



IN THE GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA,
PRETORIA

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

14 February 2017.

In the matter between: -

CASE NO.: 2013/32786

14/2/2017

SUPERWAY CONSTRUCTION (PTY) LTD

APPLICANT

And

NGWETSAMA ELIKA SWAFO

RESPONDENT

IN RE:

NGWETSAMA ELIKA SWAFO

PLAINTIFF

And

MEC FOR ROADS AND TRANSPORT, LIMPOPO

FIRST DEFENDANT

SOUTH AFRICAN NATIONAL ROADS

AGENCY LIMITED

SECOND DEFENDANT

SUPERWAY CONSTRUCTION (PTY) LTD

THIRD DEFENDANT

JUDGMENT

TSATSAWANE AJ

Introduction

- 1 In this application, the applicant ("Superway") seeks an order in terms of which the respondent's attorney of record ("Le Roux") is ordered to pay its costs of the action *de bonis propriis*, alternatively, that such costs be paid by the respondent itself on an attorney and client scale.
- 2 The application is opposed by the respondent. The other parties in the action proceedings are not involved in this application.

The action proceedings

- 3 The respondent issued summons against the three defendants in the action, with Superway cited as the third defendant. As against Superway, the respondent relied on an alleged breach of a duty of care in respect of certain road works

which breach allegedly resulted in the respondent suffering damages arising from a motor vehicle accident.

- 4 Superway delivered a notice of intention to defend the action proceedings. Thereafter, Superway entered into correspondence with the respondent with the view to show that it is not liable to the plaintiff. In this regard, in a letter dated 8 August 2013, Superway advised the respondent that ~

“2. *We confirm that we have consulted with our client and counsel and it came to our attention that our client was not under contract to maintain, improve or make safe the R71 road at the time of your client's accident.*

3. *In this regard we attach hereto a copy of the taking over certificate from which it appears that the conditions of the contract was completed by our client on 12 October 2010. Further to the above our client's defects notification period ended on 12 April 2011.”*

- 5 On the basis of the above quoted paragraphs, Superway contended that it was wrongly joined as a defendant and that the claim against it should be withdrawn, failing which it would file a special plea. Despite further correspondence in this regard, the respondent did not withdraw its claim against Superway and Superway delivered its plea to defend the claim against it and further filed a discovery affidavit.

Whether the action against Superway has been withdrawn

- 6 At a pre-trial conference held on 6 May 2015, Le Roux, acting on behalf of the respondent, withdrew the respondent's claim against Superway. This, however, was not a withdrawal of claim against Superway as contemplated in Rule 41(1)(a). In paragraph 3.19 of its founding affidavit, Superway says that it insisted "*on the plaintiff tendering the third defendant's costs in their notice of withdrawal.*"
- 7 On 26 October 2015, the respondent served a notice of withdrawal of its claim against Superway. Superway took issue with the notice of withdrawal due to the fact that it did not contain a tender for costs as requested by it at the aforesaid pre-trial conference. It demanded that this notice of withdrawal be withdrawn and that a fresh notice of withdrawal tendering Superway's costs be delivered, failing which this Court would then be approached for the costs order sought in this application.
- 8 In a letter dated 6 November 2015, Le Roux advised Superway that the respondent "*tender to withdraw the action against your client, but that the plaintiff cannot afford to pay your client's legal bill and cannot tender any further costs than that already paid.*" Superway rejected this. The "*tender to withdraw*" must have been made on the basis that it was accepted that the notice of withdrawal served on 26 October 2015 was not sufficient.

9 In the aforesaid letter, the respondent further advised Superway that ~

"6. *Should your client not be in a position to agree hereto, our client cannot afford to withdraw the matter against your client and a meeting will have to be held to establish the way forward.*

...

8. *Should your client therefore not be in agreement that the matter be withdrawn and settled between the plaintiff and your client immediately on the basis that you accept the proposal that no further costs will be paid and the matter be withdrawn, we will have no choice but to continue without withdrawing the action against your client and costs can then be determined at finalisation of the matter, against the unsuccessful defendant.*

9. *Your client's insistence on costs against a indigent, poor, injured plaintiff are not understood and we plead with your client to reconsider their position as mentioned by yourself in the conversation of 5 November 2015.*

10. *We will now proceed to withdraw the previous notice of withdrawal formally but place on record that it was at all relevant times the understanding of writer that an agreement was reached that merely the abovementioned costs of the cost account of 13 July 2015 are tendered*

by the plaintiff and will be paid immediately and that the action will be withdrawn."

