IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No. 42419/2021

REPORTABLE: *NO*

OF INTEREST TO OTHER JUDGES: *NO*

REVISED:

14/11/2022

In the matter between:

BIDVEST BANK LIMITED Applicant

(Registration No. 2000/006478/06)

And

MOENG: THABANG GALDWIN Respondent

(Identity Number, [....])

JUDGMENT

MAHOMED AJ

INTRODUCTION

1. The applicant in this matter brought an application to sequestrate the estate of the respondent, who stood as guarantor for the debts of the entity Waste Partners, being the respondent's business. On 15 March 2021 Wepener J granted a judgment

in favour of the applicants in the amount of R3 336 848.40[1]. It is common cause that the debt has been fully settled and that the sequestration application is withdrawn. The issue before this court is who is to pay for the costs of the sequestration.

2. Advocate Springveldt appeared for the respondent and submitted the provisions of Rule 41 must apply in respect of costs.

BACKGROUND

3. Advocate van der Linde appeared for the applicant and submitted that applicant has been drawn into protracted litigation, over two years and the respondent has forced the applicant into litigation when he has known all along that he had no defence to this claim.

4. The respondent has all along denied liability for the debt and eventually in August 2022 he settled the debt.

5. Counsel argued that the respondent has failed to tender the costs upon settlement of the debt. The debts were incurred due to his frivolous and vexatious conduct.

6. It was submitted that the respondent was simply stalling to pay off his debt. Counsel argued that her client has incurred substantial costs over the period and furthermore submitted that the provisions of Rule 41 (1) is not the default position regarding liability for costs. A court has a discretion on the award for costs and it must consider the overall conduct of the respondent in casu.

The applicant's submissions

7. The respondent initially argued that the address for service was incorrect, whereafter the sheriff confirmed that he effected service at the correct home address.

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[1] Caselines 001-19

8. Upon service of the writ of execution the respondent reported that he did not own any assets and failed to point out any property to attach, therefor the sheriff rendered a *nulla bona* return.

9. Ms van der Linde argued that the applicant is entitled to proceed with its application for the sequestration of the respondent, it met the requirements for the order and that it has no other remedy to recover its monies.

10. Ms van der Linde addressed the court with details of the various routes that the respondent pursued through the years and submitted that the court should not be swayed by his argument that he was not represented in the early days of the litigation.

11. The evidence is that just two days before the sequestration application was to be heard it had to be removed from the unopposed roll as the respondent filed an opposition, despite having been served with a set down and informed of a date for filing of the opposition.

11.1. The wasted costs of this removal were reserved[2] and the applicant is entitled to recover those costs.

12. Counsel submitted that the respondent pursued four unmeritorious applications and in each one he changed his versions, contradicted himself, knowing that he had no defence to the claim and to avoid sequestration.

13. Various interlocutory applications were necessary for the applicant to finally set the matter down on the opposed roll, including applications to compel its answering papers, even after a removal from the unopposed roll to the opposed roll and being ordered to file his answering papers.

14. Counsel submitted that the respondent has all along abused the court process to delay before he paid the debt. He is the controlling mind of the entity he signed

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[2] 0001-1

surety for; however, the respondent pursued an argument that the first respondent is solvent and able to pay its debts he should not be pursued for its debts.

15. Counsel referred to **Benash v Wixley**[3]**,** where the court stated, "abuse *of process takes place where the procedures permitted by the Rules of the court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective*."

16. It was submitted that this is a case in point, there was never any opposition to the merits of the debt owed.

17. Counsel referred the court to the decision in **PRICE WATERHOUSE MEYERNEL v THE THOROUGHBRED BREEDERS ASSOCIATION OF SOUTH AFRICA**,[4] Howie JA, stated: "a *cost order, it is trite to say is intended to indemnify the winner, … to the extent that it out of pocket as a result of the pursuing litigation to a successful conclusion."*

18. Ms van der Linde submitted that at each stage of the litigation, the applicant has been wrongly put through its challenges to recover its monies.

