

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: HCA10/2019

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

[22 MAY 2020]


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SIGNATURE

In the matter between:

ELIAS MOTSOLEDI LOCAL MUNICIPALITY

APPELLANT

And

VAN DER HOVEN, EMILE PAUL

RESPONDENT

J U D G M E N T

MUDAU, J:

- [1] This appeal arises from an order of the Magistrate's Court, Groblersdal, which dismissed the appellant's counterclaim, but granted the claim in convention contrary to its factual findings, as well as the order given regarding costs. The appellant seeks an order upholding the appeal against the order of the magistrate, with costs. The respondent confirmed in writing that the appeal is not opposed and will abide this court's decision. After an agreement with counsel, this appeal was disposed of without further oral submissions in open

court, pursuant to section 19 (a) of the Superior Courts Act¹. The issues that arose for determination will be best understood against the background that follows. The facts are largely common cause.

- [2] The appellant is a Municipality as contemplated in section 2 of the Local Government Municipal Systems Act.² The Municipality was the first defendant in the court *a quo* whereas Rekhuditse Construction and Cleaning Services CC (Rekhuditse) against whom the claims were later withdrawn, was the second defendant. The respondent, a practicing advocate of the High Court, was the plaintiff. The claims in convention concerned the payment of certain fees by the appellant to the respondent in his capacity as an adjudicator. The respondent was appointed in that capacity on 23 September 2016 facilitated by The Construction Industry Development Board (CIDB) following a dispute between the appellant and Rekhuditse. The dispute between the appellant and Rekhuditse centred on a project of upgrading a road. This project followed a tender process, which was awarded to Rekhuditse.
- [3] It is common cause between the parties that at a preliminary meeting held on 28 October 2016 between the appellant, Rekhuditse and the respondent, the respondent was given a mandate to determine three disputes between the appellant and Rekhuditse. These were: (a) the issue of cancellation of the contract or repudiation thereof, (b) the issue of payments made to subcontractors and (c) the return of performance guarantees. The parties agreed that the disputes were to be adjudicated upon by the respondent based on founding, answering and replying papers submitted by the parties. It is common cause that the appellant paid an amount of R15 000.00 to the respondent as a deposit at the start of the adjudication process.
- [4] Subsequently and during February 2017 (on 8 and 28 February 2017 respectively), after the appellant had submitted its answer to Rekhuditse's "statement of case", the respondent, of his own accord reached an "interim decision", which was followed by an "amended interim decision" on a procedural issue. The respondent directed the appellant to pay his "wasted costs and expenses to date" this being R62 373.80 less any contribution made as per the statement of income and expenditure attached to the interim

¹ 10 of 2013

² 32 of 2000

decision. The appellant paid R31 186.90 this being 50% of the amount as directed on 17 March 2017 pursuant to an existing agreement. The appellant contended that the "interim decision" as well as the "amended interim decision" fell outside the scope of the respondent's mandate and jurisdiction in the adjudication of the disputes referred to him upon advice by legal counsel on 27 March 2017. Therefore, the payment was made erroneously. The appellant had pleaded and contended that the appellant made the payment to the respondent under the *bona fide* but mistaken belief that the payment was due to the respondent.

- [5] Pursuant to the advice by legal counsel, the appellant and Rekhuditse's legal representatives met. Subsequent to the said meeting, the appellant's attorney sent a letter to the respondent on 3 April 2017 with copies to Rekhuditse and its legal representatives. The letter advised the respondent that the appellant would launch an application in the High Court to review and set aside his "Decisions". The respondent was further advised, "*to desist in any further handling of the matter until the aforesaid review has been completed*". The respondent was also advised that a roundtable meeting was held with the legal representatives of Rekhuditse who indicated unequivocally, that they will abide the appellant's application to the High Court for the review of the matter.
- [6] On 19 of April 2017, the respondent notified the parties that his "Final Decision" was ready for publication. Furthermore, that the final amount of costs was R94 312, 00 or the amount of R47 156, 00 due by each party. Rekhuditse paid its share of the final contribution to the costs as stipulated above. By 19 June 2017, the appellant had not paid the R31 186.90 and R47 156, 00 amounts claimed by the respondent.
- [7] Consequently, the respondent's attorneys sent a letter of demand to the appellant and further advised that if payments were not made on or before the stipulated date, the appellant was given notice in terms of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act.³ On or about 20 July 2017 the appellant launched the application at the Gauteng Local Division, Johannesburg to have the respondent's "Interim Decision" and "Amended Interim Decision" set aside. On 12 October 2017, the court per the

