REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

Case no: 22179/16 and
953214/16

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

22 June 2022
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DATE SIGNATURE

In the matter between:

THANDA MANZI CC t/a RIVER PLACE Plaintiff
(Plaintiff in both actions)

and

GUARDRISK INSURANCE COMPANY LIMITED
(Defendant under case number 22179/16) 1st Defendant

MONT BLANC FINANCIAL SERVICES (PTY) LTD
(Defendant under case number 95314/16) 2nd Defendant

J U D G M E N T

MNGQIBISA-THUSI J:

[1] On 22 March 2016, the plaintiff instituted action proceedings against the first defendant, Guardrisk Insurance Company Limited, after the first defendant repudiated its claim for indemnification for the loss sustained as a result of a fire at its premises (a thatched roofed hotel) situated at Haartbeespoort on 27 August 2015 (the premises). At the time of the incident, the first defendant was the plaintiff's short-term insurer against certain risks, including fire at the plaintiff's premises.

[2] The plaintiff also instituted an action against the second defendant, Mont Blanc Financial Services (Pty) Ltd, its insurance broker.

[3] On 15 September 2017 the plaintiff applied and an order was granted consolidating the two actions.

[4] On 23 February 2021, the plaintiff and the second defendant reached agreement in terms of which the plaintiff agreed to withdraw the action against the second defendant. Further the parties agreed that each party would pay its own costs. As a result the second defendant is not party to these proceedings.

[5] On 24 February 2021, the plaintiff filed, in terms of Rule 41(1)(a)[1], a Notice of Withdrawal giving notice of its intention to withdraw its action against the first defendant. In the Notice the plaintiff tendered to pay first defendant's costs on a party to party scale from 2 September 2019 until 24 February 2021. Further in its Notice, the plaintiff indicated that it was not prepared to pay first defendant's costs incurred

[1] Rule 41 reads as follows: "1(a) A person instituting any proceeding may at any time before the matter has been set down and thereafter by consent of the parties or leave of the Court withdraw such proceedings in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs, and the taxing master shall tax such costs on the request of the other party. (b) A consent to pay costs referred to in paragraph (a), shall have the effect of an order of court for such costs. (c) If no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to court on notice for an order for costs."

before 2 September 2019 in that had the first defendant disclosed the contents of the reports and the conclusion reached, it would have been better placed to make an informed decision on the appropriateness of instituting the action proceedings.

[6] On 26 February 2021 the first defendant filed its reply to the plaintiff's Rule 41(1)(a) notice. Inasmuch as the first defendant consented to the withdrawal of the action, it rejected the tendered costs. The first defendant gave notice of its intention to seek costs against the plaintiff on an attorney and own client scale, inclusive of costs of employing counsel, experts and all other disbursement costs and all collapse fees incurred against the plaintiff, alternatively, costs *de bonis propriis* against plaintiff's attorneys of record.

[7] The only issue to be determined is the issue of costs as between the plaintiff and the first defendant.

[8] First defendant is seeking an order of costs on the following terms:

8.1 that plaintiff be ordered to pay the first defendant's costs on an attorney and own client scale.

8.2 in the alternative, that the plaintiff be ordered to pay the first defendant's costs on an attorney and own client scale from 2 September 2019 to 1 March 2021 and to pay the first defendant's costs on a party and party scale from the date of the inception of this action up to 2 September 2019.

8.3 costs payable to include the costs of Senior Counsel.

[9] In turn, plaintiff seeks the following cost order:

9.1 that the plaintiff shall pay the taxed or agreed party and party costs of the first defendant from 2 September 2019 to 24 February 2021.

9.2 that the first defendant shall pay plaintiff's costs incurred after 24 February 2021, including the costs of 1 March 2021.

[10] The general rule is that a successful litigant is entitled to his or her costs. In exercising its wide discretion in the awarding of costs, the court must exercise such discretion judicially, taking into account the facts before it, including the nature of the litigation and the conduct of the parties[2]. Punitive costs are usually granted where a party is found to be guilty of reprehensible, vexatious or mendacious conduct or actuated by malice or lack of bona fides.

[11] In *South African Liquor Traders' Association and Others v Chairperson Gauteng Liquor Board and Others*[3] the court stated that:

> "[54] An order of costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a *serious* degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy."

Brief factual background

[12] After the plaintiff lodged its claim to be indemnified by the first defendant, on 6 October 2015, Insurance Underwriters Managers, sent the plaintiff a letter on behalf of the first defendant repudiating the plaintiff's claim on the grounds, inter alia, that:

12.1 failed to take reasonable steps to ensure and safeguard the insured property;

12.2 failed to comply with the National Building Regulations and to supply the necessary plans to the local authority;

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[2] *Chetty v Louis Joss Motors* 1948(3) SA 329 (T),
[3] 2009 (1) SA 565 (CC).

