



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO

Application no.: 4727/2023

In the matter between:

TUMELO OCTAVIA KABI

Applicant

and

UTLOANANG EUNIGAR KABI
(Born Mofana)

Respondent

CORAM:

VAN ZYL, J

HEARD ON:

18;19 JANUARY 2024

DELIVERED ON:

26 FEBRUARY 2024

- [1] This is an application for contempt of court which served before me on the unopposed motion court roll of 18 January 2024 and again on 19 January 2024.

- [2] Mr Plaatjies, who appeared on behalf of the applicant, addressed me on service of the application and was about to address me on the merits of the application when I indicated to him that I was inclined to remove the application from the roll since I consider the application to be fatally flawed. Mr Plaatjies did not indicate to me that the matter is in any event being opposed, nor did he indicate that there was a legal representative present in court who was appearing on behalf of the respondent.
- [3] Towards the end of our inter-action, I saw that Mr Carpede was on his feet and when I called upon him, he indicated that he is appearing on behalf of the respondent. He submitted that he respectfully agrees with the order I intend to make by removing the application from the roll. He did not indicate that the respondent intends opposing the application, let alone that a notice of opposition has already been filed (which was not to my knowledge at the time). He submitted that my proposed removal from the roll of the application should be done on the basis that the applicant be ordered to pay the costs of the application.
- [4] Mr Plaatjies again addressed me and submitted that such an order of costs would not be fair, since the respondent has been ignoring the court order which forms the basis of the contempt application and has done nothing since the contempt application has been served upon her attorneys. Mr Plaatjies then referred to a letter which had been received by his attorneys from the respondent's attorneys in which it was indicated, according to Mr Plaatjies, that they were "*withdrawing*" and offered to pay the costs of the day. Mr Carpede then interjected and stated that

there was a follow-up letter dated, 18 January 2024, in which it was indicated that the previous letter was retracted and that Mr Plaatjies should hand that letter to me as well. In order not to delay the rest of the unopposed motion roll, I indicated that the matter was to stand down until the end of the roll. I did not take any of the two letters from Mr Plaatjies.

- [5] When the matter was recalled at the end of the roll, Mr Plaatjies indicated that he has in the meantime done some research on the issues I raised pertaining to the merits of the application and he requested an opportunity to draft heads of argument and to address the court fully on the merits. I indicated that the application will then have to be postponed to the opposed roll of the following week, but Mr Plaatjies submitted that such a postponement will substantially increase the costs. Mr Carpede then indicated if the only issue is about costs, his instructions are that should I remove the application from the roll, the respondent is willing to agree to an order that each party pays his/her own costs. However, Mr Plaatjies was not satisfied with such an order and again requested an opportunity to address me on the merits.
- [6] Due to the presence of other counsel who were awaiting my hearing of urgent applications, I made a ruling that this matter be rolled over until the following day, 19 January 2024, at 10h00, when I will entertain further arguments. I indicated that should they so choose, they may file short heads of argument.
- [7] Mr Plaatjies prepared written heads of argument on the merits of the application for purposes of the hearing on 19 January 2024. However, due to some further research which I performed during

the night, I indicated to Mr Plaatjies that he need not address me on the merits of the application anymore, since I no longer intend removing it from the roll due to a lack of merits. Mr Plaatjies then submitted that a proper case has been made out and requested an order in terms of the Notice of Motion. He further sought costs of the previous postponement of 21 December 2023, but after I pointed out to him that costs were not reserved on the said date and that no order as to costs was made, he abandoned the last-mentioned request.

- [8] With regard to the costs of 19 January 2024 Mr Plaatjies requested that the respondent be ordered to pay same since it was the respondent's conduct which necessitated the application in the first instance.
- [9] I subsequently enquired from Mr Carpede what his submission was regarding the merits of the application, whereupon it, for the first time, became apparent that he is actually opposing the merits of the application and not only the issue of costs. He submitted that the application should not be granted. When I requested his submissions on costs, he stated that "*the respondent has already shown her intention to defend the application*". When I enquired how that had been done, he indicated that a Notice of Intention to Oppose had been served upon the respondent's attorneys via email the previous morning already, 18 January 2024, at 8h11; hence, prior to the hearing of the matter the previous day. This was for the first time since the start of the matter the previous day that any of the legal representatives mentioned something about any formal opposition to the application. The said Notice was handed to me

and it was evident that it has since also been formally filed at Court on 19 January 2024.

