

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NUMBER: 3119/2022

In the matter between:

MAJ-BRITT FABRICIUS MATCHETT

APPLICANT

and

HENNING PETRUS NICOLAAS PRETORIUS

FIRST RESPONDENT

CAPITAL STUD (PTY) LIMITED

SECOND RESPONENT

SUMMERHILL EQUESTRIAN (PTY) LIMITED

THIRD RESPONDENT

JUDGMENT

[1] On 10 March 2022 Applicant brought an application against Respondents set down for 12 April 2022 wherein she sought *inter alia* the return to her of certain horses, that the whereabouts of the said horses be disclosed and costs on an attorney and client scale against First Respondent. The application papers were served on Respondents and a notice of intention to oppose was filed on 18 March 2022. On 28 March 2022 First Respondent filed his answering affidavit. On 1 April 2022 Applicant's

attorney filed a notice of withdrawal of the application and tendered the wasted costs occasioned thereby on a party and party scale. On 4 April 2022 a notice of removal of the matter from the roll on 12 April 2022 was served and filed stating that the action had been withdrawn. On 4 April 2022 the attorney of Respondents addressed a letter to the Registrar stating that the notice of withdrawal was not by consent and that the notice was therefore invalid and that the matter had to be enrolled for 12 April 2022. It appears that the matter was then enrolled on 12 April 2022 and was adjourned *sine die* and costs reserved. The matter was then set down on the opposed roll by Respondents for hearing on 5 October 2022.

[2] Heads of argument were filed on behalf of Applicant and Respondents from which it is apparent that the basis for the set down of the matter on the opposed roll by Respondents was that it required costs to be paid on an attorney and client scale. There is no objection by Respondents that the matter had been removed from the roll. The tendering of costs on a party and party scale was not accepted by Respondents.

[3] It was submitted on behalf of Respondents that in the application of Applicant and in the opposing affidavit of Respondents costs were sought on an attorney and client scale. It was further submitted that when an application was brought on an urgent basis all material facts must be disclosed. It was submitted that to mark its disapproval of fraudulent, dishonest and *mala fide* conduct or vexatious conduct then costs can be awarded on an attorney and client scale. I was referred to the decision of Public Protector v South African Reserve Bank 2019 (6) SA 253 CC. It was accepted on behalf of Respondents that a costs order on an attorney and client scale, which is a punitive costs order, is in the discretion of the court which it must exercise judicially.

[4] It was submitted that factors which had to be considered in this matter was that it was an abuse of the court process in that it lacked urgency and was vexatious. Applicant failed to bring to the Court's attention the entire contents of the letter "H1" annexed to Respondents affidavit. There was a clear dispute of fact which was not disclosed to court and spurious allegations were made against First Respondent. The conduct of Respondents attorneys were described as "flippant" where no grounds therefore existed. It was submitted that this justified costs on an attorney and client scale.

[5] It was submitted on behalf of Applicant that at the hearing on 12 April 2022 it was confirmed by Respondents counsel that the only issue that remained was the issue of costs which Respondents required to be on an attorney and client scale. The withdrawal of the application was accepted. It was also submitted that the set down by Respondents of the matter on the opposed roll did not comply with Rule 41 (1) (c). There was a costs order tendered and the notice of set down does not set out what it was set down for. It was further submitted that the conduct of Respondents were unreasonable in pursuing costs on an attorney and client scale. I was referred to paragraph 8 of the decision of Public Protector v South African Reserve Bank. It was submitted that Applicant did not conduct herself in any manner which warranted a punitive costs order. Respondents are entitled to party and party costs up to and including the date when such costs were tendered. The costs on an attorney and clients scale should therefore be dismissed and no costs be granted after 31 March 2022. Applicant also sought that Respondents pay the costs of 12 April 2022 and the costs of the opposed hearing.

[6] Both counsel for Respondents and Applicant submitted that in the event of their respective submissions not being accepted that Applicant pay the costs but on a party and party scale.

[7] Before considering whether costs should be awarded on a punitive scale it is necessary, in my view, to set out that from the papers it appears that Applicant and First Respondent had been in a relationship from which two minor children were born. It appears that there has been litigation with regard to the minor children and also that there has been other litigation regarding horses as both First Respondent and Applicant are owners of horses. It must be borne in mind that the dispute in this matter does not only relate to a purely commercial transaction but originates from a domestic relationship between the parties which has resulted in various interdicts and also settlements reached between the parties. Accusations which are made by the two parties in their respective affidavits concerning the conduct of the other party must accordingly be seen in the light of the domestic relationship which appears to have broken down between the parties.

[8] Costs on an attorney and client scale is not to be awarded lightly and should be considered in the light that a person who exercised a right to obtain a judicial decision should not be penalised for doing so. The grounds upon which such an order may be granted is where a party has been guilty of dishonesty or fraud or was vexatious or malicious or for frivolous motives brought the said application or action.

[9] In the present matter, although it was submitted that there are averments in the affidavits which are incorrect and malicious, it has not been submitted that there is any scandalous matter included in the affidavits.

[10] In the case of *The Public Protector v African Bank* in paragraph 8 thereof it refers to a decision of the Labour Appeal Court in *Plastic Converters Association of South Africa on behalf of Members v National Union of Metal Workers of South Africa* 2016 (ZALAC39) with which it agrees and states as follows:

“The scale of an attorney and client is an extra ordinary one which should be reserved for cases where it can be found that the litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium”

[11] It is therefore, in my view, when considering the facts of this case and having to apply ones judicial discretion in such circumstances, only in very exceptional circumstances that one would award costs on attorney and client scale. In the present matter Applicant, as soon as the affidavit of Respondents was filed, immediately filed a notice of withdrawal of the application and removing it from the roll. It was only the insistence of Respondents that resulted in the matter being placed on the roll on 12 April 2022 when it was adjourned with the only issue that remained was that of costs on an attorney and client scale.

[12] As the leave of the Court had not been sought nor was it by consent I will accept that the matter was still set down on 12 April 2022. The necessity of senior counsel is however not apparent, as only the issue between party and part costs or costs on an attorney and client scale remained in issue.

[13] The setting down of the matter on the opposed roll for argument for a costs order on an attorney and client scale rather than on a party and party scale, in my view, with the facts as set out above, does not warrant a costs order on an attorney and client scale.

[14] In terms of Rule 41(1) (c) a tender for costs in the withdrawal of a matter is equivalent to an order of court. However due to the fact that in this case the notice at that stage was not by consent or with leave of the court but was accepted at the hearing of 12 April 2022 it may be necessary that an order be made in that regard.

[15] Accordingly the following order is made:

1. Applicant is ordered to pay the costs of the application up to and including 12 April 2022.
2. In respect of the costs of the opposed matter on 5 October 2022 no costs order is made.

BEZUIDENHOUT J.

JUDGMENT RESERVED:

5 OCTOBER 2022

JUDGMENT DELIVERED:

12 OCTOBER 2022

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