

IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

22 / 01 / 2016.

CASE NO: 71706/2011

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED
DATE	11/12/2015
SIGNATURE	

In the matter between:

**RAJAN RAMNATH SEWPERSADH**

**APPLICANT**

and

**THE GOVERNMENT OF THE REPUBLIC OF  
SOUTH AFRICA**

**1<sup>ST</sup> RESPONDENT**

**SPECIAL PENSIONS APEAL BOARD**

**2<sup>ND</sup> RESPONDENT**

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**JUDGMENT**

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**A.M.L. PHATUDI J.**

[1] The Applicant seeks an order:

1. That all costs previously reserved in this matter be awarded to the Applicant.
2. That the costs of the applicants in terms of Rule 35(7) heard before the above Honourable Court on 6 August 2013 be awarded in favour of the Applicant on an attorney and client scale.
3. That the costs of this application be awarded to the Applicant.

[2] At the commencement of the hearing, the applicant's counsel placed on record that the Applicant's Notice of Application dated 19 June 2015 remains unopposed. He sought clarity from the respondents if they indeed do not oppose the said application. The respondents counsel submitted that the respondents do not oppose the application.

[3] In the said application, the applicant sought the transcript of the record of the hearing on the 6 August 2013; 29 February 2012; the Application papers brought in terms of Rule 35(7); the First respondent's objection and the applicant's attorneys' affidavit "be admitted into evidence in proceedings before the above Honorable Court".

[4] The factual background set out in the founding affidavit is that on 6 August 2013, this Court issued an order in terms of the main application in favour of the applicant. The order read that '[t]he respondent defense be struck out and the following order be granted:

1.1...

1.2...

1.3...

1.4...

1.5 Costs in the application

[5] It is further alleged that the Court failed or did not deal with costs which were previously reserved and costs of the Rule 35(7) application apparently heard on 6 August 2013.

[6] In an attempt to resolve the issue of the said costs, the applicant wrote a letter to the respondents' attorney. The following was stated:

'As you are aware all the reserved costs orders were made at your clients request and at his insistence. Our client is clearly entitled to the reserved costs...'

[7] The deponent further stated:

- 7.1 I confirm that the Respondent is liable for all the reserved costs herein and for the costs for the Rule 35(7) Application heard on 06 August 2013
- 7.2 In this respect the Applicant sought attorney and client costs against the Respondent.
- 7.3 Inadvertently this matter has not alluded to a Court Order directly. For the sake of clarity I respectfully request that this aspect also be included in the Court Order sought in the present Application.'

[8] When answering to the said contentions, the respondent stated that there are no reasons advanced by the applicant why he believed that he was entitled to the reserved costs and costs of Rule 35(7) application on an attorney and client scales.

[9] It is settled law that the purpose of awarding costs is to indemnify a successful party who incurred expenses in instituting or defending a case before court or tribunal. It is further settled law that in awarding costs, the court has a discretion which must be exercised judicially upon consideration of the facts in each case. The word "costs" means party and party costs and

where attorney and client costs are intended, the costs order should be expressly stated.

[10] The applicant submits that when granting the order set out in paragraph [4] above, the court *a quo* did not specifically award costs which were previously reserved and those of the application in terms of Rule 35(7) which was scheduled to be heard on that day (6 August 2013).

[11] Having accepted the record of proceedings of both the 29 February 2012 and those of 6 August 2013, I find it inevitable to first deal with the proceedings of the 29 February 2012.

### **29 February 2012**

[12] It is clear from the record of the proceedings of the day that counsel for the applicant submitted before the unopposed motion court that 'the matter has [since] become opposed, properly opposed by both 1& 2 respondents. I have taken the liberty of preparing a draft order, it is not by consent<sup>1</sup>. The following then transpired:

Court: Do we have a letter confirming that the 2<sup>nd</sup> Respondent will pay the costs?"