10 Superway clearly did not accept any of the above. In paragraph 3.27.6 of its founding affidavit, Superway says that the *"threat of a non-withdrawal of the notice of withdrawal in the circumstances described by the plaintiff is vexatious and borders on blackmail. Such conduct should not be tolerated by any Court."* I do not agree that the plaintiff's position that it would rather proceed with the claim against Superway as opposed to withdrawing its claim against Superway *"borders on blackmail."* For purposes of this application, the parties argued their respective cases without reference to the pleadings filed in the action proceedings and I was not referred thereto. In the premises, I am not in a position to determine whether, on the face of the pleadings, the plaintiff's persistence with its claim against Superway is vexatious.

11 In opposing this application, the respondent relies on an affidavit deposed to by Le Roux. Therein, it is denied that Superway is entitled to the relief which it seeks for the reasons set out therein.

12 In paragraph 4 of the respondent's answering affidavit, the following is stated ~

"The relief sought herein is premised on the basis that the Plaintiff/Respondent has withdrawn the action under Case number 32786/13 against the Third Defendant/Applicant. This appears from paragraph 3.24 of the Founding Affidavit. However the notice of withdrawal of that action has itself been

withdrawn. A copy of such subsequent notice of withdrawal is attached hereto as Annexure "Z". The result of this is that the action of the Plaintiff/Respondent under case number 32786/13 against the Third Defendant/Applicant is still pending; and has not been withdrawn. This was done with the acquiescence of the Third Defendant/Applicant."

- 13 In the light of the above, it is contended on behalf of the respondent that the jurisdictional prerequisite for an order which the applicant seeks in this application is absent due to the fact that the claim against Superway has not been withdrawn. This contention is based on the respondent's notice of withdrawal of the notice of withdrawal of his claim against Superway. In simple terms, the respondent's defence is that the notice of withdrawal of the claim against Superway has itself been withdrawn, it is no longer there and the claim against Superway remains pending.
- 14 It is correct that the jurisdictional prerequisite for a costs order in terms of Rule 41(1)(c), the rule upon which Superway relies, is a notice of withdrawal delivered by the withdrawing party. Without such a notice having been delivered there is no entitlement to costs and there is no obligation to pay any costs.
- 15 The respondent's contention that it has withdrawn its notice of withdrawal can only be correct if there was a notice of withdrawal properly delivered in the first place. If, in the first place, there was no proper delivery of a notice of withdrawal, the question whether there has been a withdrawal of a notice of withdrawal does not arise because in that event, there is nothing to withdraw.

- 16 The general rule is that a litigant who withdraws an action must pay the defendant's costs unless "*very sound reasons exist why the defendant should not be entitled to costs.*" See Germishuys v Douglas Besproeiingsraad 1973 (3) SA 299 (NC); Wildlife and Environmental Society of South Africa v MEC for Economic Affairs and Tourism, Eastern Cape and Others 2005 (6) SA 123 (ECD). In Reuben Rosenblum Family Investments (Pty) Ltd and Another v Marsubar (Pty) Ltd 2003 (3) SA 547 (C) it was held that it is only in "*exceptional circumstances*" that a defendant will not be entitled to all the costs where a plaintiff withdraws an action.
- 17 The aforesaid general rule only applies in circumstances where a plaintiff has withdrawn an action against a defendant and the withdrawal is a withdrawal within the meaning contemplated in Rule 41(1)(a), i.e. there has been a notice of withdrawal properly delivered.
- 18 Rule 41 deals with, amongst others, the withdrawal of proceedings. In terms of Rule 41(1)(a) a plaintiff such as the respondent herein may at any time before the matter has been set down withdraw the proceedings without the consent of the other parties or the Court. The consent of the other parties or the leave of the Court is required after the matter has been set down for hearing.
- 19 A matter is withdrawn by delivering a notice of withdrawal in which may or may not be included a tender for costs by the withdrawing party.

