

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 20709/2022

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED

DATE: 23/5/2023

In the matter between:

KHATHUTSHELO NETHAVHANI

Applicant

And

NUWE SA EIENDOMME EN VERHURING CC

First Respondent

**JOMAR PROPERTIES (PTY) LTD t/a HARCOURT
MARITZ**

Second Respondent

BERT SMITH ATTORNEYS AND CONVEYANCERS INC

Third Respondent

JUDGMENT

DE BEER AJ

Introduction

1. What initially commenced as an interlocutory application to compel discovery in terms of Rule 35(7) of the Uniform Rules of Court (*“the rules”*) instituted against the third respondent (the first and second respondents are not active participants to this application) underwent a metamorphosis into an application for punitive costs and costs *de bonis propriis*.

2. The matter was enrolled and set down on the opposed motion roll for hearing on 24 April 2023.

3. Subsequent to argument presented by counsel appearing on behalf of the

respective parties (applicant and third respondent), the court granted¹ and handed down an *ex tempore* judgment from the bench. For ease of reference, the order granted that followed the judgment is quoted herein verbatim, which reads as follows:

“IT IS ORDERED THAT

1. *Prayer 2 of the notice of motion is dismissed.*
2. *The applicant is to pay the costs of the third respondent, on the scale as between attorney and client.”*

4. The applicant (plaintiff in the main action), a firm of attorneys who also represents themselves requested reasons for the order granted in an unsigned letter dated 8 May 2023, sent to the registrar. I cannot ascertain whether this letter was copied to the third respondent’s attorneys. Although the request for reasons does not comply with the rules of court² for an application to provide reasons, the court nevertheless provides its reasons in this judgment in the interest of justice³ and saving time. The reasons detailed herein will therefore be confirmed on the date that same is handed down.

Rule 35(7) application

5. In terms of rule 35(7) a party “*may*” institute an application against its opponent for the discovery and delivery of the documents sought in terms of the rule 35(1) notice. It is not a peremptory rule, and the court has a discretion whether or not to enforce discovery where the opposing party (i.e., the third respondent *in casu*) fails to deliver the documents sought by way of discovery in terms of rule 35⁴. Both sub-sections (1) and (3) must however be complied with and exhausted before sub-section (7) may be invoked.

6. *In casu*, the applicant instituted an application under the auspices of rule 35(7)

¹ CaseLines section 3

² See Rule 49(1)(b) and (c) read with section 17 of the Superior Courts Act, 10 of 2013.

³ Commissioner, South African Revenue Service v Sprigg Investment 117 CC t/a Global Investment 2012 (4) SA 551 (SCA)

⁴ Venmop 275 (Pty) Ltd v Cleverland Projects (Pty) Ltd 2016 (1) SA 78 (GJ).

on 30 August 2022⁵. In the notice of motion, the following relief is sought:

“1. Directing the Third Defendant to deliver its Discovery Affidavit within 10 (Ten) days from the date of service of this order;

2. Directing the Third Defendant to pay the costs of this application;

3. That in the event of the Third Defendant failing and/or neglecting to comply with the order in paragraph 1 above, the Plaintiff be and is hereby granted leave to strike out the Third Defendant’s defence, on these same set of papers mutatis mutandis; and

4. Further and/or alternative relief.”

7. When this application was set down on the opposed motion roll, no order was sought in terms of prayers 1 and 3.

8. To consider the aspect of costs within the discretion of the court which must be exercised judicially with due regard to the relevant circumstances⁶ the following factual chronology is relevant, *in casu*:

8.1. The particulars of claim⁷ in this action is dated 7 April 2022. In the main action, the plaintiff’s claim is based on a transaction (referred to in the pleadings as an “*Offer to Purchase*”) concluded with the first defendant through the second defendant as the estate agent. The third defendant (third respondent herein) acted as the conveyancing attorney appointed in terms of the Offer to Purchase.