³ 40 of 2002

- Honourable Madam Justice Modiba J, granted the application on an unopposed basis. The order by Modiba J was not appealed.
- [8] Together with its plea, the appellant delivered a counterclaim pursuant to Rule 20 (1) of the Magistrates' Court (Civil) Rules. In its counterclaim, the appellant sought the repayment of the amount of R31 186.90 previously paid to the respondent on 17 March 2017 based on unjustified enrichment. On the appellant's case, the return of such monies became due because of the respondent's decisions that were set aside by Modiba J. However, on the first day of trial at the magistrate's court the respondent abandoned his first claim against the appellant involving the payment of the amount of R31 686.90, but persisted with his claim regarding the amount of R47 156.00 for his "Final Decision".
- [9] The trial magistrate concluded in his written judgment dated 24 May 2019 after the conclusion of the trial at paragraph [27] that: *"[T]he court is further in full agreement with the 1st defendant's contention that the plaintiff was not entitled to be remunerated for work he had done outside the scope of his mandate and to which work was set aside by the High Court ruling. Even the Plaintiff must have realized that he will not be entitled to claim fees and costs for work he had done outside of his mandate and therefore he abandoned his claim in this regard at the start of the trial. In all fairness to the Plaintiff it must be noted that the High Court ruling was not available at the time of the issue of the summons in this matter which will explain why the first claim of the plaintiff was included in the summons at that time."*
- [10] The magistrate continued at paragraph [30]: *"[A]s determined earlier, the plaintiff was not entitled to any payments with regard to the wasted costs account and the payments made by the first defendant totalling an amount of R46 186.90 (forty six one hundred and eighty six rand and ninety cents) should stand to the credit of the 1st defendant's credit account."*
- [11] The order by the learned magistrate was couched in the following terms: "In the result the following order is made: (i) the plaintiff abandoned the first claim of R31 186,90 and therefore the claim is dismissed; (ii) judgment on the second claim of the plaintiff is granted in favour of the plaintiff against the first defendant in the amount of R969.10 (nine hundred and sixty nine rand and ten

- cents) together with interest thereon at the rate of 10.5% per annum is from 19 April 2017; (iii) The counterclaim of 1st defendant is dismissed; (iv) An order as to costs reserved for argument”.
- [12] It is common cause between the parties that on 24 May 2019 after hearing submissions regarding costs, the learned magistrate ordered each party to pay its own costs.
- [13] The attack in this appeal directed against the orders made by the learned magistrate is three-pronged. First, the dismissal of the appellant’s counterclaim. Secondly, the upholding of the respondent’s second claim regarding the amount of R 47 156.00. Third, the findings on costs referred to in paragraph 12 above.
- [14] The dismissal of the appellant’s counterclaim is inconsistent with the learned magistrate’s findings in that regard as alluded to above. Despite the wording of the relevant paragraph (iii) in dismissing the counterclaim, he confirmed that the appellant was successful in its counterclaim. As to the counterclaim, the appellant thus surmounted the hurdle of showing that its claim was dismissed without merit.
- [15] With reference to the judgment on merit, on the occasion that the costs were argued, the learned magistrate proffered an explanation for his orders in the following terms: *“Adv Steenkamp is correct in her accession [sic] to say that although the counterclaim was dismissed in essence the first defendant was successful in its action in court because they got the credit, they deserve for the money they pay [sic]. It was just a mere practicality that the credit was taken into account by adjudication of the second claim of the plaintiff rather than two separate issues. The reason the court also did this at that stage is it will be really silly to grant the plaintiff’s claim on the second count as well as the defendant’s claim, counterclaim and then have both parties excerpt even more legal costs by executing their different judgments [sic]. In other words, it would be a duplication and therefore the court structured its judgment in such a way as to actually try and benefit both parties to consolidating it to one claim. Therefore, I agree with Adv Steenkamp that in essence the first defendant was also successful in their claim.”*

