



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

Case number: 4350/2019

In the matter between:

**FREE STATE GAMBLING LIQUOR AND
TOURISM AUTHORITY**

Applicant

and

**FIRST NATIONAL BANK LTD
NEO LILIAN SEHULARO**

1st Respondent

2nd Respondent

HEARD ON: 5 DECEMBER 2019

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: 13 DECEMBER 2019

**Wasted costs occasioned by intransigent refusal of postponement -
Insistence on arguing a matter that has become moot – Duty on the
legal representatives to make sensible proposals to each other to**

obviate court's intervention - Unreasonable party ordered to pay the costs.

- [1] This matter concerns the payment of costs occasioned by the postponement on 31 October 2019 and costs of the application.
- [2] The background facts are fairly straightforward. On 18 September 2019 the applicant issued an urgent application against its former employee being the second respondent. The applicant was seeking an order interdicting the second respondent from withdrawing the sum of R186 135.00 to be deposited by an entity called Sanlam into her bank account held with the first respondent. The interim order was granted with the return date set for 31 October 2019.
- [3] It appears that on 16 October 2019, the attorney for the second respondent sent an e-mail to the attorney for the applicant requesting an indulgence to file the opposing affidavit on/or about 22 October 2019. It was granted. Given the issues raised, the attorneys for the applicant requested an indulgence too and suggested that it will be unnecessary to brief counsel and that the matter should be postponed in chambers before a Judge. This was flatly refused without providing any reasons. It therefore necessitated the briefing of counsel to argue postponement. Only on 31 October 2019 the parties agreed that the matter be postponed and costs order to be reserved.
- [4] It is a trite principle of our law that the discretion to award costs lies in the court and it must be exercised judicially in a fair and equitable manner. The attorney for the second respondent acted

in an unreasonable and inconsiderate manner by insisting that the matter proceed when the situation partly emanated from his side. He asked for the indulgence which meant that the attorneys for the applicant had to reply. They could not do so within the limited time remaining before the return date. In any event, there was no prejudice to the second respondent because the funds were not in her bank account. This intransigence led to the applicant incurring unnecessary costs which could have been avoided. It will be unfair that the applicant is out of pocket because of the actions of the attorney for the second respondent. Litigation by ambush must be discouraged. It will only be fair that the second respondent pays the costs.

- [5] The next instalment in this matter deals with the pertinent issue of who should bear the costs of the application. According to the applicant, the matter became moot when Sanlam paid the funds into a bank account different to the one held with the first respondent. The exposition of the argument of the second respondent is that the application was still born from the outset. The reliance is on the e-mail dated 13 September 2019 from Sanlam to the applicant with copy circulated to the second respondent stating that verification on her bank account failed. Sanlam requested both the applicant and second respondent to provide it with a copy of her identity document and bank statement. The result is that on 27 September 2019 Sanlam paid out the funds into a different account belonging to her held at Capitec Bank.
- [6] I broached the issue with counsel for the second respondent to explain what is really conveyed in the e-mail referred to above. Reluctantly he conceded that it can mean a number of things like

the account has been closed or there is any other bank issue with it. Therefore there is no merit in the submission that the applicant ought to have known that the application will not achieve its purpose.

[7] On discovering that payment has already been made as a result of the second respondent circumventing the costs order by providing Sanlam with a Capitec bank account, the attorney for the applicant proposed to the attorneys for the second respondent that the matter be withdrawn and each party pays its own costs. This offer was spurned and they insisted that the issue of costs should be determined by the court. It begs the question why the attorney for the second respondent rejected a reasonable proposal made with sole purpose of avoiding a protracted proceedings and piling of legal costs.

[8] In **John Walker Pools v Consolidated Aone Trade & Invest**¹, the court stated the principle as follows:-

“As a general rule, litigants and their legal representatives are under a duty, where an appeal or proposed appeal becomes moot during the pendency of appellate proceedings, to contribute to the efficient use of judicial resources by making sensible proposals so that an appellate court’s intervention is not needed. If a reasonable proposal by one of the litigants is rejected by the other, this would play an important part in the appropriate costs order”

This is the basis upon which this court concludes that the second respondent must pay the costs of the application.

¹ 2018 (4) SA 433 (SCA) at para 10

[9] Therefore the order is the following:-

- 8.1. The application is removed from the roll.
- 8.2. The second respondent is ordered to pay the wasted costs occasioned by the postponement on 31 October 2019.
- 8.3. The second respondent is ordered to pay the costs of the application.

M. A. MATHEBULA, J

On behalf of applicant:

Adv. S. Rautenbach

Instructed by:

Huggett Retief Inc
BLOEMFONTEIN

On behalf of 1st & 2nd respondent:

Adv. C. Hendriks

Instructed by:

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