



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: 630/2017

In the matter between:

**ONE TIME DREAM TEAM PROMOTIONS AND EVENTS
MANAGEMENT CC**

Plaintiff

And

MANGAUNG METROPOLITAN MUNICIPALITY

Defendant

HEARD ON: 30 JANUARY 2018

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: 31 JANUARY 2018

- [1] Sometime in January 2017 the plaintiff issued summons against the defendant claiming *inter alia* payment of the amount of R1 199 620.35 plus interest a *tempore morae* on the aforesaid amount calculated from the 12th November 2016 until date of final payment. The claim was based on a written agreement entered into by and between the parties. The defendant in defence raised a special plea alternatively denied that the plaintiff complied with its obligation.
- [2] On the day of trial to wit 30 January 2018, the parties approached me in chambers and requested to engage each other with a view to settle the matter. This was generously granted. Around tea time they emerged and informed me about the progress that they were making and that only few issues were outstanding. After lunch time they presented me with a draft order and beseeched that it be made an Order of Court. They further informed me that they could not agree on the costs aspect. This is the bone of contention and what I am called upon to adjudicate on.
- [3] The question to award costs or not lies in the discretion of the court. This principle was succinctly stated in **Union Government v Heiberg 1919 AD 477 at 484** per Solomon AJ in the following manner:-
- “The ordinary practice is, of course, that costs follow the event but that is subject to the general rule of our law that costs – unless expressly otherwise enacted – are in the discretion of the Judge... “
- [4] The discretion referred to should not be exercised in a vacuum. In **Ward v Sulzer 1973 (3) SA 701 (A)** at 706 G the court pointed out that:-

"In awarding costs the Court has a discretion, to be exercised judicially upon a consideration of all the facts; and, as between the parties, in essence it is a matter of fairness to both sides. See *Gelb v Hawkins*, 1960 (3) SA 687 (A.D.) at page 694 A; and *Graham v Odendaal*, 1972 (2) SA, 611 (A.D.) at page 616. Ethical considerations may also enter into the exercise of the discretion; see *Mahomed v Nagdee*, 1952 (1) SA 410 (A.D.) at page 420 in fin".

- [5] Counsel for the plaintiff argued that the defendant must bear the costs because the plaintiff has substantially succeeded in its claim and that the defendant has accepted liability. The submission of the counsel for the defendant is essentially that the plaintiff was not prepared to proceed with the trial to finality hence the settlement that part of the claim stand over still to be determined at a later stage.

- [6] Clause 10 of the written agreement between the parties provides that parties must engage in mediation processes during any dispute before embarking on "normal legal procedures". This can only be done before issuing summons. The plaintiff issued summons on the 8th February 2017. It appears that the plaintiff attempted mediation only three (3) months later as shown in the communication between parties around the 8th May 2017. This clause cannot be interpreted to mean that dispute would be declared when the plea was served and filed. In that scenario the parties would have reached *litis contestatio* of the "normal legal procedures". The plaintiff in my view, brought the matter before court prematurely and cannot blame any other party for incurring costs

- [7] The argument about substantial success is also misplaced. At the moment the parties have an agreement on approximately 28% of the

claim. The substantial portion of it still has to be agreed upon at a later stage when proper documents are on hand and the parties are *ad idem* on every line item.

[8] The defendant, on the other hand, appears to have been playing for time and contributed to the delay in the finalisation of this matter. Initially the basis of the defence was a denial that the plaintiff has not performed as per the written agreement. Through engagement the defendant accepted liability and agreed to make payment of R350 000 and almost the entire claim at a later stage. It is undesirable that a public entity should conduct business utilising public purse in such a flippant and truant manner. The time has come that the court should hold public officials engaged in this practice personally liable for legal costs. Again it appears that the defendant was correct not to pay over the money to the plaintiff without proper basis. Even at this late stage the plaintiff has not provided such documents or given cogent reasons regarding their unavailability.

[9] In this matter, I was not privy to the discussions culminating in the settlement agreement. In the exercise of my discretion and taking all relevant considerations into account, I remain unconvinced that any party should be ordered to pay the costs. It will be unjust and inequitable to do so.

[10] Accordingly, I make the following order:-

10.1 Each party to pay its own costs.


MATHEBULA, J

On behalf of Plaintiff:

Instructed by:

Adv. W A van Aswegen

McIntyre van der Post

Bloemfontein

On behalf of Defendant:

Instructed by:

Adv. N D Khokho

Maduba Attorneys

Bloemfontein