- [16] Accordingly, the learned magistrate took the R47 156-00 that he awarded to the respondent and deducted the amounts, which in his view were due by the respondent to the appellant. Put simply, he deducted R15 000-00 paid for by the appellant as deposit as well as an amount of R31 186.90 which he in his mind, as explained in the preceding paragraph had awarded the appellant from the R47 156-00 that he awarded to the respondent. This explains the award of R969.10 in the respondent's favour.
- [17] As counsel for the appellant contended, despite the learned magistrate's best intentions, he erred by applying what he termed "a set off". There was no request by the parties for a merger of the relief sought in the main action and the counterclaim. In our law, it is well established that a claim in convention and a claim in reconvention are in essence, two separate claims⁴. Effectively, the order made deprived the appellant years of interests on the amount awarded in the counterclaim. Prayer 2 of the counterclaim was for "*interest on the (principal amount) from the date of counterclaim (being 18 September 2018) to date of final payment a tempore morae*". It is a well-established principle of our law that where two persons are mutually indebted to each other, their obligations may be extinguished by set-off. Significantly, however, it is trite that set off can only take place in respect of liquidated claims, in the sense of having been capable of speedy and easy proof.⁵
- [18] As for the appeal against awarding the respondent R969.10 from the initial amount in the second claim in convention, the learned magistrate reasoned that the 3 April 2017 letter by the appellant calling upon the respondent to cease and desist from handling the adjudication any further, was unilateral. Rekhuditse paid the respondent its fees due on 17 May 2017, which was six weeks after the 3 April 2017 letter was sent. Significantly, the respondent had already advised the parties on 19 April 2017, which is four weeks earlier than his 'Final Decision' was ready for publication.

⁴ See *Pilcher & Conways (Pty) Ltd v Van Heerden* 1963(3) SA 205(0) at 209 A-B; *Acs v Acs* 1981(2) SA 795(W) at 797 A – H; *Fisheries Development Corporation of SA Ltd v Jorgensen and Another*; *Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others* 1979 (3) SA 1331 (W) at 1337 D-F.

⁵ *Blakes Maphanga Inc v Outsurance Insurance Co Ltd* 2010 (4) SA 232 (SCA) at para 15; *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty Ltd* 1962 (1) SA 736 (T) at 738F-G.

- [19] The court *a quo* opined that the appellant's conduct in suspending the respondent's mandate did not enjoy the support of Rekhuditse. This approach was fundamentally flawed in that, as the appellant pointed out, Rekhuditse were copied in the letter of 3 April 2017. Rekhuditse did not have a counter view and equally significant, after a roundtable meeting regarding the way forward in challenging the adjudicator's decisions. Quite clearly, Rekhuditse's election to pay as it did six weeks later has no rational connection in making common cause with the appellant to suspend the mandate given to the respondent.
- [20] It is generally accepted that 'quiescence it is not necessarily acquiescence', and that a party's failure to reply to a letter stating the existence of an obligation owed by such party to the writer does not always justify an inference that the assertion was accepted as the truth. In *McWilliams v First Consolidated Holdings*⁶, adopting the approach by Watermeyer C J in *Collen v Rietfontein Engineering Works*⁷, Miller JA, asserted aptly thus: "*But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute*".
- [21] In the *McWilliams* matter, the appellant and one S, representing the respondent had negotiated a sale of certain shares in a company. Shortly thereafter, S had written a letter to the appellant confirming that in their meeting, the appellant had agreed to purchase the shares for R55 000, 00. The appellant failed to reply to the letter. In an action in a Local Division for the payment of the purchase price of the shares, the respondent relied on an unsigned note by S that the purchase price was R55 000-00. In dismissing the appeal, it was held that the appellant's silence and inaction after receipt of the letter justify an inference adverse to him in that regard.
- [22] Adopting the approach in *McWilliams*, I hold that the learned magistrate was in this instance wrong in concluding that the appellant acted unilaterally in