12.3 failed to install, maintain and service firefighting and/or fire protection equipment on the insured property;

[13] In its plea denying liability, the first defendant raised several defences based on the provisions of the insurance policy.

[14] In preparation for trial which was allocated the week of 18 May to 5 June 2020, the parties held three pre-trial conferences, on 18 May 2018; 22 August 2019 and 25 November 2020.

[15] At the first pre-trial conference held on 18 May 2018, and in light of the refusal by the first defendant to disclose the reports of investigations conducted into the cause of the fire, plaintiff requested the first defendant to provide sufficient particularity with regard to its allegation in its plea that the plaintiff failed to install, maintain fire protection equipment in order to minimise the risk of a fire. The first defendant maintained that the allegations in its plea contained sufficient particularity for the plaintiff to prepare for trial. At that stage, in response to a notice to disclose the investigation reports, the first defendant had refused to produce the said reports under the guise that they were privileged.

[16] From the documents filed it appears that by the time the first pre-trial was held, the first defendant had already received the reports of the investigations conducted into the cause of the fire.

[17] At the second pre-trial meeting held on 22 August 2019, the plaintiff again raised the issue of the fire investigation reports as its own experts needed the reports in order to advise it accordingly. The plaintiff alluded to the fact that it was in the process of

preparing an application in terms of Uniform Rule 30A to seek an order compelling the first defendant to disclose the reports. The first defendant was of the view that the threatened application to compel was premature as it was still consulting with its legal representatives and investigators before making a final decision on whether or not to disclose the reports. The first defendant asked the plaintiff to hold over the application to compel until 3 September 2019.

[18] On 2 September and 6 September 2019, the first defendant provided the plaintiff with the requested reports. The reports provided to the plaintiff are the following:

18.1 The interim Protocol report dated 28 August 2015;

18.2 Sanseo report dated 18 September 2015; and

18.3 Reef Loss Adjusters report dated 22 September 2015.

[19] In spite of receiving the reports, the plaintiff, as set out in the first defendant's reply to the rule 41 notice, proceeded to take the following steps to advance the proceedings as set out below:

19.1 on 25 September 2019, amended its particulars of claim against the second defendant;

19.2 on 13 October requested an allocation of a special trial date;

19.3 on 29 October 2020, filed a notice of set-down;

19.4 on 5 November 2020 filed a rule 21(2) notice for further particulars;

19.5 on 25 November 2020 arranged and convened a pre-trial meeting;

19.6 on 26 November 2020 filed rule 36(9)(a) notices;

19.7 on 5 February 2021 2020 filed rule 36(9)(b) notices;

19.8 on 8 February 2021 amended its replication;

19.10 responded to the first defendant's rule 35(3) notices; and

19.11 on 22 February 2021arranged a meeting of experts which took place.

[20] On 22 February 2021, at a joint meeting of the experts held, the experts produced a report in which they agreed that the cause of the fire at the plaintiff's premises was the 'incorrect installation of the extractor unit'.

[21] It is the first defendant's contention that in view of the fact that the reasons for the rejection of the plaintiff's claim were sufficiently set out in its letter dated 6 October 2015 and in its plea, the investigation reports sought by the plaintiff were irrelevant to plaintiff making a decision on the action or its attorneys advising it. It is further the first defendant's contention that the plaintiff should also be burdened with a special cost order as it took 18 months after receiving the reports to make its decision to withdraw the action against the first defendant which has resulted in the first defendant incurring unnecessary costs which are possibly not recoverable, and will in all likelihood be disallowed by the Taxing Master.

[22] It was further submitted on behalf of the first defendant that the plaintiff should be liable for the costs incurred before 2 September 2019 in that, taking into account the other defences raised by the first defendant in its plea, the plaintiff would not have been able to overcome the allegations made. According to the first defendant the plaintiff failed to obtain the necessary approvals from the local authority and/or comply with the National Building Regulations. Further that the plaintiff could have conducted its own investigation or asked for more detail pertaining to the first defendant's letter of rejection. Furthermore, it is the first defendant's contention that there was no reason for the plaintiff to have proceeded taking further steps after receiving the investigation

reports and that proceedings with the action after receiving the reports was vexatious, deserving of an attorney and own client scale cost order.

[23] The first defendant also seeks, in the alternative, costs de bonis propriis against the plaintiff's attorneys' of record as there is no explanation as to what advice was given to the plaintiff after the investigation reports were received, the attorneys should not have advised the plaintiff that its claim had no prospects of success.

