall impression created is that the manner in which the defendant as applicant advanced, or more accurately failed to advance, its interlocutory application was designed to delay the plaintiff in its prosecution of its action in the main proceedings. This is no reflection on the defendant's counsel, who by all accounts appeared to have been briefed late in the proceedings, and then only to be the bearer of the news that the defendant would not be persisting its application.[1]

10. Also relevant in the exercise of a discretion as to an appropriate costs order is the extent of the lack of merit of the defendant's application.

11. The defendant's objection to the delivery by the plaintiff of its amended pages to its particulars of claim on 16 September 2019 were two-fold:

[1] For example, the defendant's heads of argument served on 19 May 2020 appear to have been prepared by the defendant's attorneys and not by counsel.

11.1. the plaintiff's notice of amendment delivered on 15 August 2019 in terms of rule 28 was defective;

11.2. that the amended pages that were subsequently delivered by the plaintiff on 16 September 2019, upon the defendant failing to object to the intended amendment within the prescribed ten-day period, were delivered a day late.

12. In relation to the first ground of objection, the defendant does not set out in what respect the plaintiff's notice to amend was irregular. Neither is the defect evident from a consideration of that notice. In any event, the defendant took no steps to raise any complaint consequent upon receipt of what it contended was the defective notice. It did not seek to invoke the provisions of rule 30, such as by giving notice to remove cause of complaint in terms of rule 30(2)(b) in respect of what is contended was the irregular delivery of that notice. Instead, the defendant remained silent, allowed amended pages to be delivered by the plaintiff and then only raised its objection when launching the present interlocutory application, on 20 September 2019. Even then, as stated, the defendant did not specify what the defect was in the plaintiff's rule 28 notice,

13. In relation to the second ground of objection, although the amended pages were served one day late, the defendant makes out no case whatsoever as to the prejudice it suffered by the plaintiff's delivery of the amended pages one day late. As with the first ground of objection, the defendant did not first seek to furnish notice to remove cause of

complaint in terms of rule 30(2)(b) but instead launched this present interlocutory application on 20 September 2019.

14. In both the defendant's founding and replying affidavits no attempt is made to deal with such prejudice as the defendant may have suffered because of its grounds of complaint. It is trite that absent prejudice, an application such as this cannot succeed. It is therefore not surprising that the defendant as applicant did not seek to argue the application when it came time to do so.

15. It is clear that the interlocutory application had no merit from inception. At the very least, this should have been plain to the defendant upon receipt of the plaintiff's opposing affidavit during October 2019, where the deficiencies in the defendant's application are set out. Instead the defendant persisted, filing a replying affidavit in November 2019 that does not address any of the identified deficiencies. That persistence in what proved to be an abortive application lasted until the commencement of the opposed hearing on 3 August 2020. For some eleven months the parties were engaged in what proved to be a pointless interlocutory application, consuming the litigants' and the court's time, and also the litigant's financial resources.

16. The defendant's conduct in raising frivolous objections was not limited to the Rule 28 procedure. The defendant also sought to raise various objections to the manner in which the plaintiff as respondent opposed the interlocutory application itself.

17. The defendant objected that the answering affidavit in the interlocutory application had been delivered late. Apart from the defendant not alleging any prejudice arising therefrom, as the application is an interlocutory application and so is regulated by rule 6(11) rather than by rule 6(5), it is questionable, at least, whether the plaintiff as respondent could have been said to be late in delivery of its answering affidavit.