⁶ 1982 (2) SA 1 (A) at 10E-F

⁷ 1948 (1) SA 413 (A)

suspending the mandate of the respondent without the support of Rekhuditse, whereas the latter was notified of this fact in writing, but remained silent. Silence is equivalent to consent when there is a duty to speak.⁸ I accordingly hold that on the probabilities, Rhekhuditse had acquiesced in the conduct by the appellant in the instruction given to the respondent to desist in any further handling of the matter until the review was completed, as it had a direct interest in the matter.

- [23] Absent the mandate by the appellant and Rhekhuditse, it follows accordingly, that the respondent lacked the necessary authority to continue with the adjudication process beyond the 3 April 2017 letter. Consequently, the respondent's mandate was suspended effective on 3 April 2017. It is worth noting that the respondent, as counsel for the appellant also pointed out, gave conflicting evidence with regard to how much work had already been done in relation to the Final Decision as at the time the 3 April 2017 letter was received. The answer he gave was: "*shortly after this letter, also in April, I proceeded to do the Final Decision in the adjudication*". The answer given, clearly suggested that he started with the task regarding the Final Decision in spite of the 3 April 2017 letter.
- [24] In response to a suggestive question by his own legal representative as to how far he was in reaching his Final Decision on 3 April 2017, the answer was, "*I was very close to finish*". As the proverbial saying goes, the respondent was 'blowing hot and cold' at the same time. The evidence given was contradictory in that respect, as the court *a quo* also pointed out during the proceedings. On the probabilities, the respondent failed dismally in discharging the onus of proof that rested upon him in proving the second claim. Regard being had to the entire facts placed before the court *a quo*, the respondent's claim should have been dismissed and the counterclaim, granted. It follows that the appeal must succeed.
- [25] It remains to deal with the appeal on costs. It is trite that a court *a quo* has discretion to determine the costs, if any, to be awarded. This court on appeal has limited scope to interfere with a costs order. An interference is only permissible in circumstances where the court on appeal, is satisfied that the

⁸ See *Commaile v Steyn* 1914 CPD 1100 at 1103; *Seeff Commercial and Industrial Properties (Pty) Ltd v Silberman* [2001] 3 All SA 133 (A)

discretion was not exercised judicially or that it had been influenced by principles that are wrong, a misdirection or incorrect appreciation regarding the facts.⁹

[26] It is well established regarding the question of costs that the general rule is that 'costs follow the result'. It is only in exceptional circumstances to justify a departure from the general principle that costs follow the result. The appellant in this case has been successful on appeal regarding the merit of the claim. There are no cogent reasons justifying a departure from the general principles pertaining to costs in respect of the proceedings in the court *a quo*. However, since the appeal is unopposed, I take the view that there should be no order as to costs insofar as the appeal is concerned.

[27] The following order is made:

27.1 The appeal is upheld.

27.2 The order made by the court of first instance is set aside and substituted with an order in the following terms:

'(a) The plaintiff's claim is dismissed with costs.

(b) The defendant's counterclaim is granted.

(c) Judgment is granted against the plaintiff for the payment of R31 186.90 (THIRTY ONE THOUSAND ONE HUNDRED AND NINETY CENTS) with interest from the date of the judgment (24 May 2019) to date of final payment at the applicable rate.

(d) Costs of suit'.

[28] No order is made in respect of the costs of appeal.



MUDAU J

JUDGE OF THE HIGH COURT

⁹ See *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) SA 245 (CC) at para 88; *Ferris v FirstRand Bank Ltd* 2014 3 SA 39 (CC) at paras 28 and 29

I agree.



MAKGOBA JP

JUDGE PRESIDENT OF THE LIMPOPO

DIVISION OF THE HIGH COURT

APPEARANCES

For the Appellant:

Adv. A Steenkamp

Instructed by:

Khumalo Masondo Attorneys

For the Respondent:

No Appearance

Date of Set down:

15 May 2020

Date of Judgment:

22 May 2020