

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 032219/2023

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
18/5/2023 DATE	
 SIGNATURE	

In the matter between:

APA AFRICA (PTY) LTD

Applicant

And

MELROSE ARCH INVESTMENTS HOLDINGS (PTY) LTD

First Respondent

LIBERTY LTD

Second Respondent

2 DEGREES PROPERTIES (PTY) LTD

Third Respondent

PROPERTY SERVICES

Fourth Respondent

Neutral citation: *Apa Africa (Pty) Ltd v Melrose Arch Investments* (Case No. 032219/2023) [2023] ZAGPJHC 510 (18 May 2023)

JUDGMENT

MAKUME, J:

INTRODUCTION

[1] The Applicant launched this application on the 4th April 2023 in which it seeks an order on an urgent basis in accordance with the provisions of Rule 6 (12). In particular, the Applicant ask this Court to issue the following order against the Respondents:

- 1.1 Declaring that the new lease agreement as defined in paragraph 32 of the Founding Affidavit was concluded between the Applicant and the 1st to 3rd Respondents.
- 1.2 Declaring that the 1st to 3rd Respondents and the Applicant are obliged to comply with the terms of the new lease agreement.
- 1.3 Directing the 1st to 3rd Respondents to give Applicant occupation of the new premises being Unit 20113, 2nd Floor, 30 Melrose Arch Boulevard Melrose Arch on the terms of the new lease.
- 1.4 Directing the Applicant to make payment to 1st, 2nd and 3rd Respondents in terms of the new lease agreement
- 1.5 Interdicting the Respondents from leasing and giving occupation of the new premises to any party other than the Applicant.

[2] The Respondents have filed their Answering Affidavit in which they set out not only their grounds of opposition on the merits but also raise a point in *limine* that this application falls to be struck off the roll due to lack of urgency as prescribed by Rule 6(12).

BACKGROUND

[3] On the 18th June 2020 the Respondent duly represented by one James Alexander De Beer concluded a lease agreement with one Andre Pienaar in respect of premises described as Office 108 H3 situated at First Floor 10 Melrose North, Johannesburg measuring 344 square meters.

- [4] That lease commenced on the 1st August 2020 and is to terminate by effluxion of time on the 31st July 2023.
- [5] It is common cause that during the year 2021/2022 certain disputes arose between Pienaar the tenant and the Managing Agent of the property as a result Pienaar decided to unilaterally withhold payment.
- [6] On the 31st January 2023 the Applicant was registered its sole director is Pienaar. Pienaar not being satisfied with the condition of the premises he was leasing then started negotiating with one of the leasing agents using his corporate entity to lease new premises.
- [7] On the 1st February 2023 the Applicant signed an offer to lease premises described, as Office Number 20113 Melrose Boulevard situated on Erf 181 Melrose Township. The Applicant on signing the offer to lease was represented by Mr Andre Pienaar. The lease was to take effect from 1st May 2023 expiring on 28 February 2026. The offer to lease was never accepted by the Respondents.
- [8] In the meantime Pienaar had breached the terms and conditions of his existing lease with the Respondents as a result the Respondents as they were entitled to cancelled the lease on the 11th April 2023.
- [9] Prior to that cancellation the Respondents had by February 2023 already concluded a lease with a tenant called VAT IT in respect of office 20113 Melrose Boulevard. That tenant took beneficial occupation of those premises during February 2023 and commenced with renovations. That lease is in place and the tenant has taken occupation.
- [10] As I have indicated the Respondents have raised two points in *limine* the first being that the application is not urgent and falls to be struck off the roll the second being one of non-joinder.

- [11] When the Applicant commenced this urgent application it had through its Attorneys received a directive from the Office of the Deputy Judge President to set this application down for hearing on the 8th May 2023.
- [12] On the 4th May 2023 four (4) days before the hearing of this matter the Applicant filed and served its Replying Affidavit and on Saturday the 6th May 2023 the Applicant filed and uploaded on case lines a Notice withdrawing the application. The Respondent refused to consent to the withdrawal unless the Applicant tendered costs.
- [13] This matter served before me on Monday the 8th May 2023. Counsel for the Applicant Advocate Hollander informed the Court that the Applicant no longer wishes to proceed with the application and seeks leave from this Court that it should issue an order removing the matter from the roll and postpone a decision on the costs to an ordinary opposed motion roll. The Respondent requests the Court to grant an order striking the application off the roll and that Applicant pay the costs on an Attorney and Client scale.
- [14] Rule 41 of the Uniform Rules of Court makes provisions for withdrawal, settlement, discontinuance, postponements as well as abandonment of proceedings. Rule 41(1) in particular reads as follows
- “A person instituting any proceedings 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 requirement of the other party.”
- [15] Rule 41 (1) deals with two scenarios the first being when a matter has not as yet been set down for hearing the second scenario is when the matter has been set down for hearing.
- [16] Each scenario has its own consequence in the event of a party seeking to withdraw and not proceed with the matter. If a matter has been set down for

