



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

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

Case No: 860/2019

In the matter between:

MALCOM NEIL CAMPBELL NO

1st Plaintiff

VRYSTAAT MUNISIPALE PENSIOENFONDS

2nd Plaintiff

and

FRITZ FOURIE

1st Defendant

JADE STEENKAMP

2nd Defendant

JUDGMENT

CORAM:

NAIDOO J

HEARD ON:

7 NOVEMBER 2019

DELIVERED ON:

7 NOVEMBER 2019

INTRODUCTION

- [1] The first defendant (applicant in this matter), comes before me in terms of Uniform Rule 41(1)(c), after the plaintiffs withdrew the action instituted against him and the second defendant, without tendering his costs. He seeks costs on the party and party scale. The plaintiffs opposed the application. Adv Con Joubert SC represented the plaintiffs and Adv GS Janse Van Rensburg represented the first defendant.

BACKGROUND

- [2] The 1st plaintiff is the duly appointed curator of the 2nd plaintiff, while the 1st defendant was, at all times material to this action, a member of the Board of Trustees, as well as the Principal Officer of the 2nd plaintiff. He was also a member of the Executive Committee of the 2nd plaintiff. The 2nd defendant was at the material times, the son-in-law of the 1st defendant. The 1st defendant had extensive powers in the aforementioned capacities, which placed him in a position of trust vis-à-vis the affairs of the 2nd plaintiff. These powers and positions also attracted and imposed upon the 1st defendant, numerous statutory duties and obligations in respect of the 2nd plaintiff. After his appointment as curator, the 1st plaintiff instituted extensive investigations into the financial affairs of the 2nd plaintiff.
- [3] After what the 1st plaintiff describes as a “thorough investigation” involving a large number of documents, covering a period of approximately 15 years, he and his forensic audit team and his attorneys uncovered certain irregularities and irregular payments, which prompted the institution of several legal actions against the 1st defendant and others, the current matter being one such action. These were all actions for the recovery of monies which constituted irregular expenditure. The facts in this matter are,

briefly, that the 1st defendant was found to have awarded a contract for the supply of water, during the water crisis in Kroonstad during 2016, to the premises of the 2nd plaintiff, without disclosing to the Board of Trustees or the Executive Committee of the 2nd plaintiff that the second defendant was his son-in-law.

- [4] In addition invoices rendered by the 2nd defendant did not reflect the quantities of water supplied, which made monitoring of expenditure difficult. It is alleged that even after the water supply to Kroonstad was restored in 2017, the 1st plaintiff instructed that the 2nd plaintiff was to continue purchasing water from the 2nd defendant, which turned out to be more expensive than purchasing water from the municipality. This ultimately led to the institution of this action in which the plaintiffs claimed from the defendants, jointly and severally, the one paying the other to be absolved, the payment of the amount of R483 991.33 (Four Hundred and Eighty Three Thousand Nine Hundred and Ninety One Rand and Thirty Three Cents), together with interest thereon, and costs of suit. The claim against the 1st defendant was based on the damages arising from the breach of his legal duty and various statutory duties of care, diligence and good faith in respect of the 2nd plaintiff. The claim against the 2nd defendant was based on unjust enrichment.

- [5] Both defendants filed notices to defend the action, the 1st defendant having done so on 14 March 2019 and the 2nd defendant on 18 March 2019. Shortly thereafter and before any further pleadings fell due, the second defendant made certain representations to the plaintiffs, which resulted in a settlement agreement being subsequently entered into between the plaintiffs and second defendant. The relevant term of the settlement agreement in this regard states that:

“The Second Defendant shall pay to the plaintiffs the total capital of R420 000.00 (**FOUR HUNDRED AND TWENTY THOUSAND RAND**) in full and final settlement of all claims arising under the above case number”

It is common cause that the 1st defendant was not a party to the settlement agreement, and although the 1st plaintiff alleges that he assumed there was communication in this regard between the 1st and 2nd defendants, the 1st defendant denies this and asserts that he was never informed of the settlement, nor did the plaintiffs discuss the payment of costs with him.

THE LAW

[6] As correctly pointed out by both counsel in this matter, it is well established in our law that the general rule regarding costs is that the unsuccessful party pays the costs of the successful party on the party and party scale. The determination of an appropriate costs order is in the discretion of the court, which discretion is usually informed by a number of factors in order that such discretion be exercised judicially. **Erasmus in Superior Court Practice, D5-6**, states it succinctly as follows: “In leaving the court a discretion, the law contemplates that it should take into consideration the circumstances of each case, carefully weighing the issues in the case, the conduct of the parties and any other circumstance which may have a bearing on the issue of costs and then make such order as to costs as would be fair and just between the parties.” This is particularly so if the court intends on departing from the general rule.

[7] The provisions of Rule 41(1)(c) are not in dispute nor the 1st defendants entitlement to seek an order for costs in terms thereof, given that the action was withdrawn against him. The plaintiffs aver that this is a case where the court should depart from the general rule. In this regard, Mr Joubert referred to an extract from **Erasmus** which appears at **D1-551**:

“The general principle is that the party withdrawing is liable, as an unsuccessful litigant, to pay the costs of the proceedings. The court, however, retains a discretion to deprive the successful party of his costs. In the exercise of its discretion the court should have due regard to the question whether, objectively viewed, the applicant acted reasonably in launching the main

proceedings but was subsequently driven to withdraw it in order to save costs because of facts emerging for the first time from, for instance, the respondent's answering affidavit in the main proceedings or because the relief was no longer necessary or obtainable because of developments taking place after to the launching of the main proceedings."