- 20 Rule 41(1)(c) provides that if a notice of withdrawal does not contain a consent to pay costs, the receiving party may apply to Court for a costs order.
- 21 On a proper reading of Rule 41(1)(a) a matter is withdrawn upon the delivery of a notice of withdrawal of the proceedings. The subrule says that a person who wishes to withdraw a matter “*shall deliver*” a notice of withdrawal.
- 22 It follows that until such time that the withdrawing party has “*delivered*” the notice of withdrawal, it cannot be said that the matter has been withdrawn. In terms of Rule 1 “*deliver*” means serving the document upon the relevant parties and filing it with the Registrar. Until these two steps are performed, delivery within the meaning of the Rule has not taken place. In simple terms, delivery within the meaning of Rule 41(1)(a) read with Rule 1 cannot be said to have taken place until such time that the notice of withdrawal has been served upon the defendant and the original thereof filed with the Registrar in the Registrar’s office. It is the filing of the original notice of withdrawal which completes the delivery as contemplated in the aforesaid subrule.
- 23 Rule 41(1)(c) upon which Superway relies, can only apply once a notice of withdrawal without a tender for costs has been delivered. The jurisdictional prerequisite for the application of Rule 41(1)(c) is the delivery of a notice of withdrawal. For this reason, in order to succeed in this application, Superway must first establish that a notice of withdrawal has been delivered in the sense that such a notice has been served upon it and has been filed in the Registrar’s

office with the Registrar. If this is not established, Superway cannot be entitled to the costs order which it seeks in this application.

24 The notice of withdrawal upon which Superway relies was not filed with the Registrar. In paragraph 5 of *Le Roux's* answering affidavit on behalf of the respondent, reference is only made of the notice of withdrawal having been "*served*" and nothing more. The notice of withdrawal does not have the Registrar's date stamp to show that it was in fact filed with the Registrar and therefore delivered as contemplated in Rule 41(1)(a).

25 In paragraph 3.24 of its founding affidavit, Superway also refers to an "*undated and unsigned notice of withdrawal*" having been "*served*". Superway has not placed any evidence before me to show that there was "*delivery*" of a notice of withdrawal as contemplated in Rule 41(1)(a) to entitle it to the costs order which it seeks.

26 In *Le Roux's* answering affidavit, the respondent did not rely on there not having been proper delivery of the notice of withdrawal. This issue was raised for the first time in the respondent's heads of argument. Superway received the respondent's heads of argument on 1 March 2016 and did not object to this issue being raised for the first time in the respondent's heads of argument. It also did not object to this at the hearing of this application. In any event, this is an application which is ordinarily decided on the material before the Court without the need for affidavits and could in that event have been raised in the heads of argument. I am also of the view that Superway was not prejudiced by the raising

of this point in the respondent's heads of argument because it in any event ought to have proved that there was proper delivery of the notice of withdrawal to entitle it to the costs which it seeks. Furthermore, the fact that there was no filing of the notice of withdrawal with the Registrar is apparent from the notice itself in that it does not bear the Registrar's date stamp to show that it was indeed filed with the Registrar.

- 27 In the premises, I am of the view that there was no delivery of a notice of withdrawal as contemplated in Rule 41(1)(a) read with the definition of "*deliver*" in Rule 1. Accordingly, Superway is not entitled to the costs order which it seeks.

The costs of this application

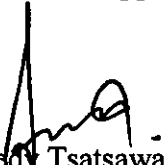
- 28 *Mr. Geach* who appeared on behalf of the respondent argued that the application should be dismissed with costs on an attorney and client scale and that such costs should include the costs consequent upon the employment of two counsel.
- 29 *Mr. Le Roux* who appeared on behalf of Superway persisted with costs as prayed for in Superway's notice of application. Superway has not succeeded and it is for this reason not entitled to any costs order.
- 30 *Mr. Geach* contended that the costs of two counsel are justified when regard is had to the nature of the costs sought against Le Roux and the basis upon which

such costs are ordinarily awarded. Whilst this is correct, I am not satisfied that the employment of two counsel, a senior and a junior, was justified.

31 In my view, no evidence was placed before the Court to suggest that Le Roux acted dishonestly, obstructed the interests of justice, mislead the Court or the opponent, or that she was guilty of gross negligence and the like so as to warrant the employment of two counsel. There was therefore, no complexity to justify the employment of two counsel.

32 For the reasons set out above, I make the following order ~

32.1 the application is dismissed with costs of one counsel.



Kennedy Tsatsawane

Acting Judge of the Gauteng Division of the High Court of South Africa.

For the applicant: J Roux

Hutten and Odendaal, Pretoria

For the respondent: BP Geach SC and LJ Visser

Salome Le Roux Attorneys, Pretoria.