IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED

12 September 2023

DATE SIGNATURE

CASE NO: 025849/22

In the matter between:-

BIDVEST McCARTHY TOYOTA LYNNWOOD Applicant

VS

SSG CASES (PTY) LTD Respondent

Coram: Kooverjie J

Heard on: 28 August 2023

Delivered: 12 September 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 12 September 2023.

SUMMARY: *Costs are awarded in favour of the applicant on an attorney and client scale. This court marks its disapproval pertaining to the conduct of the respondent. Such conduct amounts to an abuse of process of this court.*

ORDER

It is ordered:-

1. The respondent is ordered to pay the costs of the application as between attorney and client.

JUDGMENT

KOOVERJIE J

THE APPLICATION

[1] This matter turns only on the aspect of costs. The costs dispute emanates from the application issued by the applicant to compel the respondent to comply with Rule 35 of the Uniform Rules, namely to file its discovery affidavit. The applicant in this matter is the defendant in the main action.

[2] It is common cause that the respondent eventually complied with Rule 35. The respondent was required to file its discovery affidavit by 18 January 2023 but had only done so on 22 February 2023.

ISSUE FOR DETERMINATION

[3] The issue for determination is whether a case has been made for a costs order on a punitive scale. The costs pertain to the application to compel filed by the applicant. The applicants persist with an order for costs *de bonis propriis*, alternatively, attorney and client costs, in its favour.

[4] A brief chronology of events is highlighted:

4.1 the notice to discover was served on the respondent on 15 December 2023;

4.2 the respondent's discovery affidavit had to be filed by 18 January 2023;

4.3 the respondent filed an unsigned affidavit on 27 January 2023. The applicant was simultaneously informed of the challenges the respondent's attorney experienced in obtaining a signed affidavit;

4.4 on 2 February 2023, the applicant served its application to compel discovery on the respondent;

4.5 on 22 February 2023, the signed discovery affidavit was eventually filed;

4.6 upon the receipt of the discovery affidavit, the applicant proposed that the respondent pay the wasted costs of the said application. The respondent refused to tender the said costs, resulting in the applicant pursuing the application on the aspect of costs only.

THE APPLICANT'S CASE

[5] The applicant argued that it is entitled to a punitive cost order due to extensive delay on the part of the respondent's legal representatives in filing the signed affidavit. It was left with no option but to institute this application. The signed affidavit was only filed after this application was instituted.

[6] Notably, the applicant has taken umbrage to the conduct of the respondent's attorney, Ms Maharaj. It was argued that if she had complied with the "Rules" of court, this application could have been avoided. Her blatant disregard for the Rules was unreasonable and should be seen in a negative light by this court.

[7] In summary, it was argued that Ms Maharaj:

7.1 failed to comply with the Rules and was grossly negligent;

7.2 had materially and substantially deviated from the standards associated with a legal representative, personally attacked the applicant and was recklessly incompetent;

7.3 was the cause of unnecessary litigation and costs;

7.4 held a contemptuous disregard of the applicant's rights.

THE RESPONDENT'S CASE

[8] The respondent argued that even though there was a delay in filing its signed affidavit, its unsigned affidavit was filed before this application was instituted. Consequently the pursuance of this application caused unnecessary costs for the respondent and constitutes an abuse of this court's time.

[9] In fact, the respondent argued that it is the applicant who should be penalized with a punitive costs order and particularly for the following reasons:

9.1 the applicant was well informed that it was unable to serve its signed discovery affidavit timeously due to a delay on the part of the respondent's legal department;

9.2 the respondent nevertheless served an unsigned affidavit on the applicant. The applicant's attorneys refused to accept the service thereof;

9.3 the respondent's attorney was only able to serve the signed discovery affidavit on 22 February 2023 after receipt from the respondent's legal

department (on 21 February 2023). However, by this time the application to compel had already been instituted and a date was allocated in an unopposed motion court on 14 March 2023;

9.5 the contents of the signed affidavit and the unsigned affidavit are identical. Hence it was only a matter of attaining the relevant signature of the deponent;

9.6 despite the receipt of the signed discovery affidavit on 22 February 2023 the applicant persisted with this application resulting in the allocation of a date for hearing, namely 14 March 2023. This was clearly unwarranted;

9.7 the applicant's conduct was also dilatory, for instance its plea had not been filed timeously;

9.8 at best for the applicant, costs on the unopposed scale, would be appropriate.

