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

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case No: 686/2022

In the matter between:

MANTSOPA LOCAL MUNICIPALITY — Applicant

and

WEST RAND CONSULTING (PTY) LTD — Respondent

IN RE:

Case No: 686/2022

In the matter between:

WEST RAND CONSULTING (PTY) LTD — Applicant

And

MANTSOPA LOCAL MUNICIPALITY — 1st Respondent

EMS SOLUTIONS (PTY) LTD — 2nd Respondent

HEARD ON: 08 JUNE 2023

JUDGMENT BY: MHLAMBI, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLI. The date and time for the hand-down are deemed to be 15h00 on 26 July 2023.

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[1] The respondent in this application seeks an order for costs in terms of the provisions of Uniform Rule 41(1)(c). The application is opposed by the applicant.

[2] The respondent obtained an order for an interim interdict on 25 February 2022 against the applicant but, by agreement between the parties, the application was not proceeded with as the parties reached a settlement. On 28 November 2022, the applicant sought a rescission of this order on an urgent basis. The respondent opposed the application and on 1 December 2022, the court granted an order by agreement between the parties in terms of which the application was withdrawn and the parties were to agree on the costs of the application within five days from the date of the order, failing which, either party could set the matter down on the opposed motion court roll solely on the issue of costs.

[3] The respondent contended that as the applicant withdrew the application which gave rise to the settlement which was made an order of the court on 1 December 2021, it was entitled to the costs caused thereby. The crisp principle, it was submitted, is that when a party withdraws an action, it is tantamount to an acceptance of defeat and should pay the costs unless there are exceptional circumstances. The applicant should therefore pay costs on a punitive scale as the rescission order sought was no longer extant. The respondents, in that application, were compelled to oppose the application in extremely truncated time periods and the applicant acceded to the draft order dealing with Part B of the application which superseded the interim interdict. It was contended furthermore that the court, in arriving at its conclusion, should not consider the merits of the application.

[4] It was contended on behalf of the applicant that the conduct of the respondent was material to the issue of the costs order to be made. In this regard, the applicant referred to correspondence dated 17 October 2022 in which the respondent advised the applicant that the court order of 25 February 2022 was still in place, and if the applicant were to proceed with the appointment of a third party, it and its officials would be in contempt of court. The respondent would

then have no other option but to carry out the order and resort to further legal remedies available to it. The respondent, it was contended, failed to respond to these allegations which were contained in the applicant's founding affidavit.

[5] In the given circumstances, it is imperative to investigate the events which gave rise to the orders of 25 February 2022 and 1 December 2022. The interim order interdicted and restrained the applicant from appointing EMS Solutions (Pty) Ltd (the second respondent in that application) as a professional service provider for the compilation of GRAP Compliant Annual Financial Statements and Assets Register for the 2020/2021 financial year, pending the finalisation of the review that the respondent instituted in Part B of that application. The respondent, as the applicant, sought the setting aside and/or declaring as unlawful the procurement process between the two respondents in that application.

[6] In March 2022, the parties reached an agreement in terms whereof the applicant withdrew its opposition to the respondent's application, terminated its agreement with EMS and tendered the respondent's costs on a party and party scale. In its answering affidavit[1], the respondent stated that the review application was abandoned on the strength of the settlement agreement. The relief sought in the application was meritless as the interim order only governed the position pending the finalisation of the review proceedings.[2] There was no order to rescind and the application constituted an abuse of the court process.[3]

[7] On the other hand, the applicant stated that the respondent, subsequent to the granting of the interdict, failed to submit the annual financial statements timeously,[4] made unfounded excuses for its failure to submit the financial statements which led to the applicant being unable to source or roll over unspent grants[5] and ultimately suspending its services to the applicant on 29 September 2022, making it difficult for the applicant to finalise its annual financial statements as it could not utilise the services of EMS. The equitable share to the applicant

[1] Para 4.8.
[2] Para 4.9 of the answering affidavit.
[3] Para 4.10 of the answering affidavit.
[4] Paras 44-46 of the founding affidavit.
[5] Para 54 of the founding affidavit.

was payable on 7 December 2022 and, if the relevant annual financial statements and supporting documents were not submitted to the Auditor-General, the applicant would not be in good standing and the equitable share would not be paid.[6]

[8] The applicant submitted that it faced irreparable harm if the interdict remained in place. The late submission of the annual financial statements in the previous years had already caused financial damages. It contended that the letter of 17 October 2022 was the determinative factor for the application as the threat contained therein, left the applicant with no other choice but to approach the court on an urgent basis for the rescission of the said court order. I agree. I also agree with the submission that fairness dictates that each party should pay its own costs for the urgent application that was withdrawn.

[9] At the inception of the proceedings, the applicant applied and was granted condonation for the late filing of its heads of argument and the payment of the taxed unopposed costs on a party and party scale.

[10] In this application, the successful party is entitled to the costs.

[11] Consequently, I make the following order:

ORDER:

1. Each party shall pay its own costs in the urgent application that was withdrawn;

2. The respondent shall pay the applicant's costs in the Uniform Rule 41(1)(c) proceedings;

3. The applicant shall pay the taxed unopposed costs on a party and party scale in the application for the condonation of the late filing of the heads of argument.

[redacted]

MHLAMBI, J

[6] Para 80 of the founding affidavit.

On behalf of the Applicant: Adv N Snellenburg SC

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