hearing like it is in the present matter a party may only withdraw the proceeding with the consent of the opponent or with leave of the Court. On receipt of the notice of withdrawal over the weekend preceding the Monday the Respondent's Attorneys addressed a letter to the Applicant drawing their attention to the provisions of Rule 41(1) and that because there is no tender to pay costs they as the Respondents are not consenting to the withdrawal.

- [17] A Rule 30 notice filed by the Respondents to declare the notice of withdrawal an irregular procedure was not proceeded with on Monday the 8th. Both Counsel addressed me from the bar. The basis as addressed by Counsel for the Applicant why there is no tender to costs can be summarised as follows:

17.1 Firstly Applicant says the Respondent withheld the name of the new tenant of the premises hence they could not join that third party earlier.

17.2 That this Court being the urgent court is not suited to hear argument on the issues of costs hence their application to refer the issue of costs to the normal opposed motion roll.

- [18] The Applicant is being disingenuous in this regard because as far back as February 2023 Applicant was informed that a tenant has been allocated the "new premises." The Applicant is not entitled to be told of the name of the new tenant it was not their business to pry into the Respondent's business affairs. Applicant was told that it is not possible to conclude an agreement with them in view of that.

- [19] Secondly the Applicant is mistaken that this Court being an urgent Court should not deal with the issue of costs. He is wrong this Court has that authority. The matter is before this Court for adjudication one way or the other.

- [20] It is trite law that in terms of Rule 41(1)(a) a withdrawal of proceedings cannot occur unilaterally once a matter has been set down (See: **Border vs Madzie 2017 (4) SA 166 at page 170 paragraph 8**). In the absence of consent or leave

a purported notice of withdrawal will be invalid. In **Protea Assurance Co. Ltd vs Gamlase and Other 1971(1) SA 460 E at 465G** the Court said the following:

“Once the matter had been set down for hearing on the 25 May 1965 it was not competent for the Applicant to withdraw such proceedings without the consent of the Respondent or after the promulgation of the new Rules of Court on 15 January 1965 without leave of the Court. Such consent was never obtained nor was such leave ever applied for. It follows thereof that the purported notice of withdrawal on 31st October 1969 was incompetent and invalid and must be set aside.”

[21] On the 7th May 2023 after receiving the Notice of Withdrawal the Respondent attorney addressed a letter to the Applicant’s attorneys in the following words:

“your client in terms of Rule 41(1) cannot withdraw its application that is enrolled for hearing on Monday the 8th May 2023 without our client consent or leave of the Urgent Court. Our client did not and does not consent to such withdrawal without your client tendering to pay the costs of the application.”

[22] Once the Respondent refused to consent to the withdrawal it thus became imperative that the Applicant had to file an application and ask the Court’s permission to admit the withdrawal on such terms as the court may find appropriate which in my view may include an order that the Applicant should be liable for costs after all the issue of costs is in the discretion of a Court hearing the matter.

[23] In the instant matter the Applicant requires leave that its withdrawal of the proceedings be sanctioned by the Court on the basis that another Court then be approached to decide on the issue of costs. This cannot be justified the Applicant has failed to give plausible reasons why this Court should not exercise its inherent discretion in respect of the issue of costs.

APPLICABLE LEGAL PRINCIPLE ON COSTS

[24] This Court in the matter of **Martin N.O. vs Road Accident Fund 2000 (2) SA 1023 at 1026** said the following:

“Costs are usually reserved if there is a real possibility that information may be put before the Court which eventually disposes of the action or the application which may be relevant to the exercise of a discretion in regard to that although where the issues affecting interlocutory costs are clear the Court then dealing with the matter should not choose an easy way out to shift the task to another Court (See also **Fleet Motors (Pty) Ltd v Epson Motors (Pty) Ltd 1960 (3) SA 401 D**).”

[25] His Lordship Wunsh J in *Martin N.O.* (supra) concluded that costs are reserved because there is no ready view about liability for them and they will not necessarily follow the result of the cause. This is not the case in this matter the Applicant must pay the costs of its withdrawal application and has no right to dictate to this Court when and where or who should decide on the wasted costs.