ANALYSIS

[10] It is an established principle that I have a judicial discretion when considering the issue of costs. The general rule is that a successful party is entitled to its costs. The purpose of an award of costs is to indemnify a successful party who had incurred expenses in instituting proceedings.[1]

[11] I deem it necessary to emphasize that litigants, who wish to have their substantive issues determined before court, should not frustrate the litigation process with dilatory tactics. If there is such frustration, then the party subjected to such abuse

[1] Rabinowitz v Van Graan and Others 2013 (5) SA 315 (GSJ) at 324 E

is entitled to costs and, depending on the circumstances, punitive costs can be awarded in their favour. It is trite that such litigants should not be out of pocket.

[12] It is evident that the costs dispute came to light when the applicant requested the respondent to tender costs on the unopposed basis. This was after the discovery affidavit was filed, but before the application was heard.[2] I have noted that the response of Ms Maharaj was rather condescending and she, in fact, invited the applicant to proceed with this application. From the outset, she refused to tender costs.[3] There is no doubt that the response of the respondents sparked the uncollegiality between the parties' representatives.

[13] I deem it necessary to set out the contents of the said response:

"Please proceed to compel discovery

I am eager to depose to the Answering affidavit and I will certainly make sure that our firm requests a punitive cost order due to your firm not familiarizing yourself with the civil procedures of the High Court.

Also be advised that we will appoint Counsel to appear for us at your application, the costs of which you will be liable for.

[2] Annexure 'CJP6'
[3] Annexure 'CJP7'

Seeing that your client was so eager to defend this matter perhaps they should have found a firm who at the very least would know how to run a civil litigation matter."

[14] It cannot be gainsaid that in accordance with Rule 35 of the Rules of Court, the applicant was entitled to file an application to compel since there was a failure to comply with Rule 35, namely the filing of a signed discovery affidavit. At paragraph 5.1 of the founding affidavit, it was alleged:

"Despite the notice, the Respondent failed and/or neglected to make discovery under oath as prescribed by the Rules on/or before 18 January 2023 as required by Rule 35 of the Rules[4]."

[15] I do however take cognisance of the fact that the reason for the non-timeous filing of the signed affidavit was not the fault of the respondent's attorney. In Annexure 'NM5' the respondent advised its attorney that the signed affidavit would be filed within a week.

[16] I have particularly made the following observations:

16.1 the respondent was not only late in filing its unsigned affidavit, but also in filing its signed affidavit;

16.2 the signed affidavit had not as yet been filed when the application to compel was instituted;

[4] The respondent's interpretation of *dies non* was flawed. *Dies non*, as per the Rules, is not applicable in respect of Rule 35 processes. Hence the *dies* had expired on 18 January 2023.

16.3 the applicant need not have relied on the unsigned affidavit as there may have been a possibility that it could have been amended;

16.4 the applicant had, in fact, on its own accord, granted the respondent an indulgence to file by 1 February 2023.

[17] A more concerning issue for me is the manner in which the respondents conducted themselves. Although the applicant was initially informed of the reason for the delay, no further indulgence was sought with at least an explanation for the further impending delay. In fact, the respondent was left in the dark as to when the signed affidavit could be expected. No time frame was given as to when same would be furnished.

[18] During argument, the respondent submitted that it would be reasonable and fair if each party is ordered to pay its own costs in this matter on the basis that:

18.1 the respective parties should not be out of pocket due to the conduct of their legal representatives. Consequently it would be in the interest of justice that each party be liable for their own costs;

18.2 the applicant has not been prejudiced in any way by the delay; and

18.3 moreover it should not be forgotten that the applicant was also delayed in filing its plea.

[19] I am particularly mindful that a court must guard against Rules of Court being abused especially in respect of unnecessary and procedurally related

applications.[5] However, in my view, this was not purely a matter where strict compliance with the rules was sought by the applicant. The facts speak for themselves. In the period after the unsigned affidavit was filed, Ms Maharaj had not sought any further indulgence for the late filing of the signed affidavit. She remained silent on when the affidavit could be expected. The correspondence, in fact, illustrates that the respondent's attorney persisted in opposing the costs of this application.

