IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

CASE NO: 1453/2017

Heard on: 21 October 2020

Delivered on: 16 February 2021

In the matter between:

JAN JACOBUS WESSELOO **APPLICANT**

and

BHAM TAYOB KHAN MATUNDA INC **RESPONDENT**
REGISTRATION NO. 1993/006339/23

JUDGMENT IN RESPECT OF COSTS

GQAMANA J:

[1] The overall function of the court is to carry out justice, resolve disputes between litigants expeditiously as possible, ensure access to courts and uphold the law. On the other hand, legal practitioners have the responsibility of assisting and advising their clients promptly and to ensure that their clients are not drained financially by protracted litigation. The opposite happened in this case. It has a protracted and deplorable history as evident below. However, this judgment is only in respect of costs, as the main liquidation

application was dismissed on 10 September 2020. On the request of counsel for both parties, the issue of costs was reserved for further determination later as both of them hankered to file additional heads of argument addressing specifically the issue of costs occasioned by no less than six postponements and four interlocutory applications.[1]

[2] The Applicant, Mr Wesseloo was a former employee of the Respondent (BTKM). Such employment relationship was terminated on 22 November 2016, by a mutual separation agreement. In terms of such agreement, the parties agreed that the Applicant would be remunerated for all his unused leave days, but the number of leave days due to him and the quantification thereof is not set out therein. When no payments was received for his alleged unused leave days, the Applicant caused a letter of demand to be issued in terms of s 345 (1)(a) of the Companies Act 61 of 1973, (as amended) against BTKM.[2] Such notice was served by Sheriff at BTKM's registered office at 30 Bird Street, Central, Port Elizabeth.[3]

[3] After three weeks period from the date of service of the aforesaid notice and with no payment forth coming from BTKM, the Applicant issued a liquidation application against the former on 25 April 2017. In the notice of motion, BTKM was called upon to serve its notice to oppose and its answering affidavit, if any, within 5 days and 15 days of service respectively. Failing such notice to oppose, the application was to be heard on 30 May 2017.

[4] The liquidation application was served on BTKM main place of business at 84 Cape Road, Mill Park, Port Elizabeth and also at its registered address at

[1] The urgent application to stay the proceedings, the Rule 30 application, the second Rule 30 application filed on 13 August 2020 and the condonation application for the late filing of the answering affidavit in the urgent application.
[2] Index; pp 26-27.
[3] Index; p 28.

30 Bird Street, Central, Port Elizabeth, on 11 May and 15 May 2017.[4] Subsequent thereto, a notice of opposition in compliance with Rule 6 (5)(d) of the Uniform Rules was filed on behalf of BTKM on 12 May 2017.[5]

[5] On the 24 May 2017, the Applicant's attorneys addressed a letter to the Registrar of this court notifying her that the application has become opposed and accordingly it would have to be removed from the unopposed roll and be placed on the opposed motion court roll. As indicated in paragraph 3 above, the liquidation application was set down on 30 March 2017, and upon filing of the notice to oppose it had to be removed from the roll. Accordingly on the said date it was postponed *sine die*, with costs reserved.[6] I now turn on to set out the legal principles on costs before dealing with all the postponements and interlocutory applications that cropped up in this matter.

[6] The general rule is that costs follow the event, meaning the successful party should be awarded its costs. However this is subject to an overriding principle that the court has a discretion and such discretion must be exercised judicially upon a consideration of the facts of each case.[7]

[7] A court may deprive the successful party of its costs wholly or partly and order it to pay the costs of its opponent in circumstances where, for example, a litigant failed to limit or curtail proceedings and caused another party to incur unnecessarily costs through its failure to take proper steps or, if a party adopted a wrong procedure altogether, a court may visit the successful party with adverse costs order.[8] In *Niewoudt v Joubert*,[9] Mullins J (then) reiterated