8.2. On 27 May 2022, a notice of bar was delivered to the third respondent/defendant.

8.3. On 31 May 2022 the third defendant delivered its plea in the action,

⁵ CaseLines pages 14 – 9 to 14 – 11.

⁶ Jenkins v SA Boiler Maker, Iron & Steel Workers & Ship Building Society 1946 WLD 15.

⁷ CaseLines pages 0001 – 6 to 0001 – 13.

which includes special pleas of non-joinder and impossibility of performance⁸.

8.4. On 31 May 2022, a notice of bar was delivered due to the first and second defendants' failure to file a plea.

8.5. On 21 July 2022, the applicant filed a notice requesting discovery in terms of rule 35(1). In terms of the corresponding rule, a party has 20 (twenty) days to file its discovery subsequent to the filing of the notice. *In casu* the 20 (twenty) day period lapsed on 21 August 2022.

8.6. On 22 August 2022 (one day after the expiry of the 20 (twenty) day period in terms of rule 35(1), the applicant dispatched correspondence to the third respondent's attorney (the third respondent does not represent itself) wherein the following is stated, *inter alia*⁹:

*"2. Kindly take note that on **21 July 2022**, the Third Defendant was requested to discovery in terms of Rule 35(1) and to date we have not received any response to our request."*

8.7. On 23 August 2022, the third respondent's attorneys answered to the aforesaid letter, for ease of reference, the contents thereof are quoted herein, which reads as follows:

"Good afternoon, Ms Soko.

Your e-mail of below, as well as your attached letter dated 22 August 2022, refer.

*Please find attach hereto the **Third Defendant's Notice i.t.o. Rule 35(1)(6)(8) & (10).***

Can you please acknowledge receipt on the last page and then add / load a

⁸ CaseLines pages 0006 – 1 to 0006 – 10.

⁹ CaseLines page 0014 – 20.

copy thereof on CaseLines. I will download the signed copy from CaseLines.

*Please also see the (concept) attach **Filing Notice & Third Defendant's Discovery Affidavit.***

As you will see, I already drafted the concept document a couple of weeks ago. I then e-mailed it to my Advocate (Adv. E. (Eugene) Janse van Rensburg) to finalise the First Schedule and e-mail it back to me.

Unfortunately, he is in Court most of August and am I therefore waiting a little bit longer than usual for him to finalise the First Schedule.

The moment I receive the complete First Schedule back from him, I will immediately send the complete Discovery Affidavit to my client to sign and send back to me, whereafter I will serve the complete document on you.

I therefore request that you don't continue with an Application to Compel, because I believe it will be totally unnecessary to do so.

I am also 'CC-ing' my Advocate in this e-mail to take note of this e-mail.

I await to hear from you,

Thank you.

Marius Viljoen (B.PROC)(UP)"

8.8. The relevant documents together with an unsigned discovery affidavit were therefore delivered to the applicant on 23 August 2022.

8.9. The applicant, as detailed above, delivered the current application to compel in terms of rule 35(7) on 30 August 2022, whereafter the third

respondent's attorney filed a notice of intention to oppose this application to compel on 1 September 2022.

8.10. On 16 September 2022, the answering affidavit on behalf of the third respondent was filed, in subsequence whereof the replying affidavit in this application to compel was filed on 30 September 2022 by the applicant.

8.11. On 6 September 2022, the previously unsigned draft discovery affidavit was duly signed under oath on behalf of the third respondent, wherefore there was compliance with the notice in terms of rule 35(1).

8.12. On 4 November 2022, the applicant sent an e-mail to the third respondent's attorney requesting a tender for wasted costs (in respect of the application to compel), which had to be paid and/or complied with by 8 November 2022. It deems to be mentioned that the 4th of November 2022 was a Friday, whereas the 8th was the following Tuesday, therefore the requested tender for wasted costs had to be complied with within 1 (one) court day.

8.13. On 8 November 2022, the applicant filed its heads of argument¹⁰ in respect of this opposed application seeking an order for costs only.

