IN THE HIGH COURT OF SOUTH AFRICA

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GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 19781/2020

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: YES
10/03/2022

In the matter between:

DAVID MICHEAL Ó CONNELL **Applicant**

and

THE CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY **Respondent**

JUDGMENT

STRYDOM J,

[1] The applicant in this matter had an account for municipal services with the respondent.

[2] The applicant sold his property and the new buyer became responsible for the payment of services.

[3] The applicant applied to the respondent that his liability for municipal charges ceased on the date that the property was transferred to the purchaser and further to pay out any amount to the applicant that remained as credit on the applicant's account, as at the date of transfer.

[4] Applicant waited for 10 months for this to happen but to no avail.

[5] On or about 8 August 2020 the applicant filed an application against the respondent for the following relief:

5.1 Payment of the amount of R13773-23;

5.2 Closing of the account number [....];

5.3 Costs of the application on an attorney and client scale.

[6] On 14 September 2020 respondent, on its own accord, paid the amount claimed by applicant and closed the account.

[7] All that remained as a *lis* between the parties was the claim for costs as the respondent made no tender in this regard.

[8] Despite payment being made the respondent filed a notice of intention to defend the application dated 29 September 2020.

[9] The applicant then proceeded to set the matter down on the unopposed roll for 9 February 2021 as the respondent at that stage had not filed an answering affidavit. There appears to be an incorrect reference to the 9 January 2021 in the correspondence between the parties.

[10] This set down prompted respondent's attorney's to address a letter to applicant's attorneys, dated 4 January 2021 (*sic*), in which it indicated that the cause of action in this matter has already been addressed as of 14 September 2020, in that: "*our client (the City of Johannesburg) attended to credit your account*

accordingly". The applicant was asked to immediately remove the matter from the roll.

[11] To this the applicant's attorneys replied, on 5 February 2021, confirming receipt of payment in the amount of R13 773-23 on 14 September 2020.

[12] It was pointed out to the respondent's attorneys that payment was received after the application was launched.

[13] The applicant then proceeded to state as follows:

> *"4. As such, our offices shall amend their application, by way of a supplementary affidavit before the hearing date, and hereby advise further that we intend to argue costs on the hearing date, on the attorney and own client scale.*
>
> *5. Should your offices wish to settle the costs dispute for this matter, prior to the hearing date, please respond to this letter by no later than close of business on* ***5 January 2021*** *(sic)."*

[13] This letter was responded to on the same day and in paragraph 3 and 4 of the letter the respondent's attorneys stated as follows:

> *"3. We reiterate that you attend to remove this matter from the Motion Roll before close of business today and advise us accordingly, failure in which we shall prepare opposing papers and seek costs for appearance and having drafted same against your client.*
>
> *4. Even if your office were to furnish us with supplemented papers, the Rules of the Court should apply, which means our client should be afforded an opportunity to respond to such an application."*

[14] It is common cause that the application was not on the roll for 9 February 2021 (or 9 January 2021). The applicant averred that the reason for that was as a result of a fault in the Registrar's Office.

[15] It is further common cause that the applicant never amended his application nor did he file a supplementary affidavit as eluded to in the letter.

[16] Before the application would have been heard on 9 February 2021, but was not because of a set down problem, the respondent filed an answering affidavit dated 8 February 2021.

[17] This answering affidavit was filed some 12 weeks out of time.

[18] The respondent in his answering affidavit admits that the affidavit was filed late. Before this Court it was asked to condone the late filing. The applicant opposed the condonation application on two grounds;

> 18.1 First, because the lateness was not properly explained by respondent and;
>
> 18.2 Second, that no authority to oppose this application was attached to the answering affidavit.

[19] Considering the latter point first, the applicant should have filed a Rule 7 notice challenging the authority of the person acting for the respondent. This was not done and this objection should not be upheld.

[20] The lateness ground for objection has more merit as the respondent failed to provide convincing reasons for the delay, for instance, it is stated that the respondent believed that the matter has been resolved and therefore decided not to file an answering affidavit. Factually this was not the position. Further it was stated that the applicant would not have been entitled to costs as the respondent was not in wilful default. Wilfulness or not does not come into play. Fact is after 14 September 2020 the merits of the matter was resolved through payment and closing of the account. The claimed for costs was still not resolved.

[21] Despite unconvincing reasons advanced for the lateness of the affidavit the court, in exercising its discretion, will admit this affidavit, as the court, in the interest

of justice, wants to have all the facts before it to determine which party, if any, should be ordered to pay the costs in this matter. The applicant has filed a replying affidavit.

