IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: No

(2) OF INTEREST TO OTHER JUDGES: No

06/04/2022
DATE

SIGNATURE

CASE NO: A5033/2021

In the matter between:

JOOSTE, B	**1ST APPELLANT**
THE LONGEVITY INSTITUTE (PTY) LTD	**2ND APPELLANT**
T/A THE LONGEVITY CENTRE	
DR BURT JOOSTE AND ASSOCIATES INC	**3RD APPELLANT**
XENEPHIN LUDICK	**4TH APPELLANT**

and

DR MAUREEN ALLEM INC	**1ST RESPONDENT**
SKIN RENEWAL CC	**2ND RESPONDNT**

JUDGMENT

YACOOB J:

1. The appellants appeal a costs order made against them by Molahlehi J in an interlocutory application, with leave of the court below.

2. The respondents (the plaintiffs in the main action and the applicants in the interlocutory application at issue) sought to compel discovery by the appellants of certain documents. The pleadings in the main action are not part of the appeal record and this court is limited to the papers in the interlocutory application, and the judgment under appeal, for its understanding of the action and the arising issues.

3. The documents sought by the respondents fell into two broad categories. Items 1-11 on the discovery notice sought client lists from the various defendants, and items 12-35 with payslips, invoices, and financial statements.

4. Items 5-8 dealt with client lists of the fourth and fifth defendants (who are not appellants, no order having been made against them), but on it being pointed out in the answering affidavit that neither of these defendants had practiced for their own account, the respondents withdrew the relief sought regarding items 5-8. The costs related to items 5-8 and the withdrawal of that part of the relief have been reserved for determination at the main action.

5. The respondents were partially successful in the application to compel discovery, and the court ordered that certain documents (items 1-4 and 9-11 on the notice of discovery) ("the first group of documents") be made available by the appellants under a confidentiality regime.

6. The court found that the remaining documents (items 12-35 on the notice of discovery) ("the second group of documents") may well be relevant to the quantum, but that the parties may settle on quantum once merits have been determined, and therefore that the disclosure of those documents should stand down until after the determination of the merits. Although the court did not explicitly include in the order an order directing that merits should be determined first, and separately, in terms of Rule 33(4), the court did find that it was appropriate to postpone the consideration of the quantum pending

finalisation of the merits, and this was therefore the basis on which the disclosure of those documents has not yet been decided.

7. Finally, the court ordered the appellants to pay costs.

8. In granting leave to appeal the court found that another court may find differently on the costs award because the reason for the opposition to the discovery notice was to protect confidential information, and because the respondents were not successful regarding items 12-35 of the notice of discovery.

ITEMS 1-4 and 9-11 (THE FIRST GROUP OF DOCUMENTS)

9. In this court the appellants argued that they were not just entitled, but obliged, to resist the production of the first group of documents, on the basis that the information was confidential. They suggest that this is a case in which costs ought not to follow the result because they were obliged to take the position they did, to protect their patients' privacy.

10. There is no merit in that argument. As set out clearly in the judgment of the court *a quo* (with which the appellants do not quibble), there is a long history of documents which are confidential being made available subject to confidentiality regimes. The appellants did not have to wait for the court to suggest a confidentiality regime. They could have insisted that they would produce the documents only if subject to a confidentiality regime. They did not do so, nor did they suggest it in their answering affidavit to the application to compel.

11. Instead, in their response to the notice of discovery, the appellants contended that the documentation did not exist and is in any event not relevant. This is inconsistent with their current position. It is quite clear that had they admitted that the documentation did exist but claimed confidentiality, proceedings may have taken quite a different turn. As it is, the appellants' contention in the response document that the documents simply did not exist meant that an application to compel was unavoidable.

12. In their answering affidavit to the application to compel, the appellants contend that the documentation is not relevant and that it is subject to confidentiality and privacy requirements. The non-existence of the documents was no longer relied upon, presumably since the respondents had demonstrated that the appellants were obliged by law to keep such records. Again, the appellants relied on confidentiality as an absolute bar to production, rather than stipulating that the documents would be produced subject to a confidentiality regime. The appellants did not distinguish between the two groups of documents as far as relevance is concerned.

13. The confidentiality issue is met in the replying affidavit by the respondents pointing out that a confidentiality regime could be imposed to deal with that issue. It is significant that it was the respondents who suggested this. The respondents could not have done this earlier because the first time the appellants raised confidentiality was in the answering affidavit rather than in the response to the discovery notice.

14. In my view the appellants were not bound to refuse discovery because the documents were confidential. In fact, they did not do so. Their refusal was based on the untrue contention that the documents did not exist, and that would have required the bringing of the application to compel.

15. Had the appellants considered at the time of refusal that the documents were confidential, it was open to them to suggest or request a confidentiality regime, or to refuse for that reason, making it possible for the respondents to, if they so wished, request a confidentiality regime.

16. There is also no merit, therefore, in the appellants' contention that the imposition of a confidentiality regime somehow means that the respondents were less successful regarding these documents. Had the context been different, for example had the respondents opposed such a suggestion by the appellants, that may have been a factor in the appellants' favour. But, as I have set out above, that is not what happened here.