- [10] The two letters mentioned earlier herein, were then also handed to me. The letter dated 17 January 2024, on face value thereof, had been emailed to the applicant's attorneys. The said letter, *inter alia*, stated as follows:

- "1. We refer to the Court Order dated 21st of December 2023.
2. Kindly grant us indulgence and have the matter postponed to a further date in order for our firm to properly come on record and subsequently oppose the application.
3. Your indulgence will be highly appreciated.
4. We will tender costs of the said postponement."

The second letter, dated 18 January 2024, had apparently been emailed to the applicant's attorneys on 18 January 2024 at 08h11, together with the Notice of Intention to Oppose and a Notice of Appointment of Attorneys of Record. It had seemingly also been handed to Mr Plaatjies by Mr Carpede and his attorney the morning of the 18th January 2024 in the corridors of the Court before Court started. The said letter, *inter alia*, stated the following:

- "1. We refer to our letter dated 17th January 2024.
2. We confirm that we act on behalf of the respondent in the contempt application.

3. It is our instruction to retract our letter dated January 2024. (*sic*)
4. Please be informed that notice of intention to oppose and notice of appointment as attorneys of record will be filed in this regard."

[11] Mr Carpede requested that the application be postponed to the opposed motion roll of 29 February 2024 (which date also suited Mr Plaatjies), with the costs of both 18 January 2024 and 19 January 2024 to stand over for later adjudication. I indicated that there is no valid reason why costs should stand over, since another Court will be in no better position than myself to determine an appropriate order as to costs. Mr Carpede then submitted that each party should pay his/her own costs, since both parties knew the previous day already that the matter is being opposed and therefore unnecessarily caused the hearing on 19 January 2024.

[12] In reply it was evident that although Mr Plaatjies did not have the Notice of Intention to Oppose, he had both letters in his possession from which letters it was very clear that the respondent wished to oppose the application.

[13] The crux of the matter is that both Mr Plaatjies and Mr Carpede had knowledge on the 18th of January 2024 that the application was to be opposed by the respondent. Despite this knowledge, not one of them advised me accordingly. Had they done so, I would not have rolled the matter over to 19 January 2024. I would merely have postponed the application to the opposed motion roll, with an appropriate order as to costs.

- [14] It was the aforesaid failure of both legal representatives that resulted in the unnecessary and wasted costs of 19 January 2024. In my view each party should therefore pay his/her own costs. The parties are not to be mulcted in unnecessary costs and therefore the costs are only to be paid on an unopposed basis.
- [15] The fact that the application could not be finalised on 18 January 2024 (irrespective of the rolling over thereof to 19 January 2024), was due to the respondent's failure to have timeously filed her Notice of Intention to Oppose, considering that the application had been served upon the respondent's attorneys on 28 November 2023 already. There is consequently no reason why the respondent should not be ordered to pay those wasted costs. The to and fro arguments and submissions by counsel on the said date was purely as a result of their failure to have advised me about the respondent's opposition of the application and consequently the costs are also only to be paid on an undefended basis.
- [16] Unfortunately, I was unable to finalise this judgment in time for the application to be postponed to the opposed motion roll of 29 February 2024, as requested. In the circumstances I deem it practical to rather remove the application from the roll, set time lines for the filing of papers and then the application can be re-enrolled for a suitable once it is ripe for hearing. With regard to the filing of papers, I will also make provision for the filing of an application for condonation by the respondent, which is necessary due to the late filing of her Notice of Intention to Oppose.

[17] I consequently make the following order:

1. The application is removed from the roll.
2. The respondent is to file her answering affidavit, as well as her condonation application for the late filing of her Notice of Intention to Oppose, within 15 days from the date of this order.
3. The applicant is to file his replying affidavit, if any, and his answering affidavit to the respondent's condonation application, if any, within 10 days from the date of filing of the respondent's answering affidavit and condonation application.
4. The respondent is to file her replying affidavit in the condonation application, if any, within 10 days from the date of filing of the applicant's answering affidavit to the respondent's condonation application.
5. The respondent is to pay the costs of 18 January 2024 on an unopposed basis.
6. Each party is to pay his/her own costs of 19 January 2024 on an unopposed basis.


C. VAN ZYL, J

On behalf of the applicant:

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