19. Counsel referred the court to a leave to appeal the order of 15 March 2021, which did not have the effect of suspending the warrant, it was brought five months late, no condonation was granted, then followed an urgent application to stay the executability of the warrant, which was dismissed for lack of urgency, and on the same day the respondent sought leave to appeal dismissal of the urgent application, which was again dismissed with punitive costs.

20. The respondent was vexatious in the litigation and continued his mala fide conduct as it filed supplementary papers, and the applicant was obliged to reply at a substantial cost in preparation for arguments.

21. Ms van der Linde submitted that the parties are before this court because even at this late stage, the respondent refused to tender the substantial costs

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3 **1997 (3) SA 721 (SCA)**

4 2003 (3) SA 54 SCA par 18

incurred, which he knew along was due and payable to the applicant. The debt was settled only after substantial costs had been incurred, only in August 2022.

The respondent's submissions

22. Advocate Springveldt, with him Advocate Mudau, appeared for the respondent and submitted that the applicant has failed to tell the court that approximately two thirds of the debt has been paid up a year ago.

23. Counsel proffered that the applicant's counsel makes it out to be that the debt was paid only a few weeks before the hearing of the sequestration hearing, which is incorrect.

24. The applicant has also not provided the respondent with the final figures on the outstanding balance, until a few weeks ago. It was incorrect in its papers on the balance outstanding, and after a proper breakdown of figures the balance was at less than was claimed. It was contended that the respondent has paid in R23 000 more than is due.

25. Mr Springveldt argued that the applicant was not proceeding in this manner for the benefit of creditors but really using the Insolvency laws to collect its debts. This is also evident when one considers that the applicant has a parallel application for the liquidation of the entity, arising from the same judgment for the same amount.

26. Mr Springveldt submitted that the debt has been settled and the sequestration is now moot, the respondent has withdrawn and in terms of R41(1) it must tender the costs.

27. Moreover, he argued, the applicant knew weeks before the hearing of the matter that the debt had been paid, it is obliged in terms of the rules to inform the registrar as soon as it knew the matter is to be settled or removed. The applicant has itself flouted the rules of court.

28. Counsel contended that the applicant cannot place all blame on the respondent when it took eight months since January 2022 to furnish the respondent

with the final settlement figures. When the respondent received them, they proved to be incorrect until the respondent demanded a breakdown of the figures. The balance was reduced substantially to a final amount owing. It is evident that the applicants were dragging out the litigation to run up costs.

29. Mr Springveldt referred the court to **RUBEN ROSENBLUM FAMILY INVESTMENT (PTY) LTD AND ANOTHER v MARSUBAR (PTY) LTD (FORWARD ENTERPRISES (PTY) LTD AND OTHERS INTERVENING)**,[5] the court held, *"it was only in exceptional circumstances that a party who has been put to the expense of opposing withdrawn proceedings will not be entitled to all the costs caused thereby."*

30. In reply Advocate van der Linde pointed out inaccuracies in the respondent's submissions and contended the respondent was given balances outstanding in December 2021, and no monies were paid until August 2022, the applicant cannot be expected to sit back and do nothing. Counsel contended further that the respondent does not deny that it had no legal basis to proceed for his sequestration.

JUDGMENT

31. In **RABINOWITZ v VAN GRAAN**,[6] the court on costs, referenced the judgment in Mancisco,[7] and the dicta of Flemming DJP, that "*an award of costs is principally a discretion which must be judicially exercised in the sense that it must be guided by established and known considerations. The award of costs rests upon the object of reimbursing a person for costs to which he was wrongly put*."

32. The respondent has known of his indebtedness in the amount of the judgment debt throughout the litigation over the full period. He paid almost two thirds of this debt a year ago, it was an admission of liability, and no defence was ever raised.

