



Republic of South Africa

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

Case number: 8493/2016

Before: The Hon. Mr Justice Binns-Ward

Hearing: 2 November 2016

Judgment delivered: 22 November 2016

In the matter between:

VANESSA AGENBAG

Applicant

and

CBD TOWING

Respondent

JUDGMENT

BINNS-WARD J:

[1] The only question that requires determination in this matter is what order should be made as to costs.

[2] The litigation concerned an application in which relief was sought as a matter of urgency in the following terms:

2. That the applicant be ordered to pay into the trust account of VFV Attorneys the amount of R16 250.00 (sixteen thousand two hundred and fifty rand) or any other amount the court may direct to be held as security pending final resolution of any legal proceedings to be instituted by the respondent within 20 (twenty) days of delivery of this order to claim its alleged fees for towing, storage, recovery, administration and

security in respect of a Toyota Yaris vehicle with registration number CJ43730 (“the vehicle”);

3. That, upon proof of payment in terms of paragraph 2 thereof, the respondent be directed to deliver the vehicle to the applicant;
4. Authorising and directing the Sheriff of this Honourable Court to take possession of the vehicle and to deliver same to the applicant in the event of the respondent failing to comply with paragraph 3 thereof;
5. That, should the respondent fail to institute any legal proceedings as contemplated in paragraph 2 hereof within 20 (twenty) days after date of delivery of this order, the amount paid into the trust account of VFV Attorneys by the applicant as aforesaid be released;
6. That the respondent be ordered to pay the costs of this application as between attorney and client; ...

[3] The application was served on the respondent on 19 May 2016. The notice of motion set forth a timetable for exchange of papers to enable the matter to be heard on 27 May.

[4] The substantive relief became moot when the applicant regained possession of the motor vehicle on 23 May. The applicant’s attorney then proposed that the matter should be removed from the roll against an undertaking by the respondent to pay the applicant’s costs of suit. The respondent denied liability for the applicant’s costs and maintained that *it* was the party entitled to a costs order.

[5] In the context of the resultant impasse, the matter came before Allie J in the Third Division on 27 May 2016, when an order was taken by agreement postponing the matter for hearing on the opposed motion roll in the Fourth Division on 23 August 2016. The order provided a timetable for the exchange of opposing and replying affidavits and directed the respondent to pay the applicant’s costs occasioned by the postponement.

[6] On 22 August, however, a further order was made by the Judge President, also by agreement, further postponing the matter to 2 November 2016, when it came before me. By that stage the ambit of the papers conceived in terms of the order made on 27 May had expanded to include an application by the respondent to strike out the applicant’s replying affidavit in its entirety and a ‘further supplementary affidavit’ by the respondent’s sole member in response to what was contended to be new matter in the applicant’s replying papers. The supplementary affidavit was delivered to address

the contingency that the respondent's aforementioned application to strike out might not be granted.

[7] In the result, by the time the matter was called on 2 November, the amount of the costs in contention between the parties no doubt exceeded the value of the property in respect of the possession of which the litigation had been instituted. That was a most unfortunate state of affairs. Moreover, it was not even the sort of case in which the merits have to be decided only to determine the incidence of costs because the substantive issues have become moot or settled after the costs had been incurred. In this matter the costs were run up for the sole purpose of providing an evidential basis for the determination of the question of who should bear the brunt of them.

[8] The evidence that was adduced in the course of the exchange of affidavits after the substantive issue had been overtaken by events turned up disputes of fact that were arguably genuine and therefore resolvable in the applicant's favour only if confirmed by oral evidence. The applicant's counsel's primary contention was that these disputes of fact were not genuine. But he nevertheless requested that should the factual disputes be considered by the court to stand in the way of the applicant getting the costs order that she seeks, they should be referred for oral evidence. He did acknowledge though that courts were reluctant to take issues concerning costs to such lengths. I certainly have no intention of doing so in this case. It would merely exacerbate the already paradoxical situation of the parties having incurred most of the costs solely for the purpose of getting a decision as to which of them should bear them.