---

[4] Index B; pp 7 and 8.
[5] Index B; pp 1-3.
[6] Index D; p 1.
[7] City of Cape Town v Rudolph 2004 (5) SA 39 (C) at 89C.
[8] Scheepers and Nolte v Pate 1909 TS 353 at 356; King Pie Holdings Pty Ltd v King Pie (Durban) Pty Ltd 1998 (4) SA 1240 (D) at 1250.
[9] 1988(3) SA 84 (SE) at 90F

the principle that a successful party may be deprived of his costs if he has misled the unsuccessful party into litigation and the latter acted reasonably in either instituting or defending the proceedings. Also a party may be deprived of its costs where its conduct has unnecessarily prolonged the proceedings.[10]

[8] Ms Veldsman, Applicant's counsel, enthusiastically argued that this is a typical case where the court should exhibit its displeasure on BTKM's conduct by depriving it the costs despite its success in the main liquidation application. For that submission she found solace in *Pilot Freight (Pty) Ltd v Von Landsberg Trading (Pty) Ltd* 2015 (2) SA 550 (GJ). In that matter the court deprived the successful party of its costs on the basis that it had played its cards very close to its chest thereby causing the unsuccessful party into instituting the legal proceedings which were unsuccessful. The unsuccessful party was ordered to pay the costs of its opponent from receipt of the answering affidavit and for the prior costs, each party was ordered to pay its own costs.

[9] In the instant matter, as indicated in paragraph 5 above, the filing of the notice to oppose necessitated to the removal of the matter from the roll on 30 May 2017. The *dies* for filing the answering affidavit had not expired. Therefore, the application was set down prematurely. This postponement was therefore caused by the Applicant. However evident from the court order there was no appearance on behalf of the BTKM on the said date and in such circumstances it will be fair for each party to pay their own costs occasioned by such postponement.

---

[10] Van Vuuren v Agricura Laboratoria (Edms) Bpk 1974 (2) SA 324 (NC).

[10] Despite BTKM having filed its notice to oppose on 12 May 2017, but no answering affidavit was filed and the Applicant proceeded to set the matter down on 18 July 2017 as uncontested opposed application in accordance with Rule 15(k) of the Rules regulating the conduct of proceedings of the Eastern Cape Division. Sadly, it was again postponed to 01 August 2017, and nothing was said about the issue of costs.[11] And the reasons for such postponement are not apparent from the papers and without evidence pointing fault on either party, I am constrained to order each party to bear their own costs for that day.

[11] On 1 August 2017, it was again postponed to 15 August 2017, by agreement between the parties and BTKM was ordered to pay the wasted costs occasioned by such postponement on an attorney and client scale.[12] Furthermore BTKM was directed to deliver its opposing affidavit by no later than 7 August 2017.

[12] On 15 August 2017, it was again postponed to 22 August 2017,[13] with no order as to costs.

[13] Instead of filing the answering affidavit as directed by the court order as indicated in paragraph 11 above, out of the blue, BTKM filed on 22 August 2017, an urgent application to stay the proceedings.[14] As a consequence of such procedure adopted by BTKM the liquidation application was postponed again to 12 October 2017, with costs reserved.[15]

---

[11] Index D; p2.
[12] Index D; p3.
[13] Index D; p 4.
[14] Index C; pp1-40
[15] Index D; p5.

[14] The urgent application was enrolled for hearing on 29 August 2017.[16] There is no evidence of what happened to it on that day. However, the notice to oppose it and the answering affidavit thereto were filed by the Applicant [Mr Wesseloo] on 1 September and 12 October 2017 respectively.[17] As a result both the urgent and main liquidation applications were postponed to the 23 November 2017.[18] Again BTKM neglected and failed to file its answering affidavit in the liquidation application despite the order referred to in paragraph 11 above. Once again, the cause of the postponement on 12 October 2017, lies squarely at the doors of BTKM and as such it must be held responsible for the Applicant's costs occasioned therein.

[15] On the 23 November 2017, the matter was again postponed to 15 February 2018, with each party to pay their own costs.[19]

[16] On 6 February 2018, heads of argument were filed on behalf of the Applicant and the liquidation application was ripe for hearing from the Applicant's side. But from BTKM's side, neither the answering affidavit nor heads of argument were filed. Clearly from this evidence BTKM was not ready to argue the matter and that then caused another postponement at it instance. On 15 February 2018, Eksteen J, issued the following order:

"*1. That the application dated 25 April 2017 is postponed sine die.*

2. That the application dated 21 August 2017 is postponed sine die.

3. That the application dated 25 April 2017 and the application dated 21 August 2017 are to be consolidated by agreement between the parties and to be heard simultaneously.