9. The applicant was not "*dissatisfied with discovery*", in respect of the documents provided in terms of the draft discovery affidavit on 23 August 2022, and thereafter followed it by delivering a signed discovery affidavit on 6 September 2022. The period that lapsed between these two dates is not significant. The reasoning behind the continuation of the application to compel discovery was to seek costs against the third respondent.

10. In the event of the applicant being "*dissatisfied*" with the discovery that was provided, it would have been compelled to first exhaust its remedy under sub-rule (3) before proceeding with an application to compel in terms of sub-rule (7)¹¹, non-

¹⁰ CaseLines pages 0014.2 – 1 to 0014.2 – 18.

¹¹ See *Tractor and Excavator Spares (Pty) Ltd v Groenedijk* 1976 (4) SA 359 (W); *NV Alina II, Transnet Limited v NV Alina II* 2013 (6) SA 556 (WCC) at 563E – F.

compliance with sub-rule (3) would render an application to compel premature.

Application for costs only – prayer 2 of the notice of motion

11. The applicant sought punitive costs against the third respondent and/or costs *de bonis propriis* against its attorney.

12. Prayer 2 of the notice of motion sought costs against the third respondent on the normal party and party scale. During argument, applicant's counsel conceded that the notice of motion did not include a claim for costs against the third respondent on the scale as between attorney and client, nor *de bonis propriis*. There was also no application in terms of rule 28 to seek an amendment or variation to include an order for punitive costs.

13. However, the practice note and heads of argument filed on behalf of the applicant argued that costs *de bonis propriis* should be awarded against the third respondent's legal representatives. The third respondent (a firm of conveyancing attorneys) was represented by another firm of attorneys herein. Wherefore it is incumbent upon the applicant to have notified the third respondent's legal representatives that costs *de bonis propriis* were sought against it separately.

14. There was no notice filed *vis-à-vis* the third respondent's legal representatives, although the applicant was duty bound to do so¹², that punitive type and scale of costs would be sought against it.

15. The reasoning behind such a notice is to alert and notify a litigant's legal representative to, if it so chooses, appoint legal counsel on its behalf to protect its interest against an adverse cost order sought on a punitive scale.

16. In civil litigation costs are sought against one's opponent, not the legal

¹² Herbstein and van Wincent: The Civil Practice of the High Court of South Africa 5th Edition Vol 2, page 983 – “costs *de bonis propriis*, if sought, should be specially asked for, or an application for an order for the payment of costs *de bonis propriis* should be made ...”.

practitioner representing that party, other remedies¹³ are available to parties involved in litigation seeking recourse against a rival attorney.

17. The applicant has a duty to limit or curtail unnecessary proceedings and the incurrence of costs. If not complied with, such a party may be ordered to pay costs which have been incurred by taking unnecessary steps¹⁴. It was unnecessary to institute this application and set it down separately on the opposed motion roll, especially where the main relief (prayers 1 and 3 of the notice of motion) was not persisted with. Any costs aspect *in casu* could and should have been dealt with ultimately by the trial court.

18. It is irrelevant whether a party achieved technical success in a matter, should it be the applicant's argument that it was entitled to institute the application to compel. Even in circumstances where a litigating party achieves technical success, such a party may still be mulcted with costs and may be ordered to pay the costs of "*an unsuccessful opponent's costs*."¹⁵ *In casu*, prayers 1 and 3 were not granted, it cannot be argued by the applicant that it even achieved "*technical success*".

Costs de bonis propriis

19. Courts do not generally grant costs against judicial officers in relation to the performance by her/him of such functions solely on the ground that they acted incorrectly, to do so would unduly hamper a judicial officer in the proper exercise of her/his judicial function¹⁶.

