IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 15955 / 2019

In the matter between:

FRANCOIS ARNOLD DU TOIT N. O.	First Applicant
HENRI DU TOIT N. O.	Second Applicant
(Trustees for the time being of the Rijsel Trust)	

and

CLARENSVILLE SHAREBLOCK LIMITED	Respondent

Coram: Wille, J
Heard: 25th of May 2022
Delivered: 6th of June 2022

JUDGMENT

WILLE, J:

Introduction

[1] I previously heard and determined an interlocutory *variation* application in connection with this very unfortunate matter. After judgment was delivered in the *variation* matter, I discussed with counsel the issue of whether or not I should remain seized with the further determination of the matter in any form or manner. This was pertinently raised by me as in the variation matter I was obliged to some extent to express a view regarding the overall prospects of success in connection with the main application. I was assured by both the legal teams that they were in agreement

that I was in no manner precluded from further dealing with this matter. It is on this basis that I agreed to hear this second interlocutory application to which this judgment relates.

[2] During the course of my judgment in the first variation interlocutory application, I endeavored to set out some of the background facts to the main application. Of necessity, I do so again in order to position this second application in its correct context taking into account the core relief contended for in the main application which has yet to be determined.

[3] The first applicant is an experienced architect and is a duly authorized trustee of the trust. The respondent is a share-block company.[1] The company owns a block of apartments in Sea Point.[2] The building is approximately (60) years old. As a shareholder of the company, the trust enjoys certain rights to the use and the occupation of an apartment.[3]

[4] During the course of 2019, the trust made an application to the respondent's directors, so as to make certain alterations to the apartment. This application was approved in April 2019 and the works commenced. Thereafter, and during May 2019, the trust's contractor discovered that a certain upstand-beam existed in the wall of the apartment, which the trust sought to be removed in order to install a sliding door between the proposed lounge and, the balcony of the apartment.

[5] The purpose and the precise location of this upstand-beam did not seem entirely clear due to, *inter alia*, the building's age and also because no plans were available that indicated any specific detail of the structural integrity of the building and, presumably how this would be compromised (if at all), by the proposed alterations.

[6] An engineer employed by the trust held the view that the beam was *'oversized'* and designed a '*detail'* for the alteration of the beam which, in his opinion,

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[1] The share block company (the 'company').
[2] The building consists of (110) apartments.
[3] The 'apartment' - (apartment number 805).

would mean that the proposed alteration could continue, without having any impact on the structural integrity of the building. The trust was advised by a different engineer (employed by the company), that the respondent's board had resolved many years ago not to allow any modifications to the concrete frame of the building, which would include, *inter alia,* this upstand-beam of the building.

[7] Thereafter, the trust was advised that the board would permit the alterations as sought by the trust to continue, save for the fact that the beam fell to be restored to its original condition. The trustees of the trust disagreed with this condition imposed by the respondent. The subsequent confrontation by the trust was essentially one to the effect that the decision taken by the board was both *ultra vires* and *unreasonable*.

[8] This, in turn, led to a further application by the trust for permission to alter the beam on the strength of the opinions expressed by their engineer. In his letter of support, this engineer expressed, *inter alia*, the following opinion:

'…*I, Martin Woudberg, director at Ekcon Engineers, hereby state that the proposed modification of the concrete beam at 805 Clarensville is adequate. The execution of the detail will not compromise nor have any impact on the structural integrity of the building, in any way whatsoever…'*

[9] The respondent's board refused this second approach by the trust. Aggrieved by this refusal, the trust launched a substantive application for specific relief to the effect that the board's withholding of its consent to the proposed alteration be declared *unreasonable* and sought an order that the trust is permitted to alter the beam, as proposed by the engineer for the trust. In summary, the main relief sought by the trust was the following: (a) that the respondent's withholding of its consent to the proposed alteration be declared *unreasonable* and, (b) that the applicants be allowed to alter the beam as proposed.

The History of the Litigation

[10] The principal application initially fell to be determined many months ago. At one of these scheduled hearings, the trust sought a variation order and postponement of the main application. This was piloted by a formal application. This latter application was opposed and a full buffet of affidavits was filed. The trust sought to vary the order that I initially issued out on the 4th of March 2020 and it sought an order postponing the hearing and argument in the main application. The variation order stood opposed, but the inevitable postponement of the main application was not opposed, save that different terms were sought by the respondent, governing the further conduct of the matter, going forward.