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5 2003(3) SA 547 (C) headnote

6 2013 (5) SA 315 (GSJ) par 44 in 1926 AD 467 at 488

7 2001 (1) SA 168 (W) at 181D – 182B

33. I have considered Mr Springveldt's submissions that the respondent in litigating was simply exercising his rights, the debt is settled, and the applicant having withdrawn must tender the costs in terms of R41 of the Uniform Rules.

34. Rule 41(1) provides:

> *"(1)(a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and <u>may</u> embody in such notice a consent to pay costs; …"*

35. I agree with Ms van der Linde that a tender of costs is not the default position and the rule reads, that the notice "may" include a tender.

36. A court cannot condone, the deliberate and frivolous nature of this respondent's conduct of the litigation.

37. Court procedures serve a purpose and must be respected. Not only has the applicant been put through the expenses, but the court has also had to allocate time and resources to a matter which lacked any substantive merit.

38. Although I have not heard the main application in this matter, I am of the view that I have been presented with sufficient facts to exercise my discretion to the issue of costs.

39. I am of the view the respondent has abused the court process and been vexatious in the conduct of his matter. His various applications have been frivolous, and the applicant was forced into having to reply to each of the applications at considerable cost.

40. The applications not only involved answering papers but included drafting of heads and the like, with set downs which also must comply with the practise directives.

41. I noted Advocate Springveldt's argument that the applicant has not shown exceptional circumstances for it to be awarded costs.

42. On the objective evidence before this court, the respondent from the date of service of the warrant was in bad faith and embarked on a course to delay the finalisation of this matter. His argument that the entity was liquid and could afford to pay the debt can only be viewed as misleading and in bad faith.

43. It is concerning that much court time has been wasted, particularly in this division, it being the busiest division of the court in the country. Other matters could have been better serviced in that time.

44. I have noted the common tricks adopted in a change of attorneys, applications for leave to appeal, and the late filing of papers, which have serious cost implications for parties and disruptions to the management of matters.

45. The practise directives of the court are crafted with the objective of ensuring a litigant his or her rights to a speedy hearing of the matter, whilst attempting to streamline the heavy caseload which the presiding officers must manage, often having to traverse through large files. This matter was no exception. The file is large and traverses various court appearances and orders.

46. In **TAKE AND SAVE TRADING CC AND OTHERS v STANDARD BANK OF SOUTH AFRICA LTD**,[8] albeit on an application for a postponement, but on similar tactics, Harms JA, stated:

> *"judicial offices have a duty to the court system, their colleagues, the public and the parties, to ensure that this abuse is curbed, by in a suitable case, refusing a postponement."*

47. In casu, there was no defence to the judgment debt, the delay was indeed to avoid a sequestration and buy time.

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[8] 2004 (4) SA 1 SCA

48. I have difficulty with the argument that a litigant, who has no defence, who involves himself in protracted litigation can lay claim to "exercising his rights as a litigant." He did indeed gain time, through an abuse of the court processes to do so, he has never had a defence.

49. In **PUBLIC PROTECTOR v SOUTH AFRICAN RESERVE BANK**,[9] the court on the scale of costs referred to the principle as stated by Innes CJ, *"that costs on an attorney client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant."*

50. I am of the view that punitive costs are appropriate in this matter.

51. The respondent is to pay the costs of this sequestration on an attorney client scale. He defended a judgment debt only to settle it in full after forcing the applicant into litigation over months.

52. The costs are to include the reserved costs of 11 November 2021, when the matter had to be removed from the unopposed roll to be placed on the opposed roll.

Accordingly, I make the following order,

1. The sequestration application is withdrawn.

2. The respondent shall pay the applicants attorney client costs of the sequestration, including the costs for removal of the matter on 11 November 2021.

MAHOMED AJ
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email

9 [2019] SACC 29 at para

and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 14 November 2022.

Date of Hearing: 9 September 2022

Date of Judgment: 14 November 2022

Appearances:

For Applicant: Advocate C van der Linde

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Tel: 011 045 6700

For Respondent: Advocate P Springveldt

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