20. The intention of the framers of the rules¹⁷ and where costs *de bonis propriis* may be applicable contemplated situations where parties refused to facilitate the provision of documents¹⁸. This is not the case *in casu*, in fact, all documents were provided as detailed above, even prior to the institution of this application to compel discovery¹⁹. The

¹³ PL du Toit N.O. and Others v Du Toit Smuts and Partners and Another (Mpumalanga High Court as per Mashile J under case number 4748/2021 – unreported judgment dated 12 April 2023).

¹⁴ Herbstein Ibid page 963.

¹⁵ Cape and Transvaal Land and Finance Company Limited v De Villiers 1926 CPD 59.

¹⁶ Regional Magistrate du Preez v Walker 1976 (4) SA 849 (A) at 852 – 3.

¹⁷ Herbstein Ibid pages 985 – 986.

¹⁸ Herbstein Ibid page 818.

¹⁹ CaseLines pages 0014.8 – 1 to 0014.8 – 3, uploaded on 7 March 2023.

set down of this matter on the opposed motion roll occurred subsequent and after the discovery affidavit was served.

21. It was unnecessary to prosecute “*the costs of this application*” only. This aspect is exacerbated by the request on behalf of the applicant to “*pay the wasted costs on a punitive scale ... alternatively costs de bonis propriis against Mr Marais Viljoen on a punitive scale.*” (sic)²⁰. This was never applied for, nor was any subsequent notice provided.

22. In these circumstances the court cannot find that the third respondent should pay the costs occasioned by this application, much less the third respondent’s legal representatives as legal practitioners separately to pay costs *de bonis propriis*. There is nothing on the papers to suggest that it acted in an “*irresponsible and grossly negligent or reckless manner*” or that the applicant was prejudiced by the actions of the legal representatives of the third respondent and that they acted “*unreasonable and negligent*”.

23. The conduct of the third respondent’s attorneys does not rise to the level of conduct to be penalised with costs *de bonis propriis* against the legal representative, as enunciated by Fabricius, J in the Multi-links Telecommunications Limited v Africa Pre-Paid Services Nigeria Limited²¹ matter.

The costs of this application

24. The court must now consider the appropriate costs to be granted in this matter. As already found above, the institution of the current application was unnecessary. The applicant (on 22 August 2022) requested when discovery will be made. The third respondent’s attorneys responded the following day and also provided reasons why it requested an extension to provide a signed discovery affidavit. However, all documents were provided (on 23 August 2022) and it was subsequently unnecessary to institute, prosecute and continue with an application in terms of rule 35(7).

²⁰ See applicant’s heads of argument, CaseLines page 0014.2 – 7.

²¹ 2014 (3) SA 265 (GP) at 289A – D; Erasmus Superior Court Practice, 2nd Edition, Volume 2, JUTA, Van Loggerenberg, page D5 – 30A to D5 – 31/32.

25. If the applicant was “*dissatisfied*” with the documents produced, it had another remedy at its disposal, as referred to above, which it did not invoke. The request for an extension (to file a signed discovery affidavit under oath) was reasonable, the institution of this application was not. Any costs applicable or occasioned could’ve and should’ve stood over until the trial, if any, it is unnecessary to set them down separately.

26. Also, various judgments deal with the issue of unnecessary voluminous or prolix documents in a case²².

27. Before the court, the papers filed at the time of the hearing consisted of 1 880 pages (the court has since received notification of further documents uploaded on 11 May 2023). This should not be the case in circumstances where the particulars of claim consist of 6 pages (without annexures) regarding a claim of an immovable property transaction, inclusive of a rule 35(7) application, a plea, a notice of bar and an application to inspect documents. It is an abuse of process to expect this court to consider the substantial number of documents filed of record, also where a repetition of various documents occurred. The principle followed in *Jensen v Boiler Maker* referred to *supra* could not be applied herein, the court had to consider the conduct of the parties considering the matter in its entirety, almost since its inception.