[9] Costs of suit are an incidental aspect of litigation. The award of costs is a matter within the court's discretion.¹ Ordinarily, costs follow the result and that would usually be the case in proceedings of the nature in the current case. It does not follow, however, where the result has been pre-empted by an intervening event, that the parties should be allowed or encouraged to pursue proxy proceedings thereafter merely for the purpose of establishing what the result would have been. Judicial policy – which is manifested, for example, in the disinclination of appellate courts to entertain appeals when the only question remaining in contention is one of costs - would discourage such a course. In exercising its discretion in respect of costs judicially a court must have due regard to

¹ See e.g. *Chonco and Others v President of the Republic of South Africa* [2010] ZACC 7; 2010 (6) BCLR 511 (CC), at para. 6, and the other authority cited there in footnote 7.

the facts and circumstances of the given case. Ultimately, the object is to make a determination that the court considers to be just and fair.

[10] I consider that in a matter like this the court would be entitled to do the best it can in making such a decision on the papers without oral evidence irrespective of the existence of any disputes of fact. While an award of costs is final, its character is more procedural than substantive. Approaching its determination with regard to the probabilities of success in the main case as they appear from the papers would be more appropriate than requiring the parties to run up yet further costs in order to attempt to reach a more definitive conclusion on who would have won had a decision by the court on the substantive relief been required.² Regard may also be had to any other factors that might be relevant in the exercise of the discretion, including how either of the parties might reasonably have conducted themselves so as to avert the necessity for the litigation. That is the approach that I propose to apply.

[11] In accordance with that approach I shall not allow myself to be detained by the application to strike out or any dispute about the admission of the respondent's supplementary affidavit. It seems to me that neither party would suffer any prejudice were the replying papers to be left unaffected and the supplementary affidavit admitted. In deciding the issue of costs I shall have regard to all of the affidavits filed of record.

[12] The respondent relied on two points concerning the merits of the case in resisting liability for the applicant's costs. It contended that it had not been in possession of the vehicle when proceedings were instituted, and should therefore not have been joined in the proceedings. It alleged that, to the knowledge of the applicant, the vehicle had been in the possession of Combine Towing at the relevant time. Furthermore, inasmuch as the application was vindicatory in character, the applicant had not established that she was the owner of the vehicle.

[13] It is necessary to sketch the factual background to the proceedings.

[14] The applicant had been involved in a collision while driving the vehicle on the N1 in the early hours of 22 April 2016. A tow driver employed by the respondent had

² Cf. amongst others, *Jenkins v S.A. Boiler Makers, Iron & Steel Workers & Ship Builders Society* 1946 WLD 15 at pp.17-18, referred to with approval in the relevant respect in *Giliomee v Cilliers* 1958 (3) SA 97 (A) at p. 101; *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (In Liquidation)* 1998 (1) SA 811 (SCA) at 835B-D and the judgment of the Full Court in *Gamlan Investments (Pty) Ltd and Another v Trilion Cape (Pty) Ltd and Another* 1996 (3) SA 692 (C) at 700G-701B.

approached the applicant at the scene of the collision and offered to tow away the damaged vehicle. He had represented to her that the respondent was authorised by the insurers of the vehicle to undertake such towing work. The vehicle was towed to the respondent's yard at Ndabeni.

[15] The respondent alleged that later in the day the applicant requested the vehicle to be towed to Island Auto Panel in Paarden Island for a quotation to be obtained in respect of its repair. A copy of what purports to be a quotation from Island Auto Panel was annexed to the answering affidavit. The applicant denies having requested that the vehicle be taken to the panel beater for a quotation.

[16] The respondent further alleged that after the panel beater had indicated that the vehicle had been damaged beyond the cost of economical repair, it was unable to return the vehicle to its yard due to lack of capacity. It alleged that it therefore took the vehicle to be stored at Combine Towing in Diep River. According to the respondent's answering affidavit, Combine Towing is a business owned by one Conradie. It alleged that the applicant was informed of the whereabouts of her vehicle. She denies this. The respondent alleged that it had presented Combine Towing with an invoice in the amount of R6000. The arrangement was that Combine Towing would recover the amount from the applicant or her insurer and account for it to the respondent. A copy of the invoice was annexed to the answering affidavit. It is dated 22 April 2016 and numbered 'Invoice CBD056'.