[22] Before this court the applicant's case was simply that he became entitled to costs as he had to incur costs to bring this application before court when repayment was still outstanding. Payment was only made thereafter and costs was never settled. It was argued that despite stating in a letter that it would amend its notice of motion and would file a supplementary affidavit, wherein he presumably would have stated that he received payment, such amendment and further affidavit was not necessary. In court his counsel would merely have argued for costs and would have informed the court of payment. Moreover, the respondent was informed in the correspondence that this would have been done.

[23] On behalf of the respondent it was argued that respondent acted within its rights not to have tendered costs and to oppose the application by filing an affidavit. It was argued that applicant, after receiving payment and no tender as to costs, failed to amend its notice of motion by deleting the prayers which no longer applied. The applicant then failed to inform court by way of supplementary affidavit that payment was received and the account was closed.

[24] What the respondent, however, persisted with in its affidavit was to challenge the applicant's entitlement to costs in the first place and also whether the applicant was entitled to a punitive cost order.

[25] In my view, costs of this application should have been settled between the parties as, the applicant was entitled to costs of his application on an unopposed scale up to the date of payment. The costs would not have been substantial and the respondent could have tender party-to-party costs. No such tender was made. Instead what happened was the respondent decided to challenge the applicant's entitlement to any costs. This application ended up being a fully contested opposed motion. This is unfortunate as what should have been an order for costs on an unopposed scale, up to the date of payment, now escalated in substantial costs being incurred. The only winners in this scenario are the legal representatives of the parties.

[26] As stated hereinabove, I am of the view that the applicant would have been entitled to costs of the application up to the date of payment of the amount claimed. The respondent was informed that unless costs was tendered, the applicant was going to and in fact did set the matter down to obtain costs of the application. This did not prompt the respondent to make a tender and settle costs. Instead it decided to oppose the application which opposition challenged any order for costs, even up to the date of argument.

[27] In my view, there was no need for the applicant to amend its notice of motion only to leave a prayer for costs. It is common practice in our courts to set matters down for argument on costs, after the merits have been settled or dealt with on the same notice of motion. There also was no need to file a supplementary affidavit, to avoid an answering affidavit, to inform the court that payment was made. To suggest that applicant's attorneys and/or counsel could not have been trusted to inform the court as such is far-fetched and such suggestion should be rejected outright. Fact of the matter is that respondent steadfastly mentioned in its affidavit and in heads of argument that the cause of action between the parties was resolved. This contention ignored the *lis* between the parties pertaining to costs.

[28] The respondent raised a further defence by stating that the matter should have been instituted in the Magistrate's Court as the quantum of the claim was only R13 773-23. This contention ignored the fact that applicant also claimed a closure of its municipal account. The applicant was entitled to claim this specific performance in the High Court.

[29] The only outstanding issue is whether a punitive cost order should be made against respondent. The applicant requested the court to show its displeasure with the dilatory and needlessly obstructive conduct of the respondent by making an order for costs on a punitive scale. In my view, the respondent's defence that it had to oppose this application for costs as it could not take the chance that the applicant would still persist in asking for the relief as per its notice of motion, despite payment being received, borders on the absurd and is devoid of any merit. The raising of such a defence calls for a punitive cost order. By making an order as such the court will

express its displeasure as to how the issue of costs in this application was handled by the respondent.

[30] In my view, the applicant was not entitled to costs on a punitive scale as applied for in its notice of motion pertaining to all cost incurred. Only that portion of the costs which was incurred after payment was received should be paid on a punitive scale. If the opposition was only aimed at the request for punitive costs as per the notice of motion, it would have been different, but, the respondent persisted that it was not responsible for any costs and in fact asked for costs on an attorney and client scale against the applicant. Only in a draft order, requested by court, respondent included an order to the effect that respondent should pay the costs of the applicant's application up to date of payment.

[31] The court also requested and received a draft order from the applicant. This draft order was amended by court and the following order is hereby made:

31.1. The Respondent's application for condonation for the late filing of its opposing affidavit is granted.

31.2. The Respondent is ordered to pay the costs of this application up until the date of 14 September 2020 on a party and party scale;

31.3. The Respondent is ordered to pay the further costs of this application from 15 September 2020 up to and including the hearing of the opposed motion on 7 March 2022 on an attorney and client scale.

R. STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Date of Hearing: 07 March 2022

Date of Judgment: 10 March 2022

APPEARANCES:

For the Applicant:	Adv. J. Mouton
Instructed by:	Schindlers Attorneys
For the Respondent:	Adv. E. Sithole
Instructed by:	Madhlopa & Thenga Inc.