[24] Plaintiff contends that it was incumbent on the first defendant to disclose the contents of the investigation reports from the time they were requested as the first defendant was already in possession of these reports in 2015. It was submitted on behalf of the plaintiff that in relation to costs incurred from inception of the action until 2 September 2019, had the first defendant produced the reports either before the institution of these proceedings or at the time a request was made during the first pre-trial meeting or in response to the plaintiff's rule35 (3) notice where the request for disclosure of the reports was made, the plaintiff would have been in a position to make an informed decision as to whether to withdraw the action.

[25] It is common cause that first defendant disclosed the investigation reports to the plaintiff on 2 September 2019 despite the fact that before the plaintiff instituted its action, the first defendant already had the investigation reports. Further, the first defendant refused to produce the reports after they were requested by the plaintiff during the first and second pre-trial meetings.

[26] In relation to the issue of costs in cases where the matter has become settled and the need for a trial is removed, the court in *Nieuwoudt v Joubert*[4] the court stated that:

> "There seems to me unfortunately to be an increasing tendency amongst litigants and practitioners to 'play one's cards close to one's chest, and not be frank and open with an opposing party either prior to summons or during the course of pleadings. This is a practice which the Courts should seek to eliminate.
>
> A successful party may be deprived of his costs if he has misled the unsuccessful party into litigation, and the latter has acted reasonably in instituting, or defending proceedings and has thereby unsuccessfully provoked a conflict …. If the error under which a party labours has been reasonably induced by the other party, the Court may consider it unfair that he should bear the burden of the usual cost order."

[27] Taking into account the conduct of the first defendant in refusing to provide the plaintiff with the investigation reports which were relevant to the resolution of the dispute between the parties, I am of the view that this court would not be remiss, in exercising its discretion, to deviate from the general rule that the successful party is entitled to its costs.

[28] As indicated above, the first defendant provided the investigation reports to the plaintiff on 2 September 2019 thereby disclosing the cause of the fire to have been the incorrect installation of the extractor fan. I am of the view that it is at this stage that the plaintiff should have considered the withdrawal of its action or it could have commissioned its own experts and have arranged a joint meeting of the experts. From the documents filed, it is not clear as to when the plaintiff commissioned an investigation into the cause of the fire. Instead the plaintiff advanced the proceedings

[4] 1988 (3) SA 84 (SE) at 90 E-F.

by amending its particulars of claim on 25 September 2019 which led to further steps been taken by both parties, including obtaining an allocation of a trial date.

[29] I am therefore satisfied, as conceded by the plaintiff in its tender for costs that the plaintiff should be responsible for the costs incurred subsequent to 2 September 2019 to 24 February 2021.

[30] Taking into account the facts of case, I am of the view that there is no evidence that the plaintiff's conduct in pursuing the action after 2 September 2019 was mala fide nor actuated by malice. I am of the view that a cost order on an attorney and own client scale is not justified. More so since the costs on an attorney and own client basis are rarely granted by the courts. I am not convinced that the first defendant has made out a case for such a cost order to be made.

[31] However, the plaintiff has not proffered an explanation as to why, knowing the cause of the fire as disclosed in the investigation reports read together with the provisions of the insurance policy, the action was not withdrawn shortly after receipt of such reports. I am satisfied that the delay on the part of the plaintiff in taking the decision to withdraw the action and taking further steps to advance the proceedings was unjustified. I am therefore satisfied that under the circumstances a cost order on the scale of attorney and client scale would sufficiently compensate for the unnecessary steps the first defendant had to take after 2 September 2019.

[32] With regard to costs *de bonis propriis* sought in the alternative against the plaintiff's attorneys' of record, I am satisfied that there is no evidence that the attorneys acted improperly or in a negligent or unreasonable manner and that such costs are not justified.

[33] I am satisfied that had the matter proceeded to trial the first defendant would have succeeded in defending the plaintiff's action and that it is entitled to the costs incurred post 22 February to 1 March 2021.

[34] In the result the following order is made:

1. The first defendant is ordered to pay plaintiff's costs on a party and party scale from the date of the inception of this action up to 2 September 2019.
2. The plaintiff is ordered to pay the first defendant's costs on an attorney and client scale from 2 September 2019 to 1 March 2021.
3. Costs payable to include the costs of Senior Counsel.

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N P MNGQIBISA-THUSI

Judge of the High Court

Date of Hearing : 01 March 2021

Date of judgment : 22 June 2022

Appearances

For Plaintiff: Adv K Griesel (instructed by Gildenhuys Malatji Inc)

For First Defendant: Adv TALL Potgieter, SC (instructed by Savage Jooste & Adams Inc)