[17] The applicant alleged that she discovered that the respondent was in fact not authorised by her insurer to tow vehicles insured by it from scenes of collisions. She said that she opened a case of fraud against the respondent under what appears to have been an April case number (1851/04/2016). She said that her insurer negotiated with a representative of the respondent to obtain the return of the vehicle. This allegation was not denied in the respondent's answering affidavit. The applicant averred that the respondent had indicated that it was not willing to release the vehicle, save against payment of a release fee in the sum of R16250, which included storage for 4 days at R400 per day.

[18] The applicant averred that after her insurer had been unable to obtain the release of the vehicle, the matter was handed to an attorney, who also represented her insurer. The attorney addressed a demand for the return of the vehicle. The attorney's letter of demand was addressed to the respondent at its physical address at Ndabeni and at two

email addresses: combinetowing@gmail and cbdtowing@gmail. It was, however, sent as an attachment to a covering email transmitted only to cbdtowing@gmail, apparently by one Delaine Du Plessis from the applicant's attorneys.

[19] Despite one of the email addresses endorsed on the letter being an address that on its face appeared to be connected to Combine Towing, the letter was unambiguously addressed to the respondent. Its content set out the history of the matter to that stage consistently with that sketched hereinabove, and conveyed the writer's contention that the vehicle was in the respondent's possession as a result of a 'blatant misrepresentation' by its representative that the respondent was on the applicant's insurer's panel. It appeared from the body of the letter that the respondent had purported to assert a lien over the vehicle. The letter proceeded in paragraphs 7 and 8 thereof as follows:

7. We herewith demand the immediate release of the aforementioned to our client, due to your blatant misrepresentation. We will advise our client to pay the amount as per your invoice into our trust account as substituted security for your alleged lien over our client's vehicle, which amount will be held in trust pending the finalisation of an action for recovery of your fees, to be instituted by yourselves within 20 days hereof, failing which the amount so paid into trust will be released.

8. Should you not agree to release the vehicle forthwith in accordance with the proposals made in paragraph 7 above, then our further instructions are to launch an urgent application against you for the immediate return of the vehicle, together with costs as between attorney and client.

[20] The letter set a deadline of close of business on 6 May for compliance by the respondent with its demands. It included copies of orders that it had obtained previously from this court in three apparently comparable cases to demonstrate the earnestness with which the demand and threat of legal action were being made.

[21] The respondent failed to respond to the letter. Its sole member and manager, Mr Marx Orgolitsch, forwarded a copy of the email under which it was sent, together with the attachment, to Karen Brophy on 10 May. Ms Brophy then emailed Delaine Du Plessis at the applicant's attorneys later that day under the subject line 'MAT102694: MS V AGENBAG/ CBD TOWING – CLAIM NUMBER 556991694 4' and stated 'We have discounted the amount to R15000 on the 29-04-2016. We willing

(sic) to discount the discounted amount to R10 000. Please advise.’ Karen Brophy’s email address appears on the email as combinetowing@gmail.com .

[22] On 11 May 2016, the attorneys responded to Ms Brophy’s email by letter. The letter was addressed to the respondent and set out the respondent’s physical address at Ndabeni. It was sent by email to cbdtowing@gmail.com and to combinetowing@gmail.com . It was clear from its content that it was directed at the respondent as it again made reference to the alleged misrepresentation by the respondent’s tow driver employee. It also made it plain that it regarded the email received from Ms Brophy on the previous day as having come from the respondent because it conveyed the rejection of ‘your [i.e. the respondent’s] discounted amount of R10 000’.

[23] It is evident that Orgolitsch received the email. The documentary evidence shows that he forwarded it to Ms Brophy later the same day. An indication to that effect was apparent from the email chain included in an email sent later that afternoon from Ms Brophy (combinetowing@gmail.com) to Delaine Du Plessis that stated:

FWD MAT102694: MS V AGENBAG/ CBD TOWING – CLAIM NUMBER 556991694 4

We are willing to charge the following for mentioned vehicle:

Accident tow	R1300
Storage	R4750 (19 days @ R250 per day)
Total	R6050

Please advise.