Counsel for Applicant: Unfortunately not

Court: Costs are reserved'<sup>2</sup>

[13] It is trite law that the relief sought has to be found in the evidence supported by facts set out in the Founding Affidavit. It is further trite that the Notice of Motion and Founding Affidavit form part of both the pleadings and evidence respectively. The judicial officer in civil proceedings must resolve the

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<sup>1</sup> Record, page 104

<sup>2</sup> Record, page 105

dispute on the issues raised by the parties and confine the enquiry to the facts placed before court and must not have regard to extraneous issues.<sup>3</sup>

[14] Considering the contentions espoused by the applicant in his letter to the respondents, an extract I set out in paragraph [6] above, were clearly not correct. The reserved costs of the 29 February 2012 were clearly not made at the respondent's "request and... insistence." The court on the 29 February 2012 enquired if the respondents agreed to costs being awarded against them. The response was clearly in the negative. There are no other facts set out in the applicant's founding affidavit before this court why the said reserved costs should be granted in favour of the applicant.

#### **6 August 2013 and Rule 35(7) Application**

[15] The applicant did not spell out facts on what transpired on the day in question. All that is said is:

"On 06 August 2013, the above Honourable Court granted an order in terms of which the costs of the main application (that is the Application for Review) was awarded in favour of the applicant".

[16] On my perusal of the record of proceedings on the day in question, counsel for the applicant placed on record that '...the parties were very close saying that there was an issue of costs that is separated but nobody has reverted since.' In the ultimate, the Court granted an order with an award of "costs in the application."

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<sup>3</sup> Director of Hospital Services v Mistry 1979(1)SA626(A) page 635; Kleynhans v Van Der Westhuizen NO 1970(1) SA 565(O)

[17] In the absence of any evidence that the Court did not exercise its discretion judicially when awarding such an award as to costs, this Court will not be in a position to find any misdirection. This Court is not a Court of appeal either. This Court is further not placed in the position of the Court that awarded the costs on 6 August 2013.

[18] In reiteration of the settled principle that the relief sought has to be found in the evidence supported by the facts set out in the founding affidavit still find application with regard to costs of the application not dealt with on the 6 August 2013. The costs awarded on were “costs in the application.” An award of “costs in the application” means that a party that is entitled to costs at the end of the trial will be entitled to the costs of that interim proceeding unless otherwise ordered. An award of “costs in the application” can in my view, be equated with “costs in the cause” which is an order made in interlocutory proceedings which are to stand over and to be paid by a party who is ultimately ordered to pay the costs of the main action<sup>4</sup>.

[19] I cannot agree more with the respondents’ counsel that the issue of costs in respect of Rule 35 (7) application had been covered in the order made on the 6 August 2013. The matter is thus *res judicata*. The issue of costs in respect of the application in terms of Rule 35(7) is, in my view, *candid quaestio*. This Court cannot revisit that order.

[20] It is trite that costs follow the event. The successful party is, as a general rule, entitled to its costs. The respondents succeeded in opposing the application and are thus entitled to the costs of this application.

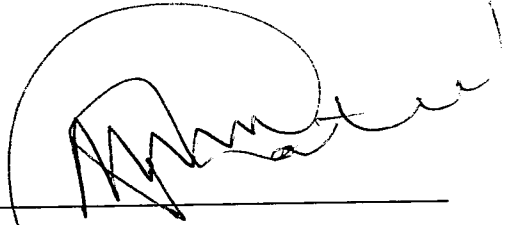
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<sup>4</sup> Erasmus Superior Court Practice, second edition, volume 2, Appendices, page D5-3

[21] I, in the result, make the following order:

**ORDER**

**The applicant's application is dismissed with costs.**

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**AML PHATUDI**  
**JUDGE OF THE HIGH COURT**

**Heard on: 02 November 2015**  
**For the Appellant: Viren Singh**  
**Instructed by: Messrs. Viren Singh Attorneys: Durban**  
**For the Respondent: Adv. ZZ Matebese**  
**Instructed by: Messrs. State Attorney: Pretoria**  
**Date of Judgment: 11 December 2015**