---

[16] Index C; p3; para2.
[17] Index C; p85; paras 18 and 19.
[18] Index C; p85 para 19.
[19] Index D; p6.

4. *That **BTKM** is ordered to file its answering affidavit to the application dated 25 April 2017 on or before 2 March 2018 at 12h00.*

5. *That **BTKM** is also ordered to file its condonation application for the late filing of its answering to the application dated 25 April 2017 on or before 2 March 2018 at 12h00.*

6. *That **Wesseloo** is ordered to file his replying affidavit in the application dated 25 April 2017 to the Respondent's Answering Affidavit and condonation application on or before 16 March 2018 at 12h00.*

7. *That **Wesseloo** is ordered to file his condonation application for the late filing of his answering affidavit in the application dated 21 August 2017 on or before 2 March 2018 at 12h00.*

8. *That **BTKM** is ordered to file its replying affidavit in the application dated 21 August 2017 to the applicant's answering affidavit and condonation application on or before 16 March 2018 at 12h00.*

9. *That the wasted costs occasioned by the postponement on 15 February 2018 are reserved."*

[17] Ms Veldsman argued for punitive costs occasioned by the postponement on 15 February 2018 as against BTKM. I am not persuaded that BTKM's conduct warrants a costs order on an attorney and client scale. Both parties were ordered by Eksteen J to file their respective affidavits either on the liquidation application or the urgent application to stay the proceedings. From that, one can infer that there were also other affidavits that the Applicant needed to file especially if one has regard to paragraphs 6 and 7 of the aforesaid order by Eksteen J. However, and having said that, BTKM was at least the cause of the postponement and therefore it must bear the costs occasioned by such postponement on a party and party scale.

[18] Neither of the parties complied with the time frames as ordered by Eksteen J. The Applicant filed on 8 October 2019, his explanatory affidavit for the late filing of his answering affidavit in the urgent application. During November 2019, a request was made to the Registrar to set down the liquidation

application, but the earliest available dates for allocation of opposed matters was from February 2020.

[19] Both the liquidation and the urgent applications were set down on 25 June 2020. Still no answering affidavit in the liquidation application was filed by BTKM. On the eve of the hearing, on 24 June 2020, suddenly BTKM filed an opposition to the Applicant's condonation application for the late filing of the answering affidavit in the urgent application. As indicated in paragraph 14 above, the aforesaid answering affidavit was filed by the Applicant on 12 October 2017. BTKM waited for thirty two months before opposing the Applicant's condonation application. Due to the stance adopted by BTKM, both applications were postponed *sine die* by Makaula J, with BTKM to pay the wasted costs.

[20] After the aforesaid postponement, the Applicant again proceeded to set down both applications on 13 August 2020. On 3 August 2020, Van Zyl DJP, issued a directive calling, *inter alia*, BTKM to indicate by not later than 5 August 2020 whether it intends to file heads of argument and appear at the hearing on 13 August 2020 and if so, to file its heads of argument by not later than 7 August 2020.

[21] Instead of complying with aforesaid directive issued by Van Zyl DJP, BTKM filed a Rule 30 application on 6 August 2020.

[22] On 13 August 2020, Rugunanan J, issued the following order:

> "1. *That the hearing of the Rule 30 application served under the Rule 30 Notice dated 6 August 2020 is postponed to 10th September 2020.*
>
> 2. *The the costs occasioned by the postponement of the hearing of the Rule 30 application are reserved for hearing on 10th September 2020.*

3. That the consolidated application is postponed to 10^{th} September 2020.

4. That the costs occasioned by the postponement of the consolidated application are reserved for hearing on 10^{th} September 2020.