Regards

Karen

[24] The attorneys responded to Ms Brophy’s email with yet another letter, dated 11 May 2016, addressed to the respondent in identical manner to the earlier letter of that date. It rejected the offer of the ‘discounted amount’ and explained that a release fee was not being tendered ‘due to the blatant misrepresentation by yourselves’. The word ‘yourselves’ could only have referred to CBD Towing, the respondent. The letter reiterated that the respondent should ‘release the vehicle immediately as you are unlawfully in possession of the vehicle’. It concluded ‘We await your urgent reply failing which we will have to launch an urgent application for the release of the vehicle the costs of which will be for your account’. This letter appears to have been sent only to Ms Brophy’s email address, combinetowing@gmail.com .

[25] Ms Brophy responded by email offering a yet further discounted amount, described as a 'final amount' in the sum of R4175. The attorneys responded to the email on 12 May by way of a letter, again addressed to the respondent, rejecting the 'final offer' and indicating that they held instructions to proceed with an urgent application for the release of the vehicle.

[26] As mentioned, proceedings were thereafter instituted on 19 May and proceeded with as described earlier. In an answering affidavit made by Orgolitsch for the first respondent on 26 May 2016, it was averred that vehicle had been 'uplifted' by the applicant's insurers from Combine Towing on 24 May. It was averred that the applicant and her attorneys had been aware prior to launching the proceedings that the vehicle had been in the possession of Combine Towing since 22 April. Orgolitsch further averred that neither he nor the respondent had any affiliation to or interest in Combine Towing. Referring to the abovementioned exchange of correspondence, Orgolitsch claimed to have been 'copied in' on correspondence sent by email to Combine Towing. He said that 'as the Applicant was aware that the vehicle was in the possession and control of Combine Towing' he had not thought that he needed to respond to the applicant's attorneys. He did not think that the threat of legal action pertained to the respondent.

[27] In the supplementary answering affidavit that the respondent was given leave to deliver, Orgolitsch attached email correspondence from the applicant on 25 and 26 April 2016. It appears from this that the applicant was addressing CBD Towing at that stage for the release of her car. In an email apparently transmitted at 15:15 to cbdtowing@gmail.com, the applicant stated in an evident tone of desperation (in capital letters): 'Hey what's going on can someone please give an answer and why must we wait so long for someone to get back to us'. It appears from a further email sent by the applicant the following morning, that a telephone conversation with Ms Brophy must have intervened because the later email was addressed to 'Karen' and the email addressed to both cbdtowing@gmail.com and combinetowing@gmail.com. That email went:

Good Morning Karen

As per conversation yesterday, please forward me the details for release of my car.

Thank you.

Vanessa

Ms Brophy responded by email, setting out a release fee of R16250, which included R6750 for 'accident tow', R2500 for 'rollback callout' and R3500 for 'recovery'.

[28] Mr Orgolitsch also annexed to his supplementary answering affidavit a number of specimen invoices to support his allegation that the respondent had in fact been authorised by the applicant's insurer to tow vehicles from the scenes of collisions. One of the attached invoices, dated 16 March 2016 bore the number 'Invoice CBD056'. It will be recalled that that is the same invoice number as that, dated 22 April 2016, mentioned above, which the respondent alleges it presented Combine Towing when transferring the applicant's vehicle to that concern. The applicant suggests that this peculiar coincidence might be indicative that the invoice purportedly made out by the respondent to Combine Towing might be an *ex post facto* creation solely for the purpose of these proceedings.

[29] In reply, the applicant explained she had no knowledge of Combine Towing as a separate concern. She said that she had dealt only with the respondent. She said that she had been informed about the release fee required by the respondent by Ms Wendy Louw who told her that she had obtained the information from someone called Karen, which the applicant took to be Ms Brophy. Ms Louw made a confirmatory affidavit confirming that she had from time to time dealt with Ms Brophy, who had communicated with her on behalf of various towing enterprises, namely CBD Towing, Combine Towing and Speedy Towing.