[11] This variation application dealt with the fact that I initially referred an issue identified by the trust, by agreement, to oral evidence in terms of rule 6(5)(g). The terms of the referral were, *inter alia*, as follows;

'…*The oral evidence shall comprise the expert evidence of Mr Len Nyenes and Mr Martin Woudberg ('the experts') on the question of whether the upstand beam referred to in the papers can be altered in the manner proposed by the applicants without adversely affecting the structural integrity of the building owned by the respondent…'*

[12] A variation of this order was sought so that the trust could introduce another different expert who was alleged to have been better qualified than the first expert employed by the trust. Significantly, it was also this expert's opinion that underpinned the second application by the trust, to the board of the respondent. I dismissed the variation application for the reasons set out in that judgment.

Subsequent Developments

[13] What followed post the refusal of the variation application is directly relevant to the determination of this application. In this new application, the respondent seeks an order against the applicants for embarking on irregular proceedings. They say this because the applicants delivered a supplementary report and opinion without the consent of the respondent and without the leave of the court.

[14] This *supplementary* report was sent to the respondent's expert on the 3rd of March 2022. This was presumably so done in anticipation of the looming meeting of the experts scheduled for the 7th March 2022. The joint meeting of the experts followed and a joint minute prepared by the applicants' counsel was then signed by both the experts on the 9th of March 2022. The supplementary expert report was only filed on the respondent's attorneys of record on the 7th of March 2022. Significantly, this was only filed after the joint meeting of the experts had already taken place.

The Respondent's Position

[15] The respondent's counsel makes a powerful point that the filing of this supplementary expert report by the applicants is irreconcilable with their conduct and the position which they previously adopted in this matter. In addition, it is submitted, that this conduct is prohibited because it amounts to approbating and reprobating at the same time.

[16] This, the respondent says, confirms the *irregularity* of the irregular step in issue in this current opposed interlocutory application. Further, it is advanced that the filing of the further supplementary report is at odds with the terms of the court order made pursuant to the parties agreeing to its terms in good faith. It is also, so it is contended, automatically manifestly prejudicial to the respondent.

The Applicants' Position

[17] The applicants' position in connection with the belated filing of the further supplementary report by their expert is a relatively simple one. They contend that the delivery of this further supplementary report without the leave of this court is *per se* valid because it is not strictly prohibited by the oral evidence order. Put in another way, they say the oral evidence order regulates what they must do and not what they are prohibited from doing.

Consideration

[18] It is so that all witnesses must only say what they know to be true. But, they must not also omit anything that would potentially cause their evidence to be misleading.[4] I say this because it was precisely the oral evidence order which regulated the parties' respective legal rights in respect of the referral to oral evidence. This order did not afford the applicants any right to file a supplementary expert report. The leave of this court was and is required.

[19] As a matter of logic, an expert witness generally enters the fray with an aura of respectability and this may cause the judicial officer to assume that this witness may be trusted. The factual canvass also needs to be considered to understand the opposition position adopted by the respondent.

[20] The main application was launched as a matter of urgency nearly (3) years ago. About a year later the variation application was argued and dismissed. No doubt this triggered the further steps by the applicants to which the respondent protested.

[21] The purpose of the oral evidence order was for a limited issue to be determined by oral evidence. Accordingly, it is contended by the respondent that there is absent any purposive or contextual basis upon which the applicants are now permitted to file a further supplementary expert report. This, without the leave of the court and after the expiry of a period of nearly (2) years. On this, I agree.

[22] Further, the further report that the applicants unilaterally filed is substantively different from the design concept initially represented to the respondent for their consideration. Put in another way, the new design concept has never been placed before the respondent’s board for consideration and does not touch upon the relief sought in the main application. As a matter of logic, it must be so that this compounds its irregularity. To interpret the order in any other manner would be to the manifest prejudice of the respondent.

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[4] *Argument and Opinion: Advocate and Expert* – By Mr. Justice Owen Rogers – ‘Advocate’ (April 2019).

[23] Factually, the engineering component of the initial proposal placed before the respondent's board was made up of the following, namely; (a) a letter from the expert and, (b) his drawing attached thereto. Whereas, the further report is (15) pages long and contains no less than (19) drawings all of which were absent from the initial proposal. The further report now contended for is substantively different from the one initially placed before the respondent's board and therefore the filing thereof is prejudicial to the respondent for reasons not only of inconvenience, but also that of costs.

[24] Further correspondence followed between the respective legal teams culminating in an arrangement being made for the experts to meet and for the joint minute of the experts to be agreed. The correspondence from the applicants' attorneys notably omitted to record that the meeting was for them to consider the now new supplementary report compiled on behalf of the applicants.