18. The second objection raised by the defendant to the plaintiff's opposition in the interlocutory application is that the attestation of the answering affidavit was defective in that the Commissioner failed in the attestation to specify the gender of the deponent. The attestation reads "*Thus signed and sworn to at Johannesburg on this the 10th day of October 2019, the deponent having acknowledged that* ***he/she*** *knows and understands the contents of this affidavit, that it is both true and correct to the best of* ***his/her*** *knowledge and belief, that* ***he/she*** *has no objection to taking the prescribed oath and that the prescribed oath will be binding on* ***his/her*** *conscience.*" (The emphasis is mine). The complaint is directed at the Commissioner's failure to have made the relevant deletion in the wording of the attestation so as to specify the gender of the deponent. This objection has no merit, particularly where the deponent is expressly described in paragraph 1 of that affidavit as a male, no prejudice is alleged by the defendant as arising therefrom and where no

concern is raised by the defendant that the affidavit may not have been attested to before a commissioner.[2]

19. The defendant as applicant has raised an array of objections, which are either ill-founded or of such a technical nature that the defendant could not reasonably have anticipated that they would have been upheld, and where in all instances there was no cognisable prejudice that the defendant may have suffered because of those objections.

20. In *Oos-Randse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk en Andere (1)* 1978 (1) SA 160 (W) the plaintiff applied to set aside an irregular notice of intention to defend. The defendant subsequently remedied the defect but the plaintiff persisted in claiming the costs of the application. The court refused to grant such costs, finding at 164D that:

> "*The application was, therefore, an empty but expensive exercise in formalism which did not yield, and could not have been expected to yield, any advantage to the applicant.*"

21. The present instance is an *a fortiori case* in that the objections raised by the defendant as applicant did not have merit. All that the interlocutory application achieved was an expensive exercise that yielded no benefit to the defendant and which delayed the plaintiff in the prosecution of its action.

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[2] *Capriati v Bonnox (Pty) Ltd and Another* (101816/2016) [2018] ZAGPPHC 345 (10 May 2018), para 4 to 14, distinguishing *ABSA Bank Limited v Botha NO and others* 2013 (5) SA 563 (GNP).

22. The defendant's counsel sought to rely on the recent decision of *Maribatsi v Minister of Police and another* [2020] ZAGPJHC 150 (17 June 2020) for support that a punitive costs order should not be granted, particularly paragraph 12:

> "*[12.] The consideration behind punitive costs is to punish a litigant who is in the wrong due to the manner in which he or she approached litigation or to deter would-be inflexible and unreasonable litigants from engaging in such inappropriate conduct in the future.*"

23. The principles governing punitive costs are usefully set out in *Maribatsi* and are trite. For example, Molahlehi J found that:

> "*[13] It has generally been said in several of the cases that the Court will issue a cost award on attorney and client scale as a matter of showing its displeasure against a litigant's objectionable conduct...*
>
> *[14] In determining whether the behaviour of a litigant is objectionable, the Court will have regard to the nature of the litigant's conduct. As stated in Telkom SA SOC Limited and Another v Blue Label Telecoms Limited and Others,[3] costs are ordinarily ordered on the party and party scale. The Court will in the exercise of its discretion and in exceptional circumstances, award costs on a punitive scale."*

[3] 2014 (4) All SA 346 (GNP) at paras 34 and 35.

24. Whichever phraseology is adopted, the defendant as applicant was wrong and handled itself inappropriately in the conduct of its interlocutory application. The defendant's behaviour was objectionable. The defendant should be deterred from such conduct in the future. There exists exceptional circumstances for the court in the exercise of its discretion to award costs on a punitive scale.

25. In the circumstances, I in the exercise of my discretion find that the defendant as applicant is to pay the costs of its withdrawn interlocutory application, and that such costs should be on an attorney and client scale.

26. The following order is made:

    26.1. The defendant as applicant is to pay the costs of its application dated 19 September 2019 and as withdrawn on 3 August 2020;

    26.2. The defendant as applicant is to pay the costs of that application on an opposed basis and on an attorney and client scale.

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Gilbert AJ

Date of hearing:	3 August 2020
Date of judgment:	6 August 2020
For the Applicant/Defendant:	Mr Baloyi
Instructed by:	Mphoke P.K. Magane Inc.
For the Respondent/Plaintiff:	Mr Ndabeni (Attorney)

Instructed by: M Ndabeni Attorneys