28. With reference to the judgment in *Venmop v Clever Lad Projects*²³, Revelas J granted a punitive cost order against the respondent in that matter for filing unnecessary prolix affidavits. In the *Venmop*-judgment, reference was made to the matter of *US v Dunkel*²⁴, where the court of appeals criticised the conduct of litigants in embarking on unnecessary and costly processes. The *Venmop* judgment also referred to a judgment by the Canadian Federal Court of Appeals, *Mckesson Canada Corporation v Canada*²⁵, where Strattas, JA criticised lengthy and unnecessary processes.

29. In the matter of *Minister of Environmental Affairs and Tourism and Others v*

²² Unreported judgment of Hacker v Hardman 2018 JOL 40147 (ECD); (1415/2017) [2018] ZAECPHC 15 (19 April 2018); [14].

²³ 2016 (1) SA 78 at 87H – J.

²⁴ A judgment in the United States Court of Appeals for the 7th Circuit, 972F – D 955 (7th CIR.1991)

²⁵ 2014 FCA 290, [23] – [25].

Panbili Fisheries (Pty) Ltd, Minister of Environmental Affairs v Bato Star Fishing (Pty) Ltd²⁶, the SCA similarly criticized prolix replying affidavits as bringing out “*irritation, not persuasion*”. *In casu*, the unnecessary prolixity and the unnecessary repetition of documents are regrettable. The court finds that the undisciplined uploading of documents to only hear a cost argument for discovery (that has been complied with, has not been pursued and became moot) impugns the effective and optimal use of court time which is paramount for the proper working and functioning of any court in this country²⁷.

30. Third respondent’s counsel contended that it is an abuse of process to exert undue pressure on the third respondent and set this matter down for hearing on the question of costs only. In the matter of TUHF Limited v Eslin Street Hillbrow CC and others²⁸, this Honourable Court found the following:

“[59] The definition of the meaning of abuse of court process was used with approval by our courts. In the Australian High Court judgment of Varawa v Howard South Co Ltd[16] the definition of ‘abuse of process’ was stated in the following terms:

“... the term ‘abuse of process’ connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking – horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate they are regarded as an abuse for this purpose ...”

31. The court finds that it was unnecessary and redundant to institute the current application. It was evenly unnecessary to involve the third respondent’s legal representative and to threaten it with costs *de bonis propriis*. No reasonable basis or foundation was laid and no cogent facts were presented to make out a case that the third

²⁶ 2003 (6) SA 407 (SCA).

²⁷ Constitutional Court Directive with effect from 1 May 2023 regarding the effective and optimal use of court time during hearings in the Constitutional Court.

²⁸ (44393/2020) [2022] ZAGPJHC 566 (12 August 2022).

respondent's legal representative acted in an "*irresponsible and grossly negligent or reckless manner*".

32. On the basis that the prosecution of this application was both unnecessary and unreasonable, the third respondent should not be out of pocket in respect of expenses caused by the current application²⁹. Attorney and client costs are also justifiable where a litigating party is put to unnecessary trouble and expense which it ought not to bear³⁰. Costs *in casu* should therefore be granted against the applicant on the scale as between attorney and client.

33. The conduct of the applicant constitutes an abuse of process. In the circumstances, the order that was granted on 24 April 2023 is herein confirmed, as well as the scale of costs, for the reasons detailed herein.

Order

34. The following order is granted:

34.1. Prayer 2 of the notice of motion dated 30 August 2022 is dismissed.

34.2. The applicant is ordered to pay the costs of the third respondent, on the scale as between attorney and client.

DE BEER AJ
Acting Judge of the High Court
Gauteng Division

Date of hearing: 24 April 2023

Judgment delivered: 23 May 2023

²⁹ Nel v Waterberg Landbouers Ko-operatiewe Vereeniging 1946 AD 597 at 607 – 608.

³⁰ Boost Sports Africa (Pty) Ltd v Southern African Breweries (Pty) Ltd 2015 (5) SA 38 (SCA) at para 27; applying the dicta in the matter in re Alluvial Creek Limited 1929 UCD at 535.

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