[26] In **Germishuys v Douglas Besproeingsraad 1973 (3) SA 299 (NC)**, the court provided the applicable legal principle on costs by stating that **at 300D-E**:

“Where a litigant withdraws an action or in effect withdraws it, **very sound reasons must exist** why the defendant or respondent should not be entitled to costs. A plaintiff or applicant who withdraws his or her action or application is in the same position as an unsuccessful litigant because, after all, such claim or application is futile, and the defendant or respondent is **entitled to all costs** caused by the institution of proceedings by the withdrawing party.”

[27] The court **at 300H** indicated that in such a case it is not necessary to go into the merits, there is a crucial difference between the position of an applicant settling his or her case on the merits and then asking the court's ruling as to costs, and the position of an applicant withdrawing his or her claim and thereafter attempting to avoid an order for costs against him- or herself.

[28] In **Apollo Tobacco CC and Others v Commissioner for South African Revenue Services 74 SATC 204 at par 23**, the court held that:

“When a party invites his opponent to a duel, which invitation is accepted, thereafter the former has a second thought and withdraws the invitation, for whatever reason, he must tender the costs occasioned by the invitation. He cannot be heard to say that the other party has not been inconvenienced by the invitation and therefore he need not tender costs occasioned by the invitation. He must be mulcted with the costs attendant to such withdrawn matter.”

- [29] In **Hammond and Hammond Transactional Law Clinic v Bitou Municipality and Others [2021] JOL 50959 (WCC)** at par 16, the court held that the withdrawal is viewed as a concession on the merits, a recognition that the relief sought is futile. Whatever the reason for the withdrawal of a matter, the court retains a wide but not unlimited discretion to award costs, with the general rule being that the respondent is entitled to all costs caused by the institution of the proceedings, a rule which is not to be departed from without good grounds.
- [30] In **Master Blaster (Pty) Ltd v Sasol Dyno Nobel (Pty) Ltd [2020] ZAGPPHC 376 at par 15**, the court held that it is trite that a party who withdraws an action or application or who abandons a defence is in the same position as an unsuccessful litigant, and therefore the other party is ordinarily entitled to costs. A departure from the principle, that costs must be awarded to the party which has been put to the expense of defending withdrawn proceedings, is only warranted in exceptional circumstances.
- [31] In **Tshabalala v Motloung [2020] ZAFSHC 228 at par 8**, the court stated that it is trite that the position of a withdrawer of court proceedings is similar to that of the loser and the general position in that regard is that where a party loses, he ought to pay the costs of the aborted proceedings, unless there are exceptional circumstances why the other party should not be entitled to its costs.
- [32] The Applicant is a law firm its director Mr Pienaar says in his affidavit that he has many years' experience and is a successful lawyer practicing in a prime area of Johannesburg. I have no reason not to believe that however coupled with that it is expected of Mr Pienaar to be conversant with the Rules of practice.

One of the issues in this application is lack of appreciation that the urgent court is not meant to deal with voluminous papers. The Applicant generated a mass of paper. The Founding Affidavit is 26 pages long divided into 74 paragraphs some of which are repetitive. The Replying Affidavit stretches over sixty-nine (69) pages divided into 118 paragraphs once again with a lot of repetitive stuff.

[33] This bring me to the issue of costs as I indicated I have retained my discretion to award costs on a scale befitting of the issue before me. In this matter the Applicant not only filed a voluminous Replying Affidavit a mere four days before the date of hearing it waited until a weekend to file a notice of withdrawal and expected his opponents to simply accept its wishes. By the time the notice of withdrawal was filed and served Counsel for the Respondent were ready for the hearing. Also, this Court had to be ready by reading voluminous papers. There is no acceptable reason why the Applicant should not have filed a notice to withdraw before filing a Replying Affidavit.

[34] I am satisfied that the Applicant's conduct requires to be visited by a punitive costs order as required by the Respondent.

[35] In the result I make the following order:

1. Leave to withdraw the application is hereby granted.
2. The Applicant is ordered to pay the Respondent taxed costs on an attorney and client scale.

Dated at Johannesburg on this 18 day of May 2023



M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING : 08 MAY 2023
DATE OF JUDGMENT : 18 MAY 2023

FOR APPLICANT : ADV L HOLLAND
INSTRUCTED BY : ANDRE PIENAAR & ASSOCIATES

FOR RESPONDENT : ADV W WANNENBURG
INSTRUCTED BY : FOURIE VAN PLETZEN INC.ATTORNEYS