[25] In ignorance of what was taking place behind the scenes with regard to the now new supplementary report, the experts met and a joint minute was signed. The joint minute was drafted by the applicant's counsel, this unbeknown to the respondent and the respondent's counsel. After the meeting of the experts, the respondent received for the first time a copy of the now new supplementary expert report by the applicants' expert. It goes without saying that this leaves a lot to be desired and the less said about this the better. Its irregularity is self-evident.

[26] This manifest failure to give timeous notice to the respondent's attorneys compounds the nature and extent of the irregularity and the filing of the further new report accordingly falls to be tainted. This is because the respondent's expert did not know whether what was being presented to him for consideration was in any legal context irregular and, whether this required authority from the board of the respondent. As a matter of pure logic very little probative weight (if any) can be attached to the joint minute. As a matter of law the applicants' acceptance and

adoption of the position being that they had to ask the court for leave to file a further report constitutes a judicial admission which they cannot now seek an exodus.[5]

[27] In the circumstances, it must be so that the applicants are precluded from departing from the judicial admission which they previously made, and by the applicants to litigate in this fashion is impermissible. Further, it is also prejudicial to the respondent's right to a fair hearing which is not tainted by any irregularity. It follows that the filing of the further report at the instance of the applicants is not only irregular but manifestly to the prejudice of the respondent.

Costs

[28] One of the fundamental principles of costs is to indemnify a successful litigant for the expense put through in unjustly having to initiate or defend litigation. The successful party should be awarded costs.[6] The last thing that our already congested court rolls require is further congestion by an unwarranted proliferation of litigation.[7]

[29] It is so that when awarding costs, a court has a discretion, which it must exercise judiciously and, after due consideration of the salient facts of each case at that moment. The decision a court takes is a matter of fairness to both sides.[8]

[30] The court is expected to take into consideration the peculiar circumstances of each case, carefully weighing the issues in each case, the conduct of the parties as well as any other circumstances which may have a bearing on the issue of costs, and then make such order as to costs as would be fair in the discretion of the court.

[31] No hard and fast rules have been set for compliance and conformity by the courts unless there are special circumstances.[9] Costs follow the event in that the

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[5] *Gordon v Tarnow* 1947 (3) SA 525 (A) at 531.
[6] *Union Government v Gass* 1959 4 SA 401 (A) 413.
[7] *Socratous v Grindstone Investments* (149/10) [2011] ZASCA 8 (10 March 2011) at [16].
[8] *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) at 1055F- G
[9] *Fripp v Gibbon & Co* 1913 AD 354 at 364.

successful party should be awarded costs.[10] This rule should be departed from only where good grounds for doing so exist.[11]

[32] The respondent seeks a special punitive costs order against the applicants. In support of this request, the following issues were emphasized; (a) that the applicants had no basis in fact or law to file the supplementary report and, (b) that the applicants simply had no basis in fact or in law to only advise the respondent of the existence of this supplementary expert report after the joint meeting of the experts had taken place.

[33] In all the circumstances of the matter, I hold the view that a punitive costs order in this matter is warranted for some of the reasons set out in this judgment and, for some of the costs incurred by the respondent.

[34] I say this because it must have dawned on the applicants shortly after the filing of the replying papers to this application that their opposition to this application was doomed to failure. It is for these reasons that a portion of the costs awarded in this matter will be awarded against the applicants on a punitive scale.

Order

[35] In the result, the following order is granted, namely:

1. That the applicants' supplementary notice in terms of rule 36(9)(b) dated the 7th of March 2022 (attached to which is the further report of Mr Woudberg dated the 3rd of March 2022), is hereby set aside as an irregular step.

2. That the applicants (jointly and severally, the one paying the other to be absolved), shall be liable for the respondent's costs of and incidental to this application, on the scale as between party and party, as taxed or

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[10] *Union Government v Gass* 1959 4 SA 401 (A) 413.
[11] *Gamlan Investments (Pty) Ltd v Trilion Cape (Pty) Ltd* 1996 3 SA 692 (C)

agreed, from the inception of this application up and until (and including) the 18th of May 2022.

3. That the applicants (jointly and severally, the one paying the other to be absolved), shall be liable for the respondent's costs of and incidental to this application, on the scale as between attorney and client, as taxed or agreed, from the 19th of May 2022 and thereafter.

E.D. WILLE
Judge of the High Court
Cape Town