17. There is no doubt in my mind that the court *a quo* was correct in ordering the appellants to pay costs of the application insofar as they related to the first group of documents.

18. Of course, that is not to say that a court would not have been entitled to order the respondents to pay costs if the application to compel the remainder of the documents had been found to be obviously vexatious, or had otherwise resulted in a finding against the respondents.

ITEMS 12-35 (THE SECOND GROUP OF DOCUMENTS)

19. The appellants also contended that, because the court did not grant the application with regard to the majority of the items, it is they, the appellants, who were overall substantially successful in the application to compel and therefore that the costs order should be in their favour.

20. They submit that a court "will not" allow a party who does not obtain all the relief sought in their notice of motion to recover all their costs. This is patently not the case, and neither of the cases referred to by the appellants in their heads in support of this submission bear it out.

21. *Mouton v Die Mynwerkersunie* 1977 (1) SA 119 (A) deals with the circumstances in which one departs from the general rule of costs following the results, and held that success only on a few of the points raised on appeal, or on a point raised for the first time in appeal, are among the circumstance in which a court *can* deviate from the rule. The court emphasised that *all* the relevant circumstances are considered in the exercise of the discretion on a costs award. (My emphasis)

22. In *Blue Circle Ltd v Valuation Appeal Board, Lichtenburg* 1991 (2) SA 772 (A), the then Appellate Division found that, substantively, the appellant had been at least as successful in those proceedings as the respondent, if not more so, despite the dismissal of the appeal. It was for that reason that the court made

no order for costs on the appeal. The court also took into account that the respondent had not behaved in the proceedings as properly as it might. The authority supports the wide discretion of the court to take all circumstances of the proceedings into account and does not support the appellants' submission that a court "will not" award costs to a party who is not one hundred percent successful.

23. Parties who are substantially successful often recover all their costs, as do parties only partially successful when the circumstances warrant it. It is however the case that partial success may lead to a partial costs order.

24. In submitting that the costs order should be overturned, the appellants submit that the respondents' notice called for discovery that is far too wide, because it included documents relevant to the quantum of their damages. They do not explain why this was inappropriate. At the time the notice was served, neither party appears to have considered asking for the separation of merits and quantum, and the respondents as plaintiffs were entitled to seek discovery of documents to enable to prepare for trial on both merits and quantum. It was only after the court, *mero motu*, decided that it was not necessary to deal with quantum before merits were determined that it became appropriate to delay determining the relevance of those documents. The respondents cannot be faulted for having sought them at the time they did, in the circumstances that existed at the time.

COSTS IN RELATION TO THE APPLICATION AS A WHOLE

25. The respondents, naturally, contend that it is they who were substantially successful in the application to compel as a whole, because they were successful in obtaining an order for the production of the first group of documents and because they achieved relief they would not have achieved had they not brought the application.

26. That the court *a quo* had a wide discretion and may in appropriate circumstances depart from the rule that costs follow the results does not help the appellants if they are not able to establish either that the circumstances

support such a departure, or that they were substantially successful and were deserving of a costs order, and that the court's failure to exercise its discretion in their favour was capricious, arbitrary or based on an incorrect principle. The Supreme Court of Appeal acknowledged in *Economic Freedom Fighters v Manuel* 2021 (3) SA 425 (SCA) at paragraph [131] that this has been settled law since *Fripp v Gibbon & Co* 1913 AD 354 – a period of over a century. Nor do the appellants suggest that there is any basis on which to tamper with the principle.

27. Even if the respondents were not substantially successful, it would have been open to the court to make the costs order it did, if it considered that the circumstances warranted it.

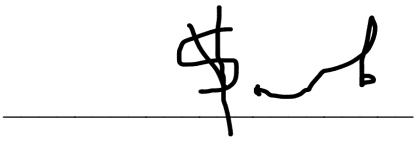
28. In my view the circumstances set out above, particularly regarding the appellants' stance during the interlocutory application do warrant a costs order being made against them.

29. Even ignoring the fact that the appellants' stance in the discovery process forced the respondents to approach the court, the respondents' incomplete success does not entitle the appellants to a costs order that is different than that made. If the respondents were not entirely successful, the appellants were not successful at all. They sought the complete dismissal of the application, and were entirely unsuccessful on that score, on the parts of it in relation to which the costs order was made.

30. There is nothing starkly unfair or glaring in the costs order of the court below and I can see nothing that entitles this court to interfere with the exercise of discretion. At most the appellants may have been entitled to an order that, on the question of the second group of documents, each party should pay its own costs. This does not make the order that was made inappropriate, and I do not see any reason to interfere with the order given.

31. For these reasons, we order as follows:

The appeal is dismissed with costs.



S. YACOOB
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree.

EJ FRANCIS
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

M L SENYATSI
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing: 20 October 2021
Date of judgment: 06 April 2022

Appearances

For the appellants:	G Amm
Briefed by:	Fluxmans Attorneys
For the respondents:	S Miller
Briefed by:	Schindlers Attorneys