EVALUATION

- [8] The plaintiffs' argument is that the matter was settled, with the 2nd defendant paying a substantial amount of the claim, meaning that the plaintiffs were substantially successful. On this basis, this was not a matter where the plaintiffs were obliged to withdraw the action due to a realisation that their case did not have prospects of success. Where a matter is withdrawn for reasons that are unclear, it is indeed so that the withdrawing party will be liable for the costs of the other parties. The 1st defendant's argument in essence is that the action against him was withdrawn, without a tender for payment of his costs, hence he is entitled to have brought this application and to an order for payment of his costs. I pause to remark that I find this rather strange behaviour on the part of the plaintiffs, as one would expect the plaintiffs to have informed the 1st defendant of the representations of the 2nd defendant. It was expected of the plaintiffs to at least have canvassed the question of costs with the 1st defendant.
- [9] In assessing the case put forward by each party, the court is required to examine the circumstances of the matter. Here the 1st plaintiff is under a statutory duty to protect the rights of the 2nd plaintiff, which is essentially a public body, dealing with public funds. There appears to be no serious dispute that he conducted an extensive investigation into the financial affairs of the 2nd plaintiff, which uncovered the irregular expenditure of large sums of money. This in turn resulted in 5 actions against the 1st defendant and others. I accept that the 1st plaintiff's conduct in

instituting this action was not unreasonable, frivolous or vexatious. He was acting in terms of his statutory duty to recover the money of the 2nd plaintiff, which was irregularly spent. The prompt consideration of the 2nd defendant's representations, culminating in his agreement to settle the matter on behalf of the 2nd plaintiff is, in my view, indicative of his consciousness of his duty to ensure that legal costs were not unnecessarily incurred, to the detriment of the 2nd plaintiff.

[10] It is common cause that the settlement agreement makes no provision for the payment of costs, and Mr Joubert's explanation that the parties intended for each to pay his own costs is not unreasonable in the circumstances. It is true that in terms of the Rules of Court, the 1st defendant is entitled to payment of his costs upon withdrawal of the action against him. However, in exercising its discretion regarding an award of costs, the court has to take into consideration a number of factors. The summons contains serious allegations against the 1st defendant of breaches of his statutory duties in respect of the various positions of trust that he held in the 2nd plaintiff, of irregularly awarding contracts to his son-in-law, without the requisite disclosure and making a large number of irregular payments (from the funds of the 2nd plaintiff) in this regard. The 2nd defendant is alleged in the summons to have been unjustly enriched, at the expense of the 2nd plaintiff, as a result of the actions of the 1st defendant

[11] The second defendant's representations were clearly aimed at settling the matter, and his agreement to pay approximately 87% of the amount claimed by the plaintiffs is, in my view, an acknowledgement that he was indeed unjustly enriched at the expense of the 2nd plaintiff. As I indicated, the conduct of the 1st defendant is the reason that the 2nd defendant was unjustly enriched. With regard to the issue of costs, such would have been

minimal at the time of withdrawal of the action, and Mr Janse Van Rensburg conceded as much, asserting that the costs of this application will in all probability be far in excess of the costs that the 1st defendant is claiming. The prayer in the summons was for an order against both defendants jointly and severally, the one paying the other to be absolved. The first defendant was therefore absolved from payment of the plaintiffs' claim. The plaintiffs were in the position that it was not necessary to proceed against the 1st defendant any longer, and even if they did, they would in all probability not have obtained judgment against him. Therefore, in my view, the withdrawal of the action against the first defendant was on good grounds and not done in a manner that caused prejudice to the first defendant.

- [12] It is so that there has not been judicial certainty regarding the issue of whether exceptional circumstances, or good grounds should exist for a court to depart from the general rule of granting costs to the party against whom an action is withdrawn. As I have indicated, the plaintiffs were substantially successful in this matter, and would have been entitled to their costs. The agreement seems to have been that each party would pay its own costs. When the 1st defendant learned of the settlement agreement and its terms, it would surely have occurred to him that he had escaped a large liability. Even if he sought legal advice, he should have been advised that costs at that stage were minimal and it was unwise to pursue this application. Instead, he chose to pursue this application, escalating costs unnecessarily.
- [13] There are cases where in exercising its discretion, the court, after considering all the circumstances of the matter, must make an equitable costs order, even if that means depriving a party of his costs, where he is entitled in terms of the Rules of Court to those costs. In my view, this is one such case. Although the 1st

defendant complains that he was not given an opportunity to plead to the summons, it is eminently clear that the settlement agreement absolved him from paying the claim and costs of the plaintiffs. It would have been common sense and prudent for him, at that stage, to have simply settled his minimal costs incurred up to that time and walked away from the matter. I gained the impression from Mr Janse Van Rensburg's reference to the personality of the 1st respondent, that the relationship between the 1st plaintiff and the 1st defendant was less than cordial and harmonious. If this was the motivation for the 1st defendant to have proceeded with application, then that is unfortunate and indicative of someone who is not concerned about the escalation of costs which a public institution is expected to pay. I find no claim that the 1st plaintiff should be held personally responsible for costs.

[14] The plaintiffs submit that the 1st defendant's pursuit of this application is unreasonable and should attract a punitive order for costs on the attorney and client scale. The 1st defendant was entitled to proceed with this application, inadvisable as it may have been. I cannot, however, find that his pursuit of this application is frivolous, vexatious or so prejudicial to the plaintiffs that it warrants a punitive costs order

[15] In the circumstances, I make the following order:

15.1 The application is dismissed

15.2 Each party is to pay its own costs

S. NAIDOO, J

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