5. That the Respondent is ordered to file its Rule 30 application on or before 28^{th} August 2020 at 12h00.

6. That the Respondent is to file its Heads of Argument and Rule 15A practise note on the Rule 30 application and the consolidated application on or before 4 September 2020 at 12h00."

[23] BTKM once again was the sole cause of the postponement on 13 August 2020. At long last BTKM's answering affidavit in the liquidation application surfaced for the first time on 4 September 2020. Bear in mind, Eksteen J had issued an order as far back as on 15 February 2018, that BTKM must file its answering affidavit on or before 2 March 2018. It took BTKM a period of approximately thirty months to comply with Eksteen J's order. For the first time BTKM's defence in the liquidation application was disclosed. The Applicant then conceded that in the light of the allegations and evidence disclosed in the answering affidavit, the liquidation application had to fail. An order dismissing the liquidation application was issued on 10 September 2020. It was evident from annexure "BTKM 10", that BTKM had the ability to pay its debts and therefore the Applicant would not have been able to meet the threshold test set out in s 345 (1) of the Companies Act.

[24] Viewed holistically and based on the evidence at my disposal, not only BTKM caused the numerous postponements because its house was in disarray but, it also played its cards close to its chest thereby causing unnecessary delay and protracted the proceedings. Annexure "BTKM 10" is its audited financial statement for the financial year end February 2018, and it was signed of on its behalf on 3 December 2018. No reasons were advanced by BTKM why its answering affidavit and annexure "BTKM 10" were not be filed earlier. Had that occurred, these proceedings would have been curtailed and

unnecessary additional costs would have been avoided. Although BTKM was successful in the liquidation application, it will be fair and it is in the interest of justice to deprive it the costs of the liquidation application.

[25] In so far as the costs for the interlocutory applications, namely, the condonation applications and the Rule 30 applications, in exercising of my discretion and having regard to the conspectus of all the facts and evidence in this case, the appropriate order would be for each party to bear his/its own costs. In respect of the costs for the urgent application to stay the proceedings, it would also be appropriate to make a similar order.

[26] Ms Veldman also argued for the costs of the liquidation application until 4 September 2020 when BTKM's answering affidavit was delivered. In response to such argument, Mr Mhlanga, BTKM's counsel, argued that the procedure adopted by the Applicant to move for the liquidation of BTKM instead of the normal action proceedings and execution process, was deployed merely to embarrass BTKM and it was an abuse of the court process.

[27] The Applicant in my view must have been aware or at the very least anticipated that the monies allegedly due to him for unused leave days were disputed. The separation agreement which is the source of BTKM's alleged indebtedness is not unequivocal that there were unused leave days due to the Applicant. The provision made in the aforesaid agreement was that, he would receive remuneration for all his unused leave days calculated until date of signature. The exercise for the quantification of the unused leave days was still necessary. In attempt to ascertain the exact methodology for purposes of such calculation, the Applicant engaged services of individuals who had no authority to bind BTKM. In any event, when the urgent application to stay the proceedings were filed, the Applicant was apprised of the fact that the

number of his unused leave days were disputed. In my view the Applicant's case as formulated in his founding affidavit in the liquidation application would not have passed the threshold test set out in s 345 (1) of the Companies. On his own founding papers, I would not have been satisfied that he is a "creditor" to BTKM and that the latter was unable to pay its debt. Therefore, the Applicant has not made out a case for the costs of the liquidation application issued on 25 April 2017 until 4 September 2020.

[28] In the circumstances the following order is issued:

1. The Respondent is ordered to pay the Applicant the reserved costs in the liquidation application occasioned by the postponements on 22 August 2017, 12 October 2017, 15 February 2018 and 13 August 2020 on a party and party scale.

2. In respect of the urgent application to stay the proceedings, the condonation applications and the Rule 30 applications, each party to pay their own costs.

N GQAMANA
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant	:	M Veldsman
Instructed by	:	Serfontein Viljoen & Swart Attorneys C/O Van Zyl's Inc. PORT ELIZABETH
Counsel for the Respondent	:	P M Mhlanga
Instructed by	:	McDonalds & Associates Inc. C/O Zolile Ngqeza Attorneys PORT ELIZABETH