[30] The applicant's replying affidavit ran to 39 pages, excluding annexures, as compared to the only nine pages, excluding annexures, of the founding affidavit. It was unduly argumentative, which is an all too frequent feature of replies in motion proceedings. The courts have warned repeatedly that it is a feature that is liable to be marked adversely in costs.³

³ In *Minister of Environmental Affairs & Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs & Tourism v Bato Star Fishing (Pty) Ltd*,³ Schutz JA trenchantly observed:

In the great majority of cases the replying affidavit should be by far the shortest. But in practice it is very often by far the longest - and the most valueless. It was so in these reviews. The respondents, who were the applicants below, filed replying affidavits of inordinate length. Being forced to wade through their almost endless repetition when the pleading of the case is all but over brings about irritation, not persuasion. It is time that the Courts declare war on unnecessarily prolix replying affidavits and upon those who inflate them.

[31] In the further supplementary affidavit in answer to the new matter in the applicant's replying papers Orgolitsch averred that the respondent had ceded its lien over the applicant's vehicle to Combine Towing. Apart from the difficulty that attaches conceptually to the notion of a cession of a lien, there is no written record of any such purported transaction. Orgolitsch stated that '[i]n terms of the cession to Combine Towing, once it was paid for the salvage and storage of the Applicant's vehicle, Combine Towing would pay me [presumably the respondent] a total of R6 000 for the salvage, recovery, rollback and administration of the operation. Combine Towing would receive payment for the storage of the vehicle from the Applicant's insurer'. He proceeded 'Once the Respondent ceded the lien over the vehicle to Combine Towing, the Respondent no longer had control over [the] vehicle and Combine Towing did not represent or act on behalf of the Respondent in any dealings with the Applicant, her attorneys or her insurer'.

[32] An affidavit by Karen Brophy was also filed in which she confirmed that she had acted in all communications between herself and the applicant and the latter's insurers and attorneys solely on behalf of Combine Towing, and not the respondent. Ms Brophy did not, however, respond to the allegations by Ms Wendy Louw of the applicant's insurers that Ms Louw had had previous dealings with her on behalf of the respondent and Speedy Towing.

[33] There is nothing in the respondent's challenge to the applicant's title to the motor vehicle. Orgolitsch admitted in the answering affidavit the applicant's averment that she was the registered owner, alternatively, bona fide possessor of the vehicle. The respondent did not place ownership of the vehicle in issue on the papers.

[34] In my view the indications on the papers are that the enterprises of CBD Towing and Combine Towing were effectively indistinguishable. There is no evidence to corroborate the respondent's claim to have notified the applicant that it was surrendering her vehicle to another business. The most obvious reaction that would have been expected of the respondent when it received the demands to surrender the vehicle or face legal proceedings would have been to point out that it was not in possession or control of the vehicle, if that were in fact the case. If Mr Orgolitsch's evidence is true, it might also have been expected to have expressed some surprise at being addressed by the applicant's attorneys if its allegation that the applicant knew that her vehicle had been passed on to another concern were well-founded.

Mr Orgolitsch's reported perception that the respondent was being addressed with the demands merely on the basis of having been 'copied in' is entirely unconvincing. Apart from any other consideration, the letters of demand were made out to the respondent at its physical address. They could hardly have been mistaken for demands addressed to another enterprise.

[35] Moreover, the fact that the final settlement offer communicated by Ms Brophy was in an amount less than that in which Orgolitsch averred Combine Towing was liable to the respondent in respect of the alleged 'cession of lien' is a strong indicator that any separation of commercial identity between the respondent and Combine Towing was fictional. The settlement offers made by Ms Brophy from the combinetowing@gmail.com address compromised charges that had uncontestedly been raised by the respondent, and not Combine Towing, in respect of matters such as accident tow, rollback and recovery. Those adjustments, which were nowhere explained in the respondent's answering papers, are most unlikely to have been effected if the business truly involved two quite independent undertakings.

[36] These considerations are sufficient to persuade me that justice would be served if the respondent were ordered to pay the applicant's costs of suit in the proceedings. However, as mentioned, the applicant's replying affidavit was unduly lengthy on account of its excessive of argumentative content. In the circumstances the costs to be awarded shall include only 50 percent of the costs in respect of the drafting of that affidavit.

[37] The following order is made:

1. Save as provided in paragraph 2, the respondent is ordered to pay the applicant's costs of suit.
2. The costs awarded in terms of paragraph 1 shall include only 50 percent of the costs incurred by the applicant in respect of the drafting of her replying affidavit.

A.G. BINNS-WARD

Judge of the High Court