[20] It is trite that the signed affidavit was necessary in order to comply with the Rules of court. Discovery in terms of Rule 35 entails a procedure whereby a party should specify, on oath, the document in its possession or content.[6] Hence the signed affidavit constitutes proper discovery. Such signed discovery affidavit was not furnished when this application was instituted.

[21] I am of the view that the hearing of this application could have been avoided if the respondent tendered costs on the unopposed scale. The applicant was entitled to costs at that stage already.

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[5] In Federated Trust Ltd v Botha **1978 (3) SA 645** (A) Van Winsen AJA (as he then was) said at 654C-F as follows:

> *"The Court does not encourage formalism in the application of the rules. The rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the Courts. See, eg Hudson v Hudson and Another **1927 AD 259** at 267; L F Boshoff Investments (Pty) Ltd v Cape Town Municipality (2) **1971 (4) SA 532** (C) at 535 (last paragraph); Viljoen v Federated Trust Ltd **1971 (1) SA 750** (O) at 754D-E; Vitorakis v Wolf **1963 (3) SA 928** (W) at 932F-G."*

[6] my underlining

[22] The remaining issue is whether punitive costs are justified. As a general rule, a court would not order a litigant to pay the costs of another litigant on an attorney and client scale, unless exceptional circumstances exist. This would entail circumstances where the motives were vexatious, reckless, malicious or frivolous or if a party acted unreasonably or in a reprehensible manner.[7]

[23] I am further of the view that this is not an instance where a costs *de bonis propriis* is warranted. It is in extreme cases that such costs are awarded. Costs of this nature are awarded under serious circumstances such as when there is negligence to a serious extent on the part of the legal representative.

[24] Courts award costs on an attorney and client scale when it marks its disapproval of the conduct of a litigant. In exercising my judicial discretion, I am required to take into account the circumstances, the conduct of the parties and any other factor that has a bearing on the matter.

[25] The general rule is that a party should not be punished at the expense of its legal representative's unreasonable conduct. However, on the facts before me, it has not been illustrated that the respondent was ignorant of the imminent litigation (this application to compel).

[26] The correspondence between the respondent and its legal representative shows that the signed affidavit was requested on more than on occasion. During

[7] See Erasmus Superior Court Practice Second Edition, Van Loggerenberg D5-21-23
In the commentary guidance is given as to when attorney and client costs are warranted.

argument counsel for the respondent indicated that there had been ongoing communication between the respondent's attorney and the respondent. However, I was informed that not all such correspondence was annexed to the papers due to their privileged content. It has further not been gainsaid that Ms Maharaj was required to keep her client abreast of the developments in this matter.

[27] At this juncture, I further wish to emphasize that courts are generally reluctant to penalize litigants due to the tardiness of their legal representatives. However there are instances where the fault of a legal representative can be imputed to the litigant.

[28] The Appellate Division in ***Salojee***[8] said:

"There is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. The attorney, after all, is the representative whom the litigant has chosen for himself and there is little reason why, in regard to the condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship…."

[29] As alluded to above, this is clearly an instance where litigation could have been avoided. I find that the respondent and its attorney's conduct in opposing the costs issue constituted an abuse of this court's time and resources. The

[8] Salojee and Another NNO v Minister of Community Development 1965 (2) SA 135 (A) at 141C-E
See also Turnball Jackson v Hibiscus Coast Municipality2014 (6) SA 592 CC at paragraph 26

application to compel was necessitated due to non-compliance with Rule 35. An unsigned affidavit could in no manner constitute compliance. The court, in this instance, marks its disapproval of the conduct of the respondent.[9]

[30] The applicant, in these circumstances, should not be out of pocket due to the conduct of the respondent and its attorney. There is no reason why the respondent should not be ordered to pay the costs of this application on an attorney and client scale.

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H KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the Applicant:	*Ms. M Thessner*
Instructed by:	*Prinsloo – Van der Linde & Thessner Attorneys*
Counsel for the Respondent:	*Adv E Muller*
Instructed by:	*Neil Govender Attorney*
Date heard:	*28 August 2023*
Date of Judgment:	*12 September 2023*

[9] Public Protector v South African Reserve Bank 2019 (6) SA 253 CC at 318-319A, the majority of the Constitutional Court with reference to Orr v Schoeman stated:

"More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark disapproval of the conduct of a litigant. Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent dishonest mala fides (bad faith) conduct, vexatious conduct, and conduct that amounts to an abuse of the process of court."