

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 25461/21

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

Date: 15 July 2021

In the matter between:

DEY STREET PROPERTIES (PTY) LTD

APPLICANT

And

**SALENTIAS TRAVEL AND HOSPITALITY CC
T/A VAN HOBBS DRY CLEANERS**

RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] The application was enrolled to be heard in the urgent motion court on 13 July 2021. The applicant filed a notice of removal from the urgent roll, on 9 July 2021. It is indicated in the notice of removal that the applicant would set the matter down on the urgent roll on 20 July 2021. The respondent vehemently opposed the removal of the matter from the roll and insisted that the matter be argued before the court. For reasons elucidated below, I ordered that the matter be removed from the roll. I reserved judgment regarding the appropriate costs order.

Background

[1] The merits of the application are of no concern in determining an appropriate costs order. The applicant issued its notice of motion on 24 May 2021, and the papers were served on the respondent on the same day. The respondent was called upon to file its intention to oppose the application within 5 days of receipt of the notice of motion and the answering affidavit within 15 days thereafter. The respondent's notice of intention to oppose is dated 1 June 2021. It was emailed to the applicant and served on 8 June 2021. The respondent avers that its answering affidavit was delivered to the applicant on 28 June 2021. The applicant states that the respondent's answering affidavit was delivered on 6 July 2021. The answering affidavit filed on the electronic CaseLine's file was only commissioned on 6 July 2021. The respondent evidently considers the emailing of an unsigned copy of the answering affidavit as the delivery thereof. It is common cause that the answering affidavit with annexures exceeds 300 pages. After receiving this voluminous answering affidavit, the applicant unilaterally served the notice of removal from the urgent roll, on 9 July 2021. During argument applicant's counsel persisted that the matter was not before the court.

[2] The applicant submitted that it justifiably removed the matter from the roll of the urgent court. The applicant was entitled to reply to the answering affidavit. It afforded the respondent the benefit of the time periods prescribed in Rule 6(5) and was entitled to sufficient time to prepare its replying affidavit. After the late filing of the answering affidavit, the applicant was afforded one and a half court days, or at most two and a half days according to the respondent, to file a replying affidavit. The delay was solely attributed to the late filing of the respondent's answering affidavit. This resulted in the matter not being ripe for hearing by 12h00 on the Thursday preceding 13 July 2021. The applicant subsequently served a notice of removal as it was, in its view, the appropriate and sensible course of action in the circumstances. The applicant seeks that the respondent is ordered to carry the wasted costs occasioned by the objection to the removal on a punitive scale.

[3] Counsel for the respondent submitted that the respondent did not consent to remove the matter from the roll. The respondent sought that the matter be dealt with on 13 July 2021 by either striking the application from the roll or dismissing it. Counsel submitted that the avenues open to the applicant were either to withdraw

the application and reissue, or to object to the late filing of the answering affidavit and to seek that such late filing not be condoned, or to approach the court with a request to postpone the application. It was, however, not entitled to remove the matter from the roll unilaterally. Counsel referred the court to *Jojobana v Regional Court Magistrate and Another* 2019 (6) SA 524 (ECM), and *RNS Investments and Another v Mathole* 2018 JDR 1537 (GP) as authority for its submissions. Applicant's counsel submitted that these cases were distinguishable from the current matter in that *Jojobana* deals with Rule 31 of the Magistrate's Courts' rules. In *RNS Investment*, the respondent filed a notice of removal from the roll. Counsel contended that the applicant as *dominus litis* was entitled to remove the matter from the roll to enrol it again on the roll, of the urgent court in the following week.

[4] I agree with the applicant that it is inconceivable that the respondent could expect it to file a replying affidavit in the two and a half days before the roll closed after the respondent was not only provided with sufficient time to file its answering affidavit but then filed its answering affidavit late. However, I have to agree with the respondent that the applicant was not entitled to remove the matter from the roll unilaterally. The way in which the notice of removal is phrased is indicative that the applicant does not intend to withdraw the application but to effectively postpone it. *Jojobana* might have Rule 31 as its subject matter, but the same reasoning can be applied to Rule 41 of the Uniform Rules of Court. Rule 41(3) provides that:

'If in any proceedings a settlement or an agreement to postpone or withdraw is reached, it shall be the duty of the attorney for the plaintiff or applicant immediately to inform the registrar accordingly.'

[5] Rule 41(3) provides for postponement by agreement. By providing for postponement by agreement, it is implied that a party cannot unilaterally postpone a matter. Where the opposing party's consent cannot be obtained, it is left to the court to decide whether a matter will, on application, be postponed. The same logic applies to removal after a matter has been enrolled for hearing. An applicant as *dominus litis* is bound to the date determined by it, in the notice of motion, for the matter to be heard.

[6] This is, however, not the end of the inquiry relating to which party is to be held liable for the wasted costs. Both parties are in the wrong - the applicant for unilaterally removing the matter from the roll, and the respondent for insisting on arguing the matter despite the late filing of the answering affidavit being at the root of the applicant's decision to remove, amidst circumstances where the respondent had more than ample time to deliver its answering affidavit. As the applicant correctly stated, there is no cogent reason for insisting on the enrolment and hearing of the application this week. Except for the interest in finalising the litigation, respondent's counsel could not indicate how the respondent would be prejudiced if the matter was removed, less so if the respondent agreed to the removal. It is evident that the relationship between the parties is, to say the least, acrimonious. It might be that the respondent's legal representative received instructions to oppose the removal of the application. It might be that the acrimony spilled over to strain the relationship between the parties' respective legal representatives. Be that as it may, the urgent court is not the playing field for a cat-and-mouse game between litigants. Even if the respondent regarded the applicant's unilateral removal of the matter from the roll as an irregular step, and took issue with the arrogance inherent to such a step, it should have realised objectively that the applicant would in all probabilities succeed with an application for removal since the matter was not ripe for hearing and the applicant gave notice of a future date on which the matter would be set down for hearing. If the applicant issued the application and provided the respondent with a very short timeframe to oppose and answer, or if the answering affidavit was filed timeously, the outcome would have been different. Every matter is decided on its own facts.

Order

In the result, the following order is granted:

1. The matter is removed from the roll.
2. The respondent is ordered to pay the wasted costs.

E van der Schyff
Judge of the High Court, Gauteng, Pretoria

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the

parties/their legal representatives by email. The date for hand-down is deemed to be 15 July 2021.

Counsel for the applicant: Adv. A W Pullinger

Instructed by: Millers Attorneys

Counsel for the respondent: Adv. J A Venter

Instructed by: Rudman and Associates Inc.

Date of the hearing: 13 July 2021